

**Defending Liberty
Pursuing Justice**

**EVALUATING FAIRNESS AND ACCURACY IN
STATE DEATH PENALTY SYSTEMS:**

The Tennessee Death Penalty Assessment Report

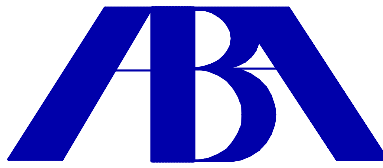
An Analysis of Tennessee's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

March 2007

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The materials contained herein represent the assessment solely of the ABA Death Penalty Moratorium Implementation Project and the Tennessee Death Penalty Assessment Team and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

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Lastly, in this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Tennessee death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

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EXECUTIVE SUMMARY

INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Tennessee assessment, the Project has released state assessments of Alabama, Arizona, Florida, Georgia, and Indiana. In the future, it plans to release reports in, at a minimum, Ohio and Pennsylvania. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal *habeas corpus* proceedings, clemency proceedings, jury

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Tennessee Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Tennessee Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Tennessee death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

I. HIGHLIGHTS OF THE REPORT

A. *Overview of the Tennessee Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Tennessee's death penalty system, the Tennessee Death Penalty Assessment Team¹ researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency proceedings; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.² Following a preliminary chapter on Tennessee's death penalty law, the Tennessee Death Penalty Assessment Report devotes a chapter to each of these twelve issues. Each chapter begins with a discussion of the relevant law and then concludes the extent to which the State of Tennessee is in compliance with the ABA's Recommendations.

Members of the Tennessee Death Penalty Assessment Team have varying perspectives on the death penalty in the State of Tennessee. The Team has concluded, however, that the State of Tennessee fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy of Tennessee's death penalty system. The Team, therefore, unanimously agrees to endorse key proposals that address these shortcomings. The next section highlights the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. *Areas for Reform*

The Tennessee Death Penalty Assessment Team has identified a number of areas in which Tennessee's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems within Tennessee's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected parts; problems in one area may undermine sound procedures in others. With this in mind, the Tennessee Death Penalty Assessment Team views the following areas as most in need of reform:

- ***Inadequate Procedures to Address Innocence Claims*** (see Chapter 8) – The State of Tennessee does not properly ensure that claims of factual innocence receive adequate judicial review. While the State of Tennessee has

¹ The membership of the Tennessee Death Penalty Assessment Team is included *infra* on pp. 3-5 of the Tennessee Death Penalty Assessment Report.

² This report is not intended to cover all aspects of a state's capital punishment system and, as a result, it does not address a number of important issues, such as the treatment of death-row inmates while incarcerated.

mechanisms to handle claims of factual innocence, including normal post-conviction proceedings and writs of error *coram nobis*, neither of these mechanisms is working as intended. For example, Tennessee courts have failed to provide relief to one death-row inmate, Paul House, despite the fact that the United States Supreme Court concluded that “it is more likely than not that no reasonable juror would have found [House] guilty beyond a reasonable doubt.”³

- ***Excessive Caseloads of Defense Counsel*** (see Chapter 6) – Tennessee courts generally appoint the district public defender to represent a capital defendant at trial and through appeal and the Office of the Post-Conviction Defender to represent a death-row inmate in state post-conviction proceedings. However, attorneys working within the district public defender offices are burdened by some of the highest caseloads in the country. In fact, in fiscal year 2006, the courts appointed over 183,000 criminal cases to the district public defender offices, which, at the time, employed only 309 full-time attorneys. In January 2007, the Tennessee Comptroller concluded that district public defender offices across the State were short 123 attorneys. Similarly, the Office of the Post-Conviction Defender has been said to be “on the verge of collapse because of its excessive caseload.”
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Tennessee are denied these necessary resources. Even if a capital defendant satisfies the stringent pleading requirements and receives pre-authorization by the trial court to obtain investigative and/or expert services, the Administrative Office of the Courts (AOC) must still approve the court’s order and the AOC has used this authority to curtail or deny such funds. Moreover, Tennessee Supreme Court Rule 13 imposes limitations on the hourly rates of compensation for expert and/or investigative services, and has set a cap of \$20,000 for all investigative services and \$25,000 for all expert services for post-conviction proceedings. Under Rule 13, the defense also is limited to obtaining an expert or investigator within 150 miles of the court in which the proceeding is pending. Although district public defender offices and the Office of the Post-Conviction Defender should generally have access to investigators within their offices, at least three district public defender offices had “no investigator positions other than those occupied by attorneys acting as defenders.”
- ***Inadequate Qualification and Performance Standards for Defense Counsel*** (see Chapter 6) – Tennessee’s statutory qualification requirements for capital defense attorneys fall far short of the requirements of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) and are insufficient to ensure qualified counsel for every death-sentenced inmate. As noted by the Tennessee Bar Association, Rule 13, which sets qualification standards for appointed capital defense attorneys, “has no mechanism to determine whether counsel will be zealous advocates,

³ House v. Bell, 126 S. Ct. 2064, 2077, 2086 (2006).

no mechanism to determine whether counsel did anything other than attend the training or to evaluate the quality or content of the training, no mechanism to determine counsel's knowledge of the requisite case law, or any means to measure or monitor the quality of the representation being provided."

- ***Lack of Meaningful Proportionality Review*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and offenders. While the Tennessee Supreme Court and the Court of Criminal Appeals are required to determine whether a death sentence “is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant,” the Tennessee Supreme Court has limited the courts’ duty to ensuring that “no aberrant death sentence is affirmed.” Accordingly, neither the Tennessee Supreme Court nor the Tennessee Court of Criminal Appeals engages in a meaningful review of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.
- ***Lack of Transparency in the Clemency Process*** (see Chapter 9) – Full and proper use of the clemency process is essential to guaranteeing fairness in the administration of the death penalty. Given the ambiguities and confidentiality surrounding Tennessee’s clemency decision-making process, and the fact that no Tennessee Governor has granted clemency in the modern death penalty era, it is difficult to conclude that Tennessee’s clemency process is adequate. In fact, the Governor can deny clemency for any reason, even without holding a public hearing on the death-sentenced inmate’s eligibility for clemency.
- ***Significant Capital Juror Confusion*** (see Chapter 10) – Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Tennessee capital jurors do not understand their roles and responsibilities when deciding whether to impose a death sentence. In one study, over 41 percent of interviewed Tennessee capital jurors did not understand that they could consider any evidence in mitigation, over 46 percent erroneously believed that the defense had to prove mitigation beyond a reasonable doubt, and over 71 percent did not understand that they did not need to be unanimous in finding mitigating circumstances. The same study found that 58.3 percent of interviewed Tennessee capital jurors believed that if they found the defendant’s conduct was “heinous, vile, or depraved” they were required by law to sentence the defendant to death and another 39.6 percent believed the death penalty was mandated upon their finding that the defendant would pose a future danger to society, despite the fact that future dangerousness is not a statutory aggravating circumstance.
- ***Racial Disparities in Tennessee’s Capital Sentencing*** (see Chapter 12 and Appendix) – The Tennessee Supreme Court’s Commission on Racial and Ethnic Fairness noted that when race or ethnicity is given preference in criminal proceedings, favor is given to the “majority” race or ethnicity, and the Tennessee Supreme Court’s Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission has recommended that the Tennessee Supreme Court and the Tennessee General Assembly fund an entity to continue the study of

how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee. Despite these findings and recommendations, no state-funded study on the impact of race on the capital system in Tennessee has ever been conducted. A recent study that was conducted as part of this Assessment Report reviewed capital sentencing in Tennessee from 1981 to 2000 and concluded that individuals who killed whites were more likely to receive the death penalty than those who killed blacks.

- ***Geographical Disparities in Tennessee’s Capital Sentencing*** (see Chapters 1 and 5 and Appendix) – The Tennessee Comptroller reported that 44.7 percent of all Tennessee capital cases from 1993 to 2003 originated in Shelby County. The cause of these geographic disparities is unclear, but one possible variable is the district attorney general. In Tennessee, individual district attorneys general have complete discretion in selecting those cases in which they will seek the death penalty. No statewide standards exist to guide the exercise of this discretion, and there is a wide variance of attitudes among the district attorneys in different parts of the State.
- ***Death Sentences Imposed on People with Severe Mental Disability*** (see Chapter 13) – The State of Tennessee does not have adequate protections for people with severe mental disabilities on death row, including those who were disabled at the time of the offense and others who became seriously mentally ill after conviction and sentence.

C. Tennessee Death Penalty Assessment Team Recommendations

As evidenced by the problems discussed above and others identified throughout this report, the State of Tennessee currently does not guarantee a fair and accurate system for all capital defendants. The Assessment Team concludes that the serious problems plaguing Tennessee’s death penalty system can be addressed only by means of systemic, institutional changes. Our recommendations therefore seek to ensure fairness and accuracy at all stages of a capital case, while emphasizing the importance of resolving important issues at the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Tennessee Death Penalty Assessment Team makes the following recommendations:

- (1) The State of Tennessee should create an independent commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate’s claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges, who would review the claim without regard to any procedural bars. This sort of commission, which would supplement either the current post-conviction or clemency process, is necessary, in large part because procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full judicial consideration.

- (2) The State of Tennessee should create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority, comprised solely of defense attorneys, also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. In addition, this independent appointing authority should create and oversee a statewide capital case trial unit and a statewide capital case appellate unit, consisting of attorneys and staff with specialized knowledge and experience in handling death penalty cases.
- (3) The State of Tennessee should require that all biological evidence is preserved and properly stored for as long as the defendant remains incarcerated and the Tennessee Bureau of Investigation should expand the services of its criminal laboratories to include Mitochondrial DNA testing of hair without roots or to include Y-STR testing.
- (4) The State of Tennessee should develop statewide protocols for determining who is charged with a capital crime, in an effort to standardize the charging decision. In standardizing the charging decision, defense attorneys should always be provided the opportunity to meet with the prosecutor to explain why s/he believes that the defendant should not be charged capitally.
- (5) The State of Tennessee should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial, on appeal, in state post-conviction proceedings, and in clemency proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.
- (6) Given the numerous ways the court may summarily dispose of a petition without first holding an evidentiary hearing, it is imperative that the right to appointed post-conviction counsel attach prior to the filing of the post-conviction petition, not after. Consequently, the State of Tennessee should provide for the appointment of counsel in state post-conviction proceedings for indigent death-row inmates prior to the filing date for a petition for post-conviction relief.
- (7) Tennessee Supreme Court Rule 13 should be amended to allow a defendant to obtain expert and/or investigative services at any time after s/he has been charged with a potentially death-eligible criminal offense, so that the defense has the opportunity to demonstrate to the prosecutor why capital charges may be inappropriate.
- (8) To ensure that death is imposed against the very worst offenses and offenders, the Tennessee Supreme Court and the Court of Criminal Appeals should include in its review and determination of proportionality those cases in which the death penalty could have been sought, but was not, and cases in which the death penalty was sought, but not imposed.

- (9) The State of Tennessee should ensure that trial judges file complete Rule 12 reports for all cases resulting in a first-degree murder conviction, as mandated by Tennessee Supreme Court Rule 12. This data should be compiled and made available to the Tennessee Supreme Court and Tennessee Court of Criminal Appeals for use in ensuring proportionality, in addition to being made available for use by defense attorneys and prosecutors.
- (10) In clemency proceedings, the State of Tennessee should provide each death-row inmate the opportunity for a hearing before the Board of Pardon and Parole and, regardless of whether the inmate requests such a hearing, should encourage the Governor to exercise his/her discretion to meet with the inmate and his/her counsel prior to rendering a final decision on clemency.
- (11) The State of Tennessee should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified.
- (12) The State of Tennessee should sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, and should develop and implement proposals to eliminate any such disparities.
- (13) Although the State of Tennessee excludes individuals with mental retardation from the death penalty, it does not explicitly exclude individuals with other types of serious mental disorders from being sentenced to death and/or executed. The State of Tennessee should adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life imprisonment without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that

allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations.

- (14) The State of Tennessee should adopt a uniform standard for determining a defendant’s competency through trial, appellate, and post-conviction proceedings. Whenever a capital defendant’s competency is in question at trial, on appeal, or during post-conviction proceedings, the courts should apply the standard that currently is used in determining a defendant’s competency to stand trial (i.e., the criminal defendant has “the capacity to understand the nature and object of the proceedings against him[/her], to consult with counsel, and to assist in preparing his[/her] defense”).⁴ Furthermore, the State of Tennessee should stay post-conviction proceedings if a death-row inmate is found incompetent.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Tennessee, our research establishes that at this point in time, the State of Tennessee cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. It is therefore the conclusion of the members of the Tennessee Death Penalty Assessment Team that the State of Tennessee should impose a temporary moratorium on executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report, and in particular the Executive Summary. Any reforms that are implemented should apply retroactively to all capital defendants and death-row inmates.

II. SUMMARY OF THE REPORT

Chapter One: An Overview of Tennessee’s Death Penalty System

In this chapter, we examined the demographics of Tennessee’s death row, the statutory evolution of Tennessee’s death penalty scheme, and the progression of an ordinary death penalty case through Tennessee’s death penalty system from arrest to execution.

Chapter Two: Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proven to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depend on the state’s laws and on its law enforcement agencies’ policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, we examined Tennessee’s laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether the State of Tennessee complies with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence.

⁴ See *State v. Reid*, 197 S.W.3d 694, 699 (Tenn. 2006) (citing *State v. Reid*, 164 S.W.3d 286, 306 (2005)).

A summary of Tennessee’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.⁵

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i> ⁶	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> ⁷	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.			X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.		X			
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.			X		

The State of Tennessee does not require the preservation of biological evidence for as long as a death-row inmate remains incarcerated and, under Tennessee law, any and all biological evidence could be destroyed before any post-conviction proceedings are initiated. In fact, Tennessee law only mandates the preservation of evidence subject to

⁵ Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

⁶ Given that a majority of the ABA’s recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which the State of Tennessee meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁷ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the death penalty in Tennessee. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

DNA analysis and, even then, only when an inmate’s post-conviction petition for DNA testing is not summarily dismissed.

The State allows a defendant to obtain DNA testing of biological evidence during pre-trial discovery or during post-conviction proceedings. Strict pleading requirements, however, have the potential to preclude inmates from successfully obtaining post-conviction DNA testing. For example, the court will summarily dismiss the petition seeking post-conviction DNA testing if the petitioner failed to allege or satisfy a pleading requirement. Most significantly, the court is never required to hold a hearing on the merits of an inmate’s petition for DNA testing.

Accordingly, the State should, at a minimum, adopt the Tennessee Death Penalty Team’s recommendations previously discussed on page vii of the Executive Summary, that would require that all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentifications and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of wrongful convictions and ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this chapter, we reviewed Tennessee’s laws, procedures, and practices on law enforcement identifications and interrogations and assessed their level of compliance with the ABA’s policies.

A summary of Tennessee’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations is illustrated in the following chart.

Law Enforcement Identifications and Interrogations						
		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation	<i>Compliance</i>					
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their accuracy. Sets of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the ABA’s <i>Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures</i> .					X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.					X	

Law Enforcement Identifications and Interrogations (Con't.)					
Recommendation	Compliance				
	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.			X		
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.			X		
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.	X				

The State of Tennessee has taken certain measures that reduce the risk of inaccurate eyewitness identifications and false confessions. For example, law enforcement officers in Tennessee are required to complete a basic training course that includes instruction on constitutional law and interpersonal communications, which, in turn, encompasses instruction on interviewing witnesses and victims.

In addition to these statewide measures, at least twelve law enforcement agencies regularly record the entirety of custodial interrogations to protect against false or coerced confessions. Unfortunately, the Tennessee Bureau of Investigation, the State's primary criminal investigative agency, implies a preference against the audio or videotaping of interrogations, allowing the practice only "on a limited basis" and only when specially authorized.

The State of Tennessee does not require law enforcement agencies to adopt procedures governing identifications and interrogations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Tennessee should require all law enforcement agencies to adopt procedures on lineups and photospreads that are

consistent with the ABA’s recommendations. In addition, the State should mandate that all law enforcement agencies record the entirety of custodial interrogations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Tennessee and assessed whether Tennessee’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

A summary of Tennessee’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices						
Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.			X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.					X	

The State of Tennessee does not require crime laboratories to be accredited, but the Tennessee Bureau of Investigation (TBI) Forensic Services Division’s three labs, which process evidence for every law enforcement agency and medical examiner in the State, are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As a prerequisite for accreditation, laboratories must take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

Despite these measures, however, an incident of evidence mishandling by the Tennessee Bureau of Investigation is partially responsible for the United States Supreme Court concluding that “it is more likely than not that no reasonable juror would have found [the defendant, Paul House,] guilty beyond a reasonable doubt.”⁸ In *House v. Bell*,⁹ the

⁸ House v. Bell, 126 S. Ct. 2064, 2086 (2006).

prosecution presented evidence at trial that the defendant's clothing contained blood from the victim. However, subsequent investigation and testimony at the defendant's *habeas corpus* hearing revealed that a vial and a quarter of autopsy blood from the victim was unaccounted for; the blood on the jeans may have come from the autopsy samples; the blood was transported by TBI officers to the FBI together with the pants in conditions that could have caused the vials to spill; some blood did spill at least once during the blood's journey from Tennessee authorities through FBI hands to a defense expert; the pants were stored in a plastic bag bearing a large bloodstain and a label from a TBI agent; and the box containing the blood samples may have been opened before arriving at the FBI lab. The failure to introduce any of this evidence at trial led the United States Supreme Court to find that "[w]hereas the bloodstains seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin."¹⁰

Furthermore, the forensic services offered by the Tennessee Bureau of Investigation's crime laboratories are somewhat limited. For example, TBI crime laboratories do not perform Mitochondrial or Y-STR testing, which is necessary for old, degraded evidence.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team's recommendation previously discussed on page vii of the Executive Summary, which states that the Tennessee Bureau of Investigation should expand its criminal laboratory services to include Mitochondrial DNA testing of hair without roots or to include Y-STR testing.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where the prosecutor has enormous discretion in deciding whether or not to seek the death penalty.

In this chapter, we examined Tennessee's laws, procedures, and practices relevant to prosecutorial professionalism and assessed their compliance with the relevant ABA policies. A summary of Tennessee's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the following chart.

⁹ *Id.*

¹⁰ *Id.* at 2083.

Prosecutorial Professionalism						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #1: Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.					X	
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.					X	
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.			X			
Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.					X	
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.					X	
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.		X				

The State of Tennessee does not require the offices of district attorneys general to establish policies on the exercise of prosecutorial discretion in seeking the death penalty or on evaluating capital cases that rely upon eyewitness identifications, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. The State of Tennessee also fails to require that prosecutors handling capital cases receive any specialized training.

We recognize, however, that the State of Tennessee has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, including that:

- The State has entrusted the Board of Professional Responsibility of the Tennessee Supreme Court and the Disciplinary Counsel with investigating grievances and disciplining practicing attorneys, including prosecutors;
- The Tennessee Supreme Court has adopted the Tennessee Rules of Professional Conduct, which require prosecutors to, among other things, disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and the court all unprivileged mitigating evidence known to the prosecutor;
- Under Tennessee law, prosecutors are responsible for disclosing not only evidence of which they are aware, but also “favorable evidence known to others acting on the government’s behalf;” and
- The State of Tennessee has created the Tennessee District Attorneys General Conference to assist in the coordination of the duties of the prosecuting attorneys and their staffs.

Nonetheless, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Team’s Recommendation previously discussed on page vii of the Report, which calls for the State to develop statewide protocols for determining who may be charged with a capital crime, in an effort to standardize the charging decision. In standardizing the charging decision, defense attorneys should always be provided the opportunity to meet with the prosecutor to explain why s/he believes that the defendant should not be charged capitally.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this chapter, we examined Tennessee’s laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA’s policies on defense services.

A summary of Tennessee’s overall compliance with the ABA’s policies on defense services is illustrated in the following chart.

Defense Services						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #1: Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)</i> —The Defense Team and Supporting Services			X			
Recommendation #2: Guideline 5.1 of the <i>ABA Guidelines</i> —Qualifications of Defense Counsel			X			
Recommendation #3: Guideline 3.1 of the <i>ABA Guidelines</i> —Designation of a Responsible Agency				X		
Recommendation #4: Guideline 9.1 of the <i>ABA Guidelines</i> —Funding and Compensation				X		
Recommendation #5: Guideline 8.1 of the <i>ABA Guidelines</i> —Training			X			

Tennessee’s capital indigent defense system is provided on a statewide basis, with the District Public Defender Offices handling the majority of capital cases at trial and on appeal and the Office of the Post-Conviction Defender handling the majority of cases in state post-conviction proceedings. While the State of Tennessee does not provide counsel automatically in clemency proceedings, the Post-Conviction Defender may choose to represent a death-row inmate during clemency proceedings. Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls far short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)* for a number of reasons:

- The State of Tennessee does not statutorily mandate that two attorneys be appointed to death-row inmates in state post-conviction proceedings, and because of overwhelming caseloads, the Office of the Post-Conviction Defender presently lacks the resources to appoint two attorneys in all post-conviction proceedings;
- The State of Tennessee requires only six hours of specialized training in capital defense for attorneys representing a capital defendant at trial and six hours every two years thereafter, and does not mandate capital defense training for counsel on appeal and in state post-conviction proceedings. No training is mandated for other members of the defense team;
- The State of Tennessee has not removed the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the potential appointment or retention of attorneys for reasons other than their qualifications; and
- As the Tennessee Bar Association’s Study Committee on the Effective Assistance of Counsel in Capital Cases concluded, the State of Tennessee

“perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation.”¹¹ Tennessee Supreme Court Rule 13, which sets qualification standards for capital attorneys, “has no mechanism to determine whether counsel will be zealous advocates, no mechanism to determine whether counsel did anything other than attend the training or to evaluate the quality or content of the training, no mechanism to determine counsel’s knowledge of the requisite case law, or any means to measure or monitor the quality of the representation being provided.”

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Team’s recommendations previously discussed on page vii of the Executive Summary, including that:

- (1) The State of Tennessee should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial, on appeal, in state post-conviction proceedings, and clemency proceedings so that they are consistent with the *ABA Guidelines*;
- (2) The State of Tennessee should create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority, comprised solely of defense attorneys, also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. In addition, this independent appointing authority should create and oversee a statewide capital case trial unit and a statewide capital case appellate unit, consisting of attorneys and staff with specialized knowledge and experience in handling death penalty cases;
- (3) Given the numerous ways the court may summarily dispose of a post-conviction petition without first holding an evidentiary hearing, the State of Tennessee should provide for the appointment of counsel in state post-conviction proceedings for indigent defendants prior to the filing date of a petition for post-conviction relief; and
- (4) Tennessee Supreme Court Rule 13 should be amended to allow a defendant to obtain expert and/or investigative services at any time after s/he has been charged with a potentially death-eligible criminal offense, so that the defense has the opportunity to demonstrate to the prosecutor why capital charges may be inappropriate.

Chapter Seven: Direct Appeal Process

¹¹ TENNESSEE BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE STUDY COMMITTEE ON EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES 47 (Dec. 31, 2004).

The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and penalty phases of the trial were improper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily, or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate, is the prime method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Tennessee’s laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with ABA policies.

A summary of Tennessee’s overall compliance with the ABA’s policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.				X			

Section 39-13-206(c)(1)(D) of the Tennessee Code Annotated (T.C.A.) requires both the Tennessee Supreme Court and the Court of Criminal Appeals to determine whether a death sentence “is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.” The Tennessee Supreme Court, however, has limited the scope of its and the Court of Criminal Appeal’s duty to ensuring that “no aberrant death sentence is affirmed.” Accordingly, a death sentence will be found disproportionate only “if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed.”

Interestingly, in conducting its proportionality review, Tennessee courts may consider capital cases in which death was sought, even though a sentence of either life imprisonment or life imprisonment without parole was imposed. However, capital cases in which death was sought, but resulted in a sentence of life imprisonment or life imprisonment without parole do not serve as a basis for invalidating a death sentence

under section 39-13-206(c)(1)(D) of the T.C.A. Tennessee courts also fail to include as part of the proportionality review cases in which the death penalty could have been sought but was not, thereby frustrating the purpose of this review.

Based on this information, the State of Tennessee should at a minimum adopt the Tennessee Death Penalty Assessment Team’s recommendations previously discussed on pages vii-viii of the Executive Summary, including that:

- (1) The Tennessee Supreme Court and the Court of Criminal Appeals should include in its review and determination of proportionality those cases in which the death penalty could have been sought, but was not, and cases in which the death penalty was sought, but not imposed; and
- (2) The State of Tennessee should ensure that trial judges file complete Rule 12 reports for all cases resulting in a first-degree murder conviction, as mandated by Tennessee Supreme Court Rule 12. This data should be compiled and made available to the Tennessee Supreme Court and Tennessee Court of Criminal Appeals for use in ensuring proportionality, in addition to being made available for use by defense attorneys and prosecutors.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because some capital defendants might receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this chapter, we examined Tennessee’s laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA’s policies on state post-conviction.

A summary of Tennessee’s overall compliance with the ABA’s policies on state post-conviction proceedings is illustrated in the following chart.

State Post-Conviction Proceedings						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay			X			

State Post-Conviction Proceedings (Con't.)

<div style="border: 1px solid black; padding: 5px; display: inline-block; margin-left: 100px;">Compliance</div> <div style="border: 1px solid black; padding: 5px; display: inline-block; margin-left: 10px;">Recommendation</div>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
<p>executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.</p>					
<p>Recommendation #2: The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.</p>				X	
<p>Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.</p>				X	
<p>Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.</p>	X				
<p>Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.</p>			X		
<p>Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.</p>			X		
<p>Recommendation #7: The State should establish post-conviction defense organizations, similar in nature to the capital resource centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal <i>habeas corpus</i>, and clemency proceedings.</p>		X			
<p>Recommendation #8: The State should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i>. The State should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.</p>		X			
<p>Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.</p>		X			
<p>Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.</p>		X			

State Post-Conviction Proceedings (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.			X			
Recommendation #12: During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.				X		

The State of Tennessee has adopted some laws and procedures that facilitate the adequate development and judicial consideration of all post-conviction claims—for example, Tennessee law requires an automatic stay of execution upon the filing of an initial post-conviction petition and may provide counsel after the filing of a post-conviction petition. But some laws and procedures have the opposite effect. The State of Tennessee:

- Does not provide for the appointment of counsel until after the court sets an evidentiary hearing date and provides a limited period of time for appointed post-conviction counsel to investigate, fully develop, and amend all claims in an amended post-conviction petition; and
- Allows the post-conviction judge numerous opportunities to summarily deny the petition without an evidentiary hearing.

The effect of these laws and procedures on the adequate development and judicial consideration of motions and/or claims is even more acute in post-conviction proceedings where the petitioner has no constitutional right to effective counsel, which underscores the importance of establishing qualification standards consistent with the *ABA Guidelines* and of providing for the appointment of counsel in state post-conviction proceedings prior to the filing of a petition for post-conviction relief.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision-makers evaluate all factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court’s or jury’s decision-making. In this chapter, we reviewed Tennessee’s laws, procedures, and practices concerning the clemency process, including, but not limited to, the Tennessee Board of Probation and Parole’s criteria for considering and deciding petitions, and assessed whether they comply with the ABA’s policies on clemency.

A summary of Tennessee’s overall compliance with the ABA’s policies on clemency is illustrated in the following chart.

Clemency					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.				X	
Recommendation #3: Clemency decision-makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.				X	
Recommendation #4: Clemency decision-makers should consider the inmate’s mental retardation, mental illness, or mental competency, if applicable, the inmate’s age at the time of the offense, and any evidence of lingering doubt about the inmate’s guilt.				X	
Recommendation #5: Clemency decision-makers should consider an inmate’s possible rehabilitation or performance of positive acts while on death row.				X	
Recommendation #6: Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines</i> .		X			
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State’s evidence.		X			
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.		X			
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with petitioners.		X			
Recommendation #10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system’s ability to grant relief under circumstances that might warrant grants of clemency.			X		

Clemency (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation					X	
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.					X	

The State of Tennessee provides the Governor with the sole constitutional and statutory power to grant or deny clemency, including reprieves, commutations, and pardons for all criminal convictions, except impeachment. The Governor, however, may request a non-binding recommendation from the Tennessee Board of Probation and Parole (Board) on whether clemency should be granted or denied. While guidelines governing the Board’s decision-making process have been established, the process by which the Governor decides to grant or deny clemency remains problematic. For example:

- The Board of Probation and Parole is required to consider nine specific factors in considering a petition for clemency, but there are additional factors that should be considered as a matter of course;
- Neither the Tennessee Code Annotated nor the Rules of the Tennessee Board of Paroles recommend that the Governor consider the findings of the Board’s investigation or any specific facts when assessing a death-sentenced inmate’s eligibility for clemency;
- Neither the Governor nor the Board of Probation and Parole is required to hold a public hearing on the death-sentenced inmate’s clemency request;
- While the Office of the Post-Conviction Defender may represent death-sentenced inmates petitioning for clemency, the State of Tennessee does not mandate the appointment of counsel in this situation; and
- While all clemency hearings involving death-sentenced inmates are open to the public, the information contained within the Board’s records is confidential. Given the apparent conflict of these two rules, it is unclear how they work together.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team’s recommendation previously discussed on pages vii and viii of the Executive Summary, including that:

- (1) In clemency proceedings, the State of Tennessee should provide each death-row inmate the opportunity for a hearing before the Board of Pardon and Parole and, regardless of whether the inmate requests a hearing, should encourage the Governor to exercise his/her discretion to meet with the inmate prior to the Governor rendering a final decision on clemency; and

- (2) The State of Tennessee should create an independent commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate’s claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges for review. This sort of commission, which would supplement either the current post-conviction or clemency process, is necessary, in large part because procedural defaults and inadequate lawyering sometimes prevent claims of factual innocence from receiving full judicial consideration.

Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the “awesome responsibility” of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses jurors about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Tennessee’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

A summary of Tennessee’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise them as necessary to ensure jurors understand applicable law, and monitor the extent to which jurors understand revised instructions.			X			
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.			X			
Recommendation #3: Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday					X	

Capital Jury Instructions (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
usage and, where appropriate, by directly answering jurors' questions about applicable law.						
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the State to clarify jurors' understanding of alternative sentences.			X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.				X		
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X			
Recommendation #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.				X		

Tennessee capital jurors appear to have difficulty understanding their roles and responsibilities, as described by trial judges in their instructions. Specifically, research illustrates a startling amount of misunderstanding among Tennessee jurors in regards to mitigation evidence. In fact, 41.3 percent of interviewed capital jurors failed to understand that they could consider any mitigating evidence in their deliberations and 71.7 percent failed to understand that unanimity was not required in finding mitigation established.

Tennessee capital jurors also had difficulty in understanding the applicable burden of proof for mitigating and aggravating circumstances. Over 46 percent of interviewed Tennessee capital jurors erroneously believed that mitigation had to be proven beyond a reasonable doubt, while 20.5 percent erroneously believed that aggravation need not be proven beyond a reasonable doubt. Strikingly, 58.3 percent of capital jurors believed the death penalty was required upon finding that the defendant's conduct was "heinous, vile, or depraved." Another 39.6 percent believed the death penalty was mandated upon their finding that the defendant would pose a future danger to society, despite the fact that future dangerousness is not a statutory aggravating circumstance.

In 1999, the Tennessee Bar Association’s Jury Reform Commission highlighted jurors’ miscomprehension of jury instructions in its first report and recommended establishing a long-term committee or working group to rewrite the pattern jury instructions. To date, no committee or working group has been appointed to redraft the *Tennessee Pattern Capital Jury Instructions*. Without clear and comprehensible capital sentencing instructions, the State of Tennessee risks jurors misconstruing the law and imposing a sentence that does not accurately reflect the jury’s determination of the proper sentence.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team’s recommendation previously discussed on page viii of the Executive Summary, which provides that the State should redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified.

Chapter Eleven: Judicial Independence

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society’s confidence that individuals in court are guaranteed a fair hearing. In this chapter, we reviewed Tennessee’s laws, procedures, and practices on the judicial selection and decision-making processes and assessed whether they comply with the ABA’s policies on judicial independence.

A summary of Tennessee’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

Judicial Independence					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.		X			

Judicial Independence (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.					X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on <i>habeas corpus</i> should not be litmus tests or important factors in the selection of judges.			X			
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure the defendant receives a proper defense.					X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.					X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.					X	

Tennessee's partisan judicial election format for trial judges, combined with Tennessee's legislatively mandated judicial evaluation program for appellate judges, call into question the fairness of the judicial selection process in Tennessee:

- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. For example, the Tennessee Conservative Union and the Republican Party of Tennessee funded a campaign against then-Supreme Court Justice Penny White in 1996, assailing her decision to join an opinion setting aside a death sentence on the basis that the defendant had been denied his constitutional right to present mitigation evidence. As a result, voters chose not to retain Justice White. In addition to the example of Justice White, a slew of news editorials attacked Justice Adolpho Birch for his votes in capital cases from 1996 through 1998, and an unsuccessful effort was made to prevent his retention on the Tennessee Supreme Court. One Tennessee newspaper report has even gone so far as to intimate that the Tennessee Supreme

Court delayed deciding capital cases until after the 1988 judicial retention elections for political reasons; and

- Tennessee’s judicial evaluation program, which was created to “assist the public in evaluating the performance of incumbent appellate judges,” may in some ways conflict with the goal of fostering judicial independence.¹² Although the Judicial Evaluation Commission (JEC) safeguards the process by delineating criteria by which to review judges, some of the performance standards appear not to be strictly defined. For example, criteria such as “knowledge and understanding of the law” may allow the JEC to review actual decisions by a judge and “integrity” purportedly could be enlarged to encompass a judge’s personal views on the death penalty.

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Tennessee’s laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA’s policies.

A summary of Tennessee’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Racial and Ethnic Minorities						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.			X			
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.			X			

¹² TENN. CODE ANN. § 17-4-201(a)(1) (2006); *see also* American Judicature Society, Tennessee: Current Methods of Judicial Selection, at http://www.ajs.org/js/TN_methods.htm (last visited Feb. 14, 2007).

Racial and Ethnic Minorities (Con't.)

Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation					
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.			X		
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X		
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> case is established, the State should have the burden of rebutting it by substantial evidence.			X		
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during <i>voir dire</i> .			X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision-making and that they should report any evidence of racial discrimination in jury deliberations.		X			
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.				X	

Racial and Ethnic Minorities (Con't.)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.					X		

The State of Tennessee has taken some steps to explore the impact of race on Tennessee’s criminal justice system, but has not yet done so in a comprehensive manner.

In 1994, the Tennessee Supreme Court created the Commission on Racial and Ethnic Fairness (Commission) to “provide a fair and balanced assessment of how race and ethnicity affect Tennessee’s system of justice and how the system addresses those issues.”¹³ In 1997, the Commission concluded in its final report that while no “explicit manifestations of racial bias abound [in the Tennessee judicial system] . . . , institutionalized bias is relentlessly at work.”¹⁴ Furthermore, the report concluded that when race or ethnicity is given preference in criminal proceedings, favor is given to the “majority” race or ethnicity. In response to its findings, the Commission specified forty-six recommendations to help eliminate bias in the judicial system.

In 1998, the Tennessee Supreme Court created the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission (Committee) to plan, oversee, and monitor the implementation of the Commission’s recommendations. In 2000, the Committee released its report to the Tennessee Supreme Court, delineating specific proposals for each of the Commission’s findings and general recommendations, including that: (1) the Tennessee Supreme Court and General Assembly should fund an entity to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee; and (2) the State should reduce the number of preemptory challenges permitted in criminal cases as such challenges may be based on racial or ethnic bias.

None of the State’s efforts, including those of the 1994 Commission and the 1998 Committee, have studied the administration of the death penalty or recommended any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in

¹³ FINAL REPORT OF THE TENNESSEE COMMISSION ON RACIAL AND ETHNIC FAIRNESS TO THE SUPREME COURT OF TENNESSEE 15 (1997) [hereinafter RACIAL AND ETHNIC FAIRNESS REPORT], available at <http://www.tncourts.gov/geninfo/publications/racethn4.pdf> (last visited Feb. 14, 2007).

¹⁴ *Id.* at 5.

death penalty proceedings. Furthermore, *The Tennessean* reported that, in 2001, fifteen of the fifty-two black inmates on death row were sentenced to death by all-white juries, raising concerns about possible racial bias in jury selection and/or jury deliberations.

Former Tennessee Supreme Court Chief Justice Birch also has voiced concerns that racial bias may be permeating the death penalty process in Tennessee. In *State v. Chalmers*, Justice Birch noted that “numerous studies have indicated that racial bias may play a significant role in determining which defendants receive the death penalty.”¹⁵ A recent study that reviewed capital sentencing in Tennessee from 1981 to 2000 and was conducted as part of this ABA Tennessee Death Penalty Assessment Report has given credence to Justice Birch’s concerns. The study concluded that “those who kill whites are more likely to be sentenced to death than those who kill blacks.”¹⁶ In addition to the race of victims and suspects in homicide cases, the study took account of legally relevant factors that are legitimately related to the imposition of the death penalty, namely two prevalent aggravating factors in death penalty sentencing: (1) whether the crime took the life of more than one victim; and (2) whether the homicide involved accompanying felonies, such as rape or robbery. The study found that individuals who killed whites were 4.75 times more likely to receive the death penalty than those who killed blacks in the absence of these aggravating factors. When at least one of these aggravating factors was present, individuals who killed whites were 3.15 times more likely to be sentenced to death than individuals who killed blacks.

Based on this information, the State of Tennessee should, at a minimum, adopt the Tennessee Death Penalty Assessment Team’s recommendation previously discussed on page viii of the Executive Summary, which calls for the State to sponsor a study to determine the existence or non-existence of unacceptable disparities, whether they be racial, socio-economic, geographic, or otherwise in its death penalty system, and develop and implement proposals to eliminate any such disparities.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant was mentally retarded at the time of the offense. In this chapter, we reviewed Tennessee’s laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental retardation and the death penalty.

A summary of Tennessee’s overall compliance with the ABA’s policies on mental retardation is illustrated in the following chart.

¹⁵ *State v. Chalmers*, 28 S.W.3d 913, 922-23 (Tenn. 2000) (Birch, J. dissenting).

¹⁶ Glenn Pierce, Michael Radelet & Raymond Paternoster, *Race and Death Sentencing in Tennessee, 1981-2000*, in AMERICAN BAR ASSOCIATION, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH SENTENCING SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT* app. A (2007).

Mental Retardation					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the AAIDD (formerly the AAMR). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.			X		
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.			X		
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.				X	
Recommendation #4: For cases commencing after <i>Atkins v. Virginia</i> or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	X				
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				

Mental Retardation (Con't.)						
Compliance		In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation						
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.					X	
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.		X				

The State of Tennessee statutorily prohibited the execution of mentally retarded offenders in 1990, but the statute applied only to mentally retarded defendants sentenced after the statute’s effective date of July 1, 1990. In 2001, the Tennessee Supreme Court extended the application of the statute to death-row inmates who had concluded their post-conviction relief prior to 1990. However, these statutory and judicially-created procedures do not fully comply with the ABA’s recommendations on mental retardation, and some are particularly problematic, for example:

- While no state should impose an IQ maximum lower than 75, the State of Tennessee requires that a capital defendant exhibit an IQ of 70 or less in order to be found mentally retarded. The Tennessee Supreme Court has explicitly rejected the claim that the Tennessee Code Annotated should be interpreted to broadly exclude defendants from capital punishment whose IQ score *range* met seventy or below;
- While adaptive behavior limitations are a key part of finding mental retardation and generally are considered to be “expressed in conceptual, social, and practical adaptive skills,”¹⁷ the Tennessee Court of Criminal Appeals has demonstrated a lack of understanding of adaptive deficits and has stated that courts “must not become so entangled with the opinions of experts that [they] lose sight of the nature of the criminal offense itself.”¹⁸ In determining whether an individual exhibits deficits in adaptive behavior, courts thus “cannot forget to examine the nature of the criminal conduct and the circumstances involved in that conduct.”¹⁹ In fact, the Court of Criminal Appeals has found that “the more complex the crime . . . the less likely that the person is mentally retarded.”²⁰

¹⁷ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at 7 (2002) (unpublished manuscript), available at www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on Feb. 14, 2007).

¹⁸ *Van Tran v. State*, 2006 WL 3327828, *25 (Tenn. Crim. App. Nov. 9, 2006) (unpublished opinion).

¹⁹ *Id.*

²⁰ *Id.*

We also reviewed Tennessee’s laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

A summary of Tennessee’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

Mental Illness					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.			X		
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.				X	
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.				X	

Mental Illness (Con't.)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #4: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State.		X			
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.				X	
Recommendation #6: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.			X		
Recommendation #7: The jurisdiction should forbid death sentences and executions for everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of the conduct, (b) to exercise rational judgment in relation to the conduct, or (c) to conform one's conduct to the requirements of the law.			X		
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to the law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.			X		
Recommendation #9: Jury instructions should adequately communicate to jurors that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.			X		

Mental Illness (Con't.)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
<p>Recommendation #10: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.</p>			X			
<p>Recommendation #11: The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.</p>				X		
<p>Recommendation #12: The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.</p>				X		
<p>Recommendation #13: Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.</p>		X				

The State of Tennessee has taken steps to protect the rights of individuals with mental disorders or disabilities by educating certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, a number of law enforcement agencies have chosen to provide training on the recognition of mental illness in defendants and incarcerated individuals. Additionally, the State of Tennessee has adopted some mechanisms—including provision for the filing of “next friend” petitions—to protect individuals with mental disorders or disabilities from waivers that are a product of their mental disorder or disability. Despite these steps, the State of Tennessee does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Tennessee does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner’s input;
- The State of Tennessee does not permit the courts to stay post-conviction proceedings for an incompetent death-row inmate and instead may appoint a “next friend” to pursue post-conviction relief on behalf of the inmate;
- The State of Tennessee does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant’s subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing, nor does it have a pattern jury instruction on the administration of medication to the defendant for a mental disorder or disability.

Based on this information, the State of Tennessee should, as previously discussed on page viii-ix of the Executive Summary, adopt a law or rule: (a) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had significantly sub-average limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole (or to a life sentence for those sentenced prior to the adoption of life without the possibility of parole as the sole alternative punishment to the death penalty). Policies and procedures that allow for objective expert testimony should be adopted to ensure the fairness and completeness of these determinations. Additionally, the State of Tennessee should adopt a uniform standard for determining a defendant’s competency through trial, appellate,

and state post-conviction proceedings and stay post-conviction proceedings if a death-row inmate is found incompetent.

INTRODUCTION

GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Tennessee assessment, the Project has released state assessments of Alabama, Arizona, Georgia, Florida, and Indiana. In the future, it plans to release reports in, at a minimum, Ohio, and Pennsylvania. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal *habeas corpus* proceedings, clemency proceedings, jury

instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Tennessee Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Tennessee Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Tennessee death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

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¹ The affiliations of each member are listed for identification purposes only. Each Team member has acted in his/her personal capacity. The contents and views expressed in this report do not necessarily reflect those of any listed affiliations.

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Judge Merritt currently serves as a Senior Judge on the United States Court of Appeals for the Sixth Circuit in Nashville, Tennessee. He also acts as an advisor to the United States Department of Justice concerning the restoration of Iraq's judicial system and the relocation of the Iraqi Supreme Court. Prior to his appointment by President Jimmy Carter in 1977, Judge Merritt served as United States Attorney for the Middle District of Tennessee, as well as Metropolitan Attorney for the City of Nashville, and as executive secretary for the Tennessee Commission Code. He was also in private practice at the Nashville law firm of Gullett, Steele, Sanford, Robinson & Merritt. He is a graduate of Yale University, and received his LL.B. from Vanderbilt University School of Law, where he was Managing Editor of the Vanderbilt Law Review and Order of the Coif. Judge Merritt also received an LL.M. from Harvard Law School.

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CHAPTER ONE

AN OVERVIEW OF TENNESSEE'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF TENNESSEE'S DEATH ROW

A. A Historical Perspective

The State of Tennessee initially reenacted the death penalty in 1973, but Tennessee's death penalty scheme is largely based on the death penalty statutes enacted in 1977.¹ Between 1977 and 2005, the State of Tennessee imposed 164 death sentences.² During that same time period, the State of Tennessee executed two individuals—Robert Glen Coe and Sedley Alley.³

B. A Current Profile of Tennessee's Death Penalty System

Between 1995 and 2005, 909 defendants were convicted of first-degree murder.⁴ Of the 909 defendants, fifty-one were sentenced to death, 235 were sentenced to life without parole, and the other defendants were sentenced to a term of imprisonment less than life without parole.⁵ The fifty-one death sentences were imposed in fifteen of Tennessee's thirty-one judicial districts.⁶

¹ See *infra* Section II: Statutory Evolution of Tennessee's Death Penalty Scheme, at 12-15.

² See Death Penalty Information Center, Death Sentences in the United States from 1977 to 2005, at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=847> (last visited Feb. 14, 2007).

³ Death Penalty Information Center, Searchable Database for Executions, at <http://www.deathpenaltyinfo.org/executions.php> (using state search function and designation "TN" as search criteria) (last visited Feb. 14, 2007).

⁴ Administrative Office of the Courts, 1995-2005, First Degree Murder Convictions by Judicial Circuit (July 29, 2005) (on file with author).

⁵ *Id.*

⁶ *Id.* The death sentences were imposed in the following districts: Second, Fifth, Sixth, Eighth, Tenth, Seventeenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fifth, Twenty-sixth, Twenty-ninth, and Thirtieth. *Id.* Each judicial district is composed of one or more of Tennessee's 95 counties. See FedStats, State Court Districts: Tennessee, at <http://www.fedstats.gov/mapstats/statecourts/sc47.html> (last visited Feb. 14, 2007). Tennessee's judicial districts are specifically composed of the following counties: First – Carter County, Johnson County, Unicoi County, and Washington County; Second – Sullivan County; Third – Greene County, Hamblen County, Hancock County, and Hawkins County; Fourth – Cocke County, Grainger County, Jefferson County, and Sevier County; Fifth – Blount County; Sixth – Knox County; Seventh – Anderson County; Eighth – Campbell County, Claiborne County, Fentress County, Scott County, and Union County; Ninth – Loudon County, Meigs County, Morgan County, and Roane County; Tenth – Bradley County, McMinn County, Monroe County, Polk County; Eleventh – Hamilton County; Twelfth – Bledsoe County, Franklin County, Grundy County, Marion County, Rhea County, and Sequatchie County; Thirteenth – Clay County, Cumberland County, DeKalb County, Overton County, Pickett County, Putnam County, and White County; Fourteenth – Coffee County; Fifteenth – Jackson County, Macon County, Smith County, Trousdale County, and Wilson County; Sixteenth – Cannon County and Rutherford County; Seventeenth – Bedford County, Lincoln County, Marshall County, and Moore County; Eighteenth – Sumner County; Nineteenth – Montgomery County and Robertson County; Twentieth – Davidson County; Twenty-first – Hickman County, Lewis County, Perry County, and Williamson County; Twenty-second – Giles County, Lawrence County, Maury County, and Wayne County; Twenty-third – Cheatham County, Dickson County,

Currently, Tennessee's death row houses 101 inmates, of which ninety-nine are male and two are female.⁷ Of the 101 death-row inmates, fifty-eight are white, forty are African American, one is Hispanic, one is Native American, and one is Asian.⁸

II. THE STATUTORY EVOLUTION OF TENNESSEE'S DEATH PENALTY SCHEME

A. *Tennessee's Post-Furman 1973 Death Penalty Scheme*

1. The Tennessee Legislature's Response to *Furman v. Georgia*⁹

In the wake of the United States Supreme Court's decision in *Furman v. Georgia*, finding the imposition of the death penalty as practiced violated the Eighth and Fourteenth Amendments of the United States Constitution,¹⁰ the Tennessee Legislature enacted in 1973 both a new first-degree murder statute and a new death penalty statute (section 39-2402¹¹ of the Tennessee Code Annotated and section 39-2406¹² of the Tennessee Code Annotated, respectively).

Section 39-2402 of the Tennessee Code Annotated (T.C.A.) classified the following offenses as first-degree murder:

- (1) Committing a willful, deliberate, malicious, and premeditated killing or murder;
- (2) Committing a willful, deliberate, and malicious killing or murder, and:
 - (a) The victim is an employee of the Department of Corrections having custody of the actor,
 - (b) The victim is a prison inmate in custody with the actor,
 - (c) The victim is known to the actor to be a peace officer or fireman acting in the course of his[/her] employment,
 - (d) The victim is a judge acting in the course of his[/her] judicial duties,
 - (e) The victim is a popularly elected public official, or
 - (f) The offense is committed for hire;
- (3) Hiring another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim;

Houston County, Humphreys County, and Stewart County; Twenty-fourth – Benton County, Carroll County, Decatur County, Hardin County, and Henry County; Twenty-fifth – Fayette County, Hardeman County, Lauderdale County, McNairy County, and Tipton County; Twenty-sixth – Chester County, Henderson County, and Madison County; Twenty-seventh – Obion County and Weakley County; Twenty-eighth – Crockett County, Gibson County, and Haywood County; Twenty-ninth – Dyer County and Lake County; Thirtieth – Shelby County; and Thirty-first – Van Buren County and Warren County. *Id.*

⁷ Tennessee Department of Corrections, Death Row Facts, at <http://www.state.tn.us/correction/deathfacts.html> (last visited Feb. 14, 2007).

⁸ *Id.*

⁹ 408 U.S. 238 (1972).

¹⁰ *Id.*

¹¹ See 1973 Tenn. Pub. Acts 192, § 1.

¹² See 1973 Tenn. Pub. Acts 192, § 2.

- (4) Committing a willful, deliberate, malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb; and
- (5) Violating Tenn. Code Ann. § 52-1432(a)(1) (the Drug Control Act), and the recipient of the controlled substance dies as a result of such controlled substance.¹³

Pursuant to the new death penalty statute, upon conviction for first-degree murder, the trial judge held a separate hearing before the trial jury to determine the defendant's sentence of "death, life imprisonment, or imprisonment for some period over 25 years."¹⁴ If the defendant waived his/her right to a jury trial, or if the defendant pleaded guilty, the sentencing proceeding was held before a jury empanelled only for sentencing purposes—unless the defendant again waived his/her right to a jury.¹⁵

During the sentencing hearing, both parties were authorized to present evidence as to any matter that the court deemed relevant to the defendant's sentence, which included matters relating to any of the aggravating and mitigating circumstances.¹⁶ In fact, any such evidence that the court deemed to have probative value could be presented, regardless of its admissibility under the exclusionary rules of evidence, as long as two criteria were met:¹⁷ (1) the defendant had a fair opportunity to rebut hearsay statements, and (2) the evidence was not obtained in violation of the United States Constitution or the Tennessee Constitution.¹⁸

Additionally, counsel for the State and the defendant were permitted to present arguments for and against a death sentence, which included the presentation of evidence of aggravating and mitigating circumstances.¹⁹

The aggravating circumstances were:

- (1) The murder was committed by a person under sentence of imprisonment;
- (2) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person;
- (3) The defendant knowingly created a great risk of death to many persons;
- (4) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- (5) The murder was committed for pecuniary gain;
- (6) The murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and
- (7) The murder was especially heinous, atrocious, or cruel.²⁰

¹³ 1973 Tenn. Pub. Acts 192, § 1.

¹⁴ 1973 Tenn. Pub. Acts 192, § 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

The mitigating circumstances were:

- (1) The defendant had no significant history of prior criminal activity;
- (2) The murder was committed when the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The murder was committed under circumstances which the defendant believed to provide a moral justification for his/her conduct;
- (5) The defendant was an accomplice in the murder committed by another person and his/her participation was relatively minor;
- (6) The defendant acted under extreme duress or under the substantial domination of another person;
- (7) The capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was substantially impaired as a result of mental disease or defect or intoxication;
- (8) The youth of the defendant at the time of the crime;
- (9) The defendant was acting in the heat of passion; and
- (10) The evidence against the defendant upon which the conviction was based was entirely circumstantial alone, but such evidence persuaded the jury that the defendant was guilty beyond a reasonable doubt because the evidence was not only consistent with guilt but inconsistent with innocence to such an extent that it excluded every reasonable hypothesis except that of guilt.²¹

Under this scheme, once the jury heard all of the evidence, it was instructed to deliberate and render a sentence based upon the following considerations: (1) whether sufficient aggravating circumstances existed; (2) whether sufficient mitigating circumstances existed, that outweighed the aggravating circumstances found; and (3) whether, based on the above factors, the defendant should be sentenced to death, life imprisonment, or imprisonment for some period over twenty-five years.²² In all cases in which the jury imposed a sentence of death, the Tennessee Supreme Court was required to automatically review the sentence within sixty days after the sentencing court certified the record.²³ This time period, however, could be extended, upon a showing of good cause, for an additional period not to exceed thirty days.²⁴

2. The Tennessee Supreme Court's Review of the New First-Degree Murder and Death Penalty Statutes

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Shortly after the adoption of the new first-degree murder and death penalty statutes, the Tennessee Supreme Court, in *State v. Hailey*,²⁵ found the Act containing such statutes to be in violation of the Tennessee Constitution.²⁶ Following the Court's decision in *Hailey*, the Tennessee Legislature responded by amending both the first-degree murder and death penalty statutes.

B. Tennessee's 1974 Death Penalty Scheme

1. The Tennessee Legislature's Response to *State v. Hailey*

In 1974, the Tennessee Legislature amended the first-degree murder statute, section 39-2402 of the T.C.A., by: (1) adding the offense of committing a willful, deliberate, and malicious killing or murder while attempting to evade law enforcement to the list of offenses that qualified as first-degree murder;²⁷ and (2) deleting the offense of violating section 52-1432 (a)(1) of the T.C.A. (the Drug Control Act) from the list of offenses that qualified as first-degree murder.²⁸

The Tennessee Legislature also deleted the death penalty statute, section 39-2406 of the T.C.A., in its entirety, and replaced it with the following paragraph:

When a person is convicted of the crime of murder in the first degree, or as an accessory before the fact of such a crime, it shall be the duty of the jury convicting him[/her] in their verdict to fix his[/her] punishment at death as provided by law.²⁹

In addition to amending the first-degree murder and death penalty statutes, the Tennessee Legislature made the offense of rape punishable by death. Specifically, the legislature amended the statute prescribing the penalty for rape, section 39-3702 of the T.C.A.,³⁰ by requiring death by electrocution to be imposed for the rape of any female under twelve years old.³¹ Rape of a female over the age of twelve, however, was to be punished by imprisonment for life or for a period of not less than ten years.³²

2. The Tennessee Supreme Court's Review of the Amended First-Degree Murder and Death Penalty Statutes

²⁵ *State v. Hailey*, 505 S.W.2d 712 (Tenn. 1974).

²⁶ *Id.* at 715.

²⁷ 1974 Tenn. Pub. Acts 462, § 1.

²⁸ *Id.*

²⁹ 1974 Tenn. Pub. Acts 462, § 3.

³⁰ 1974 Tenn. Pub. Acts 461, § 1. Prior to 1974, the offense of rape was punishable by imprisonment for life or for not less than three years as the punishment for rape of any female. *See* 1973 Tenn. Pub. Acts 192, § 5. However, before *Furman*, death by electrocution was the punishment for rape of any female, although the jury could commute the sentence to imprisonment for life or for a period not less than ten (10) years. *See* 1974 Tenn. Pub. Acts 461, § 1 (footnotes).

³¹ 1974 Tenn. Pub. Acts 461, § 1.

³² *Id.*

In 1977, the Tennessee Supreme Court declared the 1974 death penalty statute unconstitutional in *Collins v. State*,³³ holding that the Tennessee Legislature gave no “controlled discretion” to the jury to fix punishment.³⁴ In light of *Collins*, the Tennessee Legislature amended the first-degree murder statute and adopted an entirely new death penalty scheme.

C. Tennessee’s Post-Collins Death Penalty Scheme

In 1977, the Tennessee Legislature amended the first-degree murder statute—section 39-2402 of the T.C.A.—and amended three existing statutes—sections 39-2404, 39-2405, and 39-2406—to pertain to the death penalty.³⁵ Section 39-2404 of the T.C.A. contained the new sentencing guidelines for death penalty cases;³⁶ section 39-2405 of the T.C.A. included the defendant’s right to waive a jury trial during the guilt/innocence and sentencing phases;³⁷ and section 39-2406 of the T.C.A. provided the defendant’s right of direct appeal to the Tennessee Supreme Court once the death penalty had been imposed in the defendant’s case.³⁸

The new first-degree murder statute classified two types of offenses as first-degree murder:

- (1) Murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditating killing; and
- (2) Murder committed in the perpetration of or attempt to perpetrate any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.³⁹

Pursuant to the new death penalty scheme, upon conviction for first-degree murder, a defendant would be sentenced to either death or life imprisonment.⁴⁰ A defendant’s punishment was affixed in a separate hearing in which the same jurors from the guilt/innocence phase participated.⁴¹ With the advice of his/her counsel and consent of the court and the State, however, the defendant could waive the right to a jury to determine punishment.⁴² In that case, the trial judge determined punishment.⁴³

³³ *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977).

³⁴ *Id.* at 646-47.

³⁵ 1977 Tenn. Pub. Acts 51, §§ 1-4.

³⁶ 1977 Tenn. Pub. Acts 51, § 2.

³⁷ 1977 Tenn. Pub. Acts 51, § 3.

³⁸ 1977 Tenn. Pub. Acts 51, § 4.

³⁹ 1977 Tenn. Pub. Acts 51, § 1(a).

⁴⁰ 1977 Tenn. Pub. Acts 51, § 1(b); 1977 Tenn. Pub. Acts 82, § 2(a).

⁴¹ 1977 Tenn. Pub. Acts 51, § 2(a).

⁴² 1977 Tenn. Pub. Acts 51, § 3(b).

⁴³ *Id.*

During the sentencing hearing, which was required to be held as soon as practicable after the guilt/innocence phase,⁴⁴ both the prosecution and defense were authorized to make opening statements.⁴⁵ Waiver of the opening statement by one party did not preclude an opening statement by the other.⁴⁶

Additionally, at the sentencing hearing, both parties were authorized to present evidence as to any matter the court deemed relevant to the punishment. Such evidence included, but was not limited to: “the nature and circumstances of the crime; the defendant’s character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances; and any evidence tending to establish or rebut any mitigating factors.”⁴⁷ Evidence having probative value would be heard regardless of its admissibility under the rules of evidence, provided the defendant was accorded a fair opportunity to rebut any hearsay statements admitted.⁴⁸

The statutory aggravating circumstances were:

- (1) The murder was committed against a person less than twelve years old and the defendant was age eighteen or older;
- (2) The defendant was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to a person;
- (3) The defendant knowingly created a great risk of death to two or more persons, other than the murdered victim, during his/her act of murder;
- (4) The defendant committed the murder for remuneration or promise of remuneration, or employed another person to commit the murder for remuneration or the promise of remuneration;
- (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;
- (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
- (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
- (8) The murder was committed by the defendant while s/he was in lawful custody or in a place of lawful confinement or during his/her escape from lawful custody or from a place of lawful confinement;
- (9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his/her duties, and the defendant knew or reasonably should have known

⁴⁴ 1977 Tenn. Pub. Acts 51, § 2(a).

⁴⁵ 1977 Tenn. Pub. Acts 51, § 2(b).

⁴⁶ *Id.*

⁴⁷ 1977 Tenn. Pub. Acts 51, § 2(c).

⁴⁸ *Id.*

- that the victim was one of the above-named officials engaged in the performance of his/her duties;
- (10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his/her official duty or status and the defendant knew that the victim occupied that office; and
 - (11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and defendant knew that the victim was such an official.⁴⁹

The statutory mitigating circumstances included but were not limited to the following:

- (1) The defendant had 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) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The murder was committed under circumstances that the defendant reasonably believed to provide a moral justification for his/her conduct;
- (5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
- (6) The defendant acted under extreme duress or under the substantial domination of another person;
- (7) The youth or advanced age of the defendant at the time of the crime; and
- (8) The defendant's capacity to appreciate the wrongfulness of his/her conduct or to conform his/her conduct to the requirements of 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 affected his/her judgment.⁵⁰

Following the presentation of evidence, both the prosecution and the defense were authorized to make closing arguments.⁵¹ After the closing arguments, the trial judge was required to instruct the jury to weigh and consider any mitigating or statutory aggravating circumstances raised at either the guilt/innocence and/or sentencing hearing.⁵² If the jury unanimously determined that the State proved the aggravating circumstance(s) beyond a reasonable doubt, but that such circumstance was outweighed by mitigating circumstances, the defendant's sentence had to be life imprisonment.⁵³ However, if the jury unanimously determined that an aggravating circumstance or circumstances had been proven by the State beyond a reasonable doubt, but that such circumstances were

⁴⁹ 1977 Tenn. Pub. Acts 51, § 2(i).

⁵⁰ 1977 Tenn. Pub. Acts 51, § 2(j).

⁵¹ 1977 Tenn. Pub. Acts 51, § 2(d).

⁵² 1977 Tenn. Pub. Acts 51, § 2(e).

⁵³ 1977 Tenn. Pub. Acts 51, § 2(f).

not outweighed by mitigating circumstances, the defendant's sentence had to be death.⁵⁴ In the case of a death sentence, the jury was required to set forth in writing the statutory aggravating circumstance(s) found and attest that there were no mitigating circumstances "sufficiently substantial" to outweigh the aggravating circumstance(s).⁵⁵ When the jury was unable to agree on the verdict, the judge was to dismiss the jury and impose a sentence of life imprisonment.⁵⁶

In cases in which the defendant was convicted of first-degree murder and sentenced to death, the Tennessee Supreme Court was to review the conviction and punishment on appeal.⁵⁷ In addition to exercising ordinary appellate review, if the conviction was affirmed, the Court was to review the death sentence to determine whether: (1) the sentence was imposed in an arbitrary fashion; (2) the evidence supported the jury's finding of statutory aggravating circumstances; (3) the evidence supported the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances; and (4) the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.⁵⁸ The Tennessee Supreme Court was authorized to affirm the death sentence or modify the punishment to life imprisonment.⁵⁹ If either the death penalty statute or its application was deemed unconstitutional by the Tennessee Supreme Court or a federal court, the defendant's sentence of death had to be changed to life imprisonment.⁶⁰

1. Amendments to Tennessee's First-Degree Murder Statute—From Section 39-2402 to Section 39-13-202 of the T.C.A

In 1979, the Class X Felonies Act (the Act) amended section 39-2402 of the T.C.A. by categorizing first-degree murder as a Class X felony.⁶¹ Under the Act, Class X felonies: (1) were determinate in nature; (2) were not subject to reduction for good honor or incentive or other sentence credit of any sort; (3) terminated or expired only after service of the entire sentence; and (4) were not included in any pre-trial diversion program.⁶²

In 1988, the Tennessee Legislature amended the first-degree murder statute by renumbering it as section 39-2-202 of the T.C.A.⁶³ That amendment also classified as first-degree murder the killing of a child less than thirteen years old if the child's death "result[ed] from one [] or more incidents of a protracted pattern or multiple incidents of *child abuse* committed by the defendant against such child or if such death result[ed]

⁵⁴ 1977 Tenn. Pub. Acts 51, § 2(g).

⁵⁵ *Id.*

⁵⁶ 1977 Tenn. Pub. Acts 51, § 2(h).

⁵⁷ 1977 Tenn. Pub. Acts 51, § 4(a).

⁵⁸ 1977 Tenn. Pub. Acts 51, § 4(b), (c).

⁵⁹ 1977 Tenn. Pub. Acts 51, § 4(d).

⁶⁰ 1977 Tenn. Pub. Acts 51, § 6.

⁶¹ 1979 Tenn. Pub. Acts 318, § 4.

⁶² 1979 Tenn. Pub. Acts 318, § 3.

⁶³ 1988 Tenn. Pub. Acts 802, § 2; 1979 Tenn. Pub. Acts 318, § 2.

from the cumulative effects of such pattern or incidents.”⁶⁴ In 1989, the Tennessee Legislature again renumbered the first-degree murder statute as section 39-13-202 of the T.C.A.⁶⁵ The first-degree murder statute remains section 39-13-202 to the present day.

In 1990, the Tennessee Legislature amended the first-degree murder statute to include “the reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.”⁶⁶ In 1991, the Tennessee Legislature again amended the first-degree murder statute to include the “killing of a child less than thirteen years of age, if the child’s death result[ed] from a protracted pattern or multiple incidents of *bodily injury* committed by the defendant against such child and the death [was] caused either by the last injury or the cumulative effect of such injuries.”⁶⁷ However, in 1993, the “bodily injury” language was deleted and replaced with the “reckless killing of a child less than thirteen years of age, if the child’s death result[ed] from *aggravated* child abuse, as defined by Tenn. Code Ann. § 39-15-402, committed by the defendant against the child.”⁶⁸ A separate 1993 amendment added life imprisonment without the possibility of parole as a sentencing option for first-degree murder.⁶⁹ A 1994 amendment modified the age the child could be for the defendant to be convicted of first-degree murder by aggravated child abuse, raising it from thirteen to sixteen.⁷⁰

In 1995, the Tennessee Legislature deleted section 39-13-202 of the T.C.A. and re-enacted the section under the same number, with a few changes.⁷¹ The new statute included aggravated child abuse in the list of offenses that qualified as first-degree murder if the defendant was perpetrating child abuse or attempting to perpetrate child abuse at the time of the killing and deleted all references to the requisite age of a child abuse victim in order for the defendant to be convicted of first-degree murder.⁷² The 1995 amendment also provided a definition of premeditation: “an act done after the exercise of reflection and judgment.”⁷³ The definition stated that the purpose to kill did not have to exist in the accused’s mind for a definite period of time before the murder.⁷⁴ Also, the amendment recognized the need to determine whether excitement or passion influenced the accused’s capability for premeditation.⁷⁵

A 1998 amendment to section 39-13-202 of the T.C.A. added “aggravated child neglect” to the list of offenses that qualify as first-degree murder if the defendant is perpetrating child abuse or attempting to perpetrate child abuse at the time of the killing.⁷⁶ In 2002,

⁶⁴ 1988 Tenn. Pub. Acts 802, § 1 (emphasis added).

⁶⁵ 1989 Tenn. Pub. Acts 591, § 1.

⁶⁶ 1990 Tenn. Pub. Acts 1030, § 15.

⁶⁷ 1991 Tenn. Pub. Acts 377, § 2.

⁶⁸ 1993 Tenn. Pub. Acts 338, § 1.

⁶⁹ 1993 Tenn. Pub. Acts 473, § 1.

⁷⁰ 1994 Tenn. Pub. Acts 883, § 1.

⁷¹ 1995 Tenn. Pub. Acts 460, § 1.

⁷² *Id.*

⁷³ 1995 Tenn. Pub. Acts 460, § 1(d).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 1998 Tenn. Pub. Acts 1040, § 3.

the Tennessee Legislature added “act of terrorism” to the list of offenses constituting first-degree murder.⁷⁷

2. Amendments to Tennessee’s Death Penalty Sentencing Statute—From Section 39-2404 to Section 39-13-204 of the T.C.A.

From 1977 to the present, the Tennessee Legislature amended and renumbered the State’s death penalty sentencing statute several times. Over this period, the Tennessee Legislature significantly increased the number of aggravating circumstances contained in the original statute.

In 1981, the Tennessee Legislature added the commission of mass murder as a statutory aggravating circumstance.⁷⁸ Mass murder was defined as “the murder of three or more persons within [the State] within a period of forty-eight months and perpetrated in a similar fashion in a common scheme or plan.”⁷⁹ That same year, the legislature also renumbered section 39-2-2404 of the T.C.A. as section 39-2-203.

In November 1989, the Legislature repealed section 39-2-203 of the T.C.A. and passed it again with no substantive changes on the very same day that the Legislature passed section 39-13-203.⁸⁰ Section 39-13-203 of the T.C.A. was then renumbered as section 39-13-204 in 1990, when the legislature reassigned section 39-13-203 to a new statute prohibiting defendants with mental retardation from being subject to the death penalty.⁸¹ The death penalty statute remains section 39-13-204 to the present day.

In 1993, the Tennessee Legislature added imprisonment for life without the possibility of parole to section 39-13-204 of the T.C.A. as a possible sentence for first-degree murder.⁸² Pursuant to the 1993 amendment, the trial judge was required to instruct the jury on the difference between life imprisonment and life imprisonment without possibility of parole during the sentencing hearing.⁸³ The judge also had to instruct the jury that defendants who receive a sentence of life imprisonment were not eligible for parole until they had served twenty-five calendar years,⁸⁴ and that defendants who received a sentence of life imprisonment without the possibility of parole were not eligible for release.⁸⁵

Under the same 1993 amendment, if the jury unanimously found no statutory aggravating circumstance proven beyond a reasonable doubt, the sentence had to be imprisonment for life.⁸⁶ If the jury unanimously determined that statutory aggravating circumstances had

⁷⁷ 2002 Tenn. Pub. Acts 849, § 2(a).

⁷⁸ 1981 Tenn. Pub. Acts 33, § 1.

⁷⁹ *Id.*

⁸⁰ *See* TENN. CODE ANN. § 39-2-203 (1989); TENN. CODE ANN. § 39-13-203 (1989).

⁸¹ *See* TENN. CODE ANN. § 39-13-204 (1990).

⁸² 1993 Tenn. Pub. Acts 473, § 1.

⁸³ 1993 Tenn. Pub. Acts 473, § 4.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 1993 Tenn. Pub. Acts 473, § 5(f)(1).

been proven beyond a reasonable doubt but that the mitigating circumstances outweighed them, the jury could sentence the defendant to either life imprisonment or life imprisonment without possibility of parole.⁸⁷ In such case, the trial judge instructed the jury that in choosing between the two sentences, it needed to weigh both the aggravating and mitigating circumstances.⁸⁸ In the event that the jury unanimously found statutory aggravating circumstance(s) beyond a reasonable doubt, and that such circumstance(s) outweighed any mitigating circumstances, the jury could sentence the defendant to death.⁸⁹ If the jury could not ultimately agree on punishment, the trial judge had to ask the jury foreman whether the jury was divided over imposing a death sentence.⁹⁰ If the jury was divided over a death sentence, the trial judge was to instruct the jury to only consider life imprisonment or life imprisonment without the possibility of parole as sentences.⁹¹ If the jury still could not agree, the judge was to dismiss the jury and impose a sentence of life imprisonment.⁹² The 1993 amendment also provided that in the case of a new trial for guilt or punishment, any of the three punishments discussed could be imposed.⁹³

Between 1995 and 1998, the Tennessee Legislature made several amendments, which expanded the number of aggravating circumstances and revised existing ones, beginning with two amendments in 1995. The first added “the defendant knowingly mutilated the body of the victim after death” to the list of aggravating circumstances.⁹⁴ The second amendment revised an existing aggravating circumstance by requiring that the murder be “*knowingly* committed, solicited, directed, or aided by the defendant while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.”⁹⁵ In 1996, the legislature amended the aggravating circumstance of “knowingly committing murder against public officials” by adding emergency medical or rescue worker, emergency medical technician, and paramedic to the list of officials.⁹⁶

A 1997 amendment stated that a sentence of death or life imprisonment without the possibility of parole could not be set aside because the judge failed to instruct the jury as to the existence of a non-statutory mitigating circumstance.⁹⁷ Other 1997 amendments added two new aggravating circumstances: (1) the defendant committed mass murder, defined as “the murder of three [] or more persons whether committed during a single

⁸⁷ 1993 Tenn. Pub. Acts 473, § 5(f)(2).

⁸⁸ *Id.*

⁸⁹ 1993 Tenn. Pub. Acts 473, § 4(f)(2).

⁹⁰ 1993 Tenn. Pub. Acts 473, § 6(h).

⁹¹ *Id.*

⁹² *Id.*

⁹³ 1993 Tenn. Pub. Acts 473, § 14.

⁹⁴ 1995 Tenn. Pub. Acts 356, § 1.

⁹⁵ 1995 Tenn. Pub. Acts 377, § 1 (emphasis added).

⁹⁶ 1996 Tenn. Pub. Acts 830, § 1.

⁹⁷ 1997 Tenn. Pub. Acts 139, § 1.

criminal episode or at different times within a forty-eight [] month period,”⁹⁸ and (2) “the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability.”⁹⁹ Then, in 1998, the legislature added “the murder victim was seventy [] years of age or older” to the aforementioned handicap or disability aggravating circumstance.¹⁰⁰

In 1997 and 1998, the Tennessee Legislature made substantial amendments to evidentiary procedures related to capital sentencing. The first amendment stated that when the prosecution relies upon the aggravating circumstance that the defendant was previously convicted of one or more felonies, whose statutory elements involve the use of violence to the person, either party must be permitted to introduce evidence concerning the facts and circumstances of the prior conviction.¹⁰¹ The amendment also stated that such evidence was not to be construed as creating unfair prejudice, confusing the issues, or misleading the jury and was not subject to exclusion on the ground that the probative value of the evidence was outweighed by prejudice to either party.¹⁰²

Another 1998 amendment stated that the court *may* permit family members or representatives of the victim’s family to testify at the sentencing hearing about the victim and the impact of the murder on the victim’s family and other relevant persons.¹⁰³ It also authorized the jury to use this evidence in determining which sentence to impose.¹⁰⁴ The amendment also provided that the court must not exclude members or representatives of the victim’s family from attending the trial if they also are to testify at the sentencing hearing as to the impact of the offense.¹⁰⁵ But a 1999 amendment took discretion from the judge in permitting victim impact testimony, stating the court “shall” permit members or representatives of the victim’s family to testify at the sentencing hearing as to the impact of the murder.¹⁰⁶

In 2002, the legislature added the following aggravating circumstance: “The murder was committed in the course of an act of terrorism.”¹⁰⁷

III. THE PROGRESSION OF A TENNESSEE DEATH PENALTY CASE FROM ARREST TO EXECUTION

A. *The Pretrial Process*

1. Commencement of a Prosecution for a Capital Offense

⁹⁸ 1997 Tenn. Pub. Acts 358, § 1.

⁹⁹ 1997 Tenn. Pub. Acts 491, § 1.

¹⁰⁰ 1998 Tenn. Pub. Acts 712, § 1.

¹⁰¹ 1998 Tenn. Pub. Acts 915, § 1.

¹⁰² *Id.*

¹⁰³ 1998 Tenn. Pub. Acts 916, § 1 (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 1999 Tenn. Pub. Acts 504, § 1.

¹⁰⁷ 2002 Tenn. Pub. Acts 849, § 2(c).

The State of Tennessee defines first-degree murder, the State’s only capital offense,¹⁰⁸ as:

- (1) A premeditated and intentional killing of another;
- (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or
- (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.¹⁰⁹

To commence a prosecution for a capital offense, the State may either seek a grand jury indictment, officially charging an individual with first-degree murder,¹¹⁰ or, if the individual waives his/her constitutional right to be tried upon a grand jury indictment, the State may file an information.¹¹¹ Alternatively, the State may commence a prosecution by filing an affidavit of complaint,¹¹² alleging an individual has committed the offense of first-degree murder and stating the essential facts underlying the offense.¹¹³ If the State initiates the prosecution of an individual arrested without a warrant by filing an affidavit of complaint,¹¹⁴ the State must still seek an indictment or file an information.¹¹⁵

2. Arrest, Initial Appearance, and Preliminary Examination

If a prosecution has been commenced by a grand jury indictment, the clerk must issue a *capias* upon the return of the indictment.¹¹⁶ A *capias*, which is identical in form to an

¹⁰⁸ TENN. CODE ANN. § 39-13-202(c)(1) (2006).

¹⁰⁹ TENN. CODE ANN. § 39-13-202(a)(1)-(3) (2006).

¹¹⁰ TENN. CODE ANN. § 40-3-102 (stating that criminal law violations may be prosecuted by indictment or presentment of a grand jury); TENN. CODE ANN. § 40-13-101(b) (“whenever the context so requires or will permit,” the term “indictment” also encompasses the term “presentment”). An indictment is a written accusation presented by the grand jury charging an individual with a felony or a misdemeanor. TENN. CODE ANN. § 40-13-101(a) (2006); *see also* Moore v. State, 578 S.W.2d 78, 80 (Tenn. 1979) (“It is the prerogative of the District Attorney General and law enforcement personnel to omit the arrest procedure and take prosecutions directly to the grand jury.”).

¹¹¹ TENN. CODE ANN. §§ 40-3-101, -103(a)-(c) (2006); *see also* Mark Ward, *Tennessee Criminal Trial Practice*, § 12:25 (2006) (“After being advised of his[her] right, if the defendant agrees in writing in the presence of the defendant’s attorney to waive such right, the case may proceed in all respects as if the defendant was being prosecuted by indictment or presentment.”).

¹¹² An affidavit of complaint is “a written statement alleging that a person has committed an offense and alleging the essential facts constituting the offense charged.” TENN. R. CRIM. P. 3.

¹¹³ TENN. R. CRIM. P. 3; TENN. R. CRIM. P. 4(a) (describing the issuance of an arrest warrant or a criminal summons upon the filing of the affidavit of complaint).

¹¹⁴ TENN. R. CRIM. P. 5(a)(2).

¹¹⁵ TENN. CODE ANN. §§ 40-2-104; 40-3-103(a), (c)(1) (2006); *see also* State v. Brackett, 869 S.W.2d 936, 938 (Tenn. Crim. App. 1993) (“Absent either grand jury action or the written waiver of that guarantee, there can be no valid conviction.”).

¹¹⁶ TENN. R. CRIM. P. 9(a). A criminal summons may also be issued under Rule 9(a) of the Tennessee Rules of Criminal Procedure, however, a review of Tennessee case law indicates that a criminal summons is not generally issued in practice, especially in regards to a first-degree murder offense.

arrest warrant, similarly commands the arrest of the defendant and his/her appearance before the court.¹¹⁷ An individual whose prosecution is commenced by a grand jury indictment or by the filing of an information has no right to a preliminary examination,¹¹⁸ and will later proceed instead to his/her arraignment.¹¹⁹

If, however, a prosecution is initiated by the filing of an affidavit of complaint, the magistrate or clerk must issue an arrest warrant when probable cause that the accused committed a capital offense appears to exist.¹²⁰ Any individual arrested for a capital offense, except those individuals arrested upon a *capias*,¹²¹ must be brought “without unnecessary delay”¹²² before a magistrate.¹²³ When an arrest is made without a warrant, the State must immediately file an affidavit of complaint when the accused appears before a magistrate.¹²⁴ At this initial appearance, the magistrate must inform the accused— regardless of whether s/he was arrested pursuant to a warrant—of: (1) the charge and the affidavit of complaint; (2) his/her right to counsel; (3) his/her right to appointed counsel if indigent; (4) his/her right to remain silent; (5) the fact that any statement given voluntarily may be used against him/her; (6) the circumstances under which s/he may obtain pretrial release; and (7) his/her right to a preliminary examination.¹²⁵ The magistrate must also set a date for a preliminary examination (within ten days of the initial appearance if the accused is in custody or within thirty days if the accused is not in custody), unless the accused waives his/her right to a preliminary examination, in which case, the court binds the accused over to the grand jury in order to determine whether an official charging instrument should be issued.¹²⁶

¹¹⁷ TENN. R. CRIM. P. 9(a)-(c).

¹¹⁸ See *State v. Best*, 614 S.W.2d 791, 795 (Tenn. 1981); *State v. Watson*, 1991 WL 153017, *5 (Tenn. Crim. App. Jan. 27, 1992) (unpublished opinion) (stating that where an arrest is commenced by the return of an indictment, the accused is not entitled to a preliminary hearing); *State v. Johnson*, 2004 WL 2378256, *6 (Tenn. Crim. App. Oct. 20, 2004) (unpublished opinion) (“Because the prosecution began with an indictment rather than an arrest, the defendant was not entitled to a preliminary hearing.”); see also TENN. CODE ANN. § 40-3-103(c)(2) (stating that upon the completion of an information, the court “may proceed in all respects as in cases prosecuted by indictment or presentment”).

¹¹⁹ See, e.g., *Watson*, 1991 WL 153017, at *4 (noting that after a grand jury indictment was issued, a *capias* was executed, and counsel was appointed, the defendant pled at her arraignment).

¹²⁰ TENN. R. CRIM. P. 4(a), (c). A criminal summons, requesting the defendant’s appearance before a magistrate at a stated time and place, may also be issued. TENN. R. CRIM. P. 4(a), (b)(2). If a defendant does not appear in court in response to a criminal summons, a warrant will be subsequently issued for his/her arrest. TENN. R. CRIM. P. 4(a). However, a review of Tennessee case law indicates that a criminal summons is not generally issued in practice, especially in regards to a first-degree murder offense.

¹²¹ Those individuals arrested upon a *capias* and thus not subject to Rule 5(a) of the Tennessee Rules of Criminal Procedure include any “defendant named in the indictment or presentment who is not in actual custody, or who has not been released on recognizance or on bail, or whose undertaking of bail has been declared forfeited.” TENN. R. CRIM. P. 9(a); see also TENN. R. CRIM. P. 5(a).

¹²² See *State v. Huddleston*, 924 S.W.2d 666, 670-71 (Tenn. 1996) (determining that an individual held for more than seventy-two hours without a judicial determination of probable cause for a warrantless arrest constituted “unnecessary delay”).

¹²³ TENN. R. CRIM. P. 5(a).

¹²⁴ *Id.*

¹²⁵ TENN. R. CRIM. P. 5(d)(1).

¹²⁶ TENN. R. CRIM. P. 5(d); see also *State v. Hammonds*, 30 S.W.3d 294, 297 (Tenn. 2000) (recognizing that the indictment serves to inform the accused of the nature of the offense); *State v. Talley*, 1986 WL

During the preliminary examination, the court must determine whether there is probable cause that the accused committed a capital offense.¹²⁷ If probable cause that the accused committed a capital offense does not appear to exist, the magistrate must release the accused.¹²⁸ If, however, probable cause that the accused committed a capital offense does appear to exist, the magistrate must immediately bind the accused over to the grand jury.¹²⁹

3. Grand Jury Indictment or Filing of an Information and Pre-Trial Conference

In order to proceed with a prosecution initiated by the filing of an affidavit of complaint, a grand jury must return an indictment for the capital offense.¹³⁰ For an indictment to be returned, at least twelve grand jurors must reach consensus.¹³¹ If the grand jury does not return an indictment, the accused must be released.¹³² Otherwise, the case proceeds to trial.¹³³ If the grand jury, however, returns an indictment before the preliminary examination is completed, the defendant may move to dismiss the indictment, provided the motion to dismiss is made within thirty days of the arrest.¹³⁴ All parties though must act with “good faith” for the thirty day limitation to be applicable.¹³⁵

Alternatively, the accused may waive his/her constitutional right to be tried upon an indictment presented by the grand jury, and a prosecution for a capital offense may proceed, with the consent of the court, upon the filing of an information.¹³⁶ An information is a written statement by the State charging an individual with a criminal offense.¹³⁷ The accused’s waiver, which constitutes a portion of the information, must be in writing and executed in the presence of his/her attorney.¹³⁸

After the grand jury returns an indictment or the State files an information, the court, on its own motion or in response to a motion by either party, may order a pretrial conference.¹³⁹ The purpose of the pretrial conference is to consider matters that promote

6907, *4 (Tenn. Crim. App. June 20, 1986) (unpublished opinion) (noting that the purpose of the grand jury is to determine whether there is a *prima facie* case against the defendant).

¹²⁷ TENN. R. CRIM. P. 5.1(b).

¹²⁸ TENN. R. CRIM. P. 5.1(c).

¹²⁹ TENN. R. CRIM. P. 5.1(b).

¹³⁰ TENN. CODE ANN. § 40-2-104 (2006). Specifically, Article 1, Section 14 of the Tennessee Constitution mandates that “no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment.” TENN. CONST. art. 1, § 14.

¹³¹ TENN. CODE ANN. § 40-13-105 (2006).

¹³² TENN. CODE ANN. § 40-4-102(c) (2006).

¹³³ TENN. CODE ANN. § 40-4-102(b) (2006).

¹³⁴ TENN. R. CRIM. P. 5(e). This Rule applies only to those individuals arrested prior to an indictment.

See TENN. CODE ANN. § 40-4-102 (b) (2006)

¹³⁵ *State v. Whaley*, 51 S.W.3d 568, 570-71 (Tenn. Crim. App. 2001) (citing *Moore v. State*, 578 S.W.2d 78, 82 (Tenn. 1979)).

¹³⁶ TENN. CODE ANN. § 40-3-103(a), (c)(1) (2006).

¹³⁷ TENN. CODE ANN. § 40-3-103(b) (2006).

¹³⁸ TENN. CODE ANN. § 40-3-103(c)(2), (3) (2006). The case then proceeds as a case prosecuted by an indictment. TENN. CODE ANN. § 40-3-103(c)(2) (2006).

¹³⁹ TENN. R. CRIM. P. 17.1(a) (noting that more than one pretrial conference may be held).

“a fair and expeditious trial” and that “minimize the time that jurors are not directly involved in the trial or deliberations.”¹⁴⁰ At the close of the pretrial conference, the court must file a memorandum of the matters agreed upon by the parties.¹⁴¹

4. Notice of Intent to Seek the Death Penalty

When the State decides to seek the death penalty upon an information or indictment of a capital offense, the State must file a notice of intent to seek the death penalty at least thirty days before trial.¹⁴² The notice must declare the State’s intention to seek the death penalty and the statutory aggravating circumstance(s)¹⁴³ upon which the State is relying to impose a sentence of death.¹⁴⁴ The notice must also be served on defense counsel.¹⁴⁵ If the notice is not filed thirty days before trial, the defendant, upon request, must be granted a reasonable continuance to prepare for trial.¹⁴⁶

5. Appointment and Qualifications of Defense Counsel

An individual accused of a capital felony must receive court appointed counsel if s/he (1) is not represented by counsel and (2) is an “indigent person” who has not waived his/her right to counsel.¹⁴⁷ After the accused notifies the court of his/her financial inability to retain counsel,¹⁴⁸ the court is obligated to “conduct a full and complete hearing” to determine the accused’s indigent status.¹⁴⁹ An “indigent person” is “any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.”¹⁵⁰ To determine whether the accused is an “indigent person,” the court may consider a number of factors, including the type of services to be rendered, the customary cost of the service of a lawyer in the community providing similar services, the accused’s income and property interests, the U.S. Department of Labor’s poverty level income guidelines, whether the defendant has been able to make bond and the amount and source of the money used to make bond, as well as any other circumstances “relevant to the issue of indigency.”¹⁵¹

¹⁴⁰ *Id.*

¹⁴¹ TENN. R. CRIM. P. 17.1(b).

¹⁴² TENN. R. CRIM. P. 12.3(b)(1); *see also* TENN. CODE ANN. § 40-3-103(c)(2) (2006) (noting that a case in which an information was filed proceeds in the same manner as in case in which an indictment was filed).

¹⁴³ *See infra* notes 196-197 and accompanying text.

¹⁴⁴ TENN. R. CRIM. P. 12.3(b)(2). The State must also give notice to the defendant of its intention to seek the punishment of life without the possibility of parole. TENN. CODE ANN. § 39-13-208(b) (2006). The filing of the notice of intent to seek the death penalty also constitutes notice that the State intends to seek a possible sentence of life imprisonment without the possibility of parole. TENN. CODE ANN. § 39-13-208(a) (2006).

¹⁴⁵ TENN. R. CRIM. P. 12.3(c).

¹⁴⁶ TENN. R. CRIM. P. 12.3(b).

¹⁴⁷ TENN. CODE ANN. § 40-14-202(a) (2006). If the court appoints counsel, yet finds the accused can defray a segment or all of the cost of the representation, the court must enter an order directing him/her to do so. TENN. CODE ANN. § 40-14-202(e) (2006).

¹⁴⁸ TENN. CODE ANN. § 40-14-202(i)(1) (2006) (noting that an individual who informs the court of his/her indigency must complete a uniform affidavit of indigency).

¹⁴⁹ TENN. CODE ANN. § 40-14-202(b) (2006).

¹⁵⁰ TENN. CODE ANN. § 40-14-201(1) (2006).

¹⁵¹ TENN. CODE ANN. § 40-14-202(c)(1)-(7) (2006).

If the accused is eligible for appointed counsel, s/he is entitled to two attorneys: one to serve as lead counsel and the other to serve as co-counsel.¹⁵² The attorneys must be members in good standing of the Tennessee Bar or be admitted *pro hac vice* following a motion to the court.¹⁵³ Before being appointed, counsel must also have completed at least six hours of capital defense training and an additional six hours every two years thereafter.¹⁵⁴ Specifically, lead counsel in a death penalty case must possess the following credentials:

- (1) Five years of experience in criminal jury trials; and
- (2) Experience as one of the following:
 - (a) Lead counsel in the jury trial of one capital case;
 - (b) Co-counsel in the trial of two capital cases;
 - (c) Co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of one murder case;
 - (d) Lead or sole counsel in three murder jury trials or one murder jury trial and three felony jury trials; or
 - (e) Judge in the jury trial of one capital case.¹⁵⁵

Co-counsel must either qualify as lead counsel or have relevant experience as an attorney in a murder jury trial.¹⁵⁶

6. Arrest and Pleas

Prior to trial, each defendant is entitled to an arraignment.¹⁵⁷ During the arraignment, the court must state the substance of the indictment or information and the defendant must plead to the charge.¹⁵⁸ Before rendering a plea, the defendant must also receive a copy of the indictment or information.¹⁵⁹

The defendant may plead not guilty, guilty, or *nolo contendere*.¹⁶⁰ In order for the defendant to plead *nolo contendere*, s/he must obtain the consent of the court.¹⁶¹ The court may provide consent only after “due consideration” of the parties’ views and of the public’s interest “in the effective administration of justice.”¹⁶² If the defendant refuses to enter a plea, the court must enter a plea of not guilty on his/her behalf.¹⁶³

¹⁵² TENN. SUP. CT. R. 13(3)(b)(1). When possible, a public defender must be designated lead counsel. *Id.*

¹⁵³ *Id.* Only one of the two attorneys may not be licensed to practice law in the State of Tennessee and be admitted *pro hac* to appear in the court on behalf of the defendant. *Id.*

¹⁵⁴ TENN. SUP. CT. R. 13(3)(c)(3), (3)(d)(2).

¹⁵⁵ TENN. SUP. CT. R. 13(3)(c)(2), (c)(4)(A)-(E).

¹⁵⁶ TENN. SUP. CT. R. 13(3)(d)(3)(A), (B).

¹⁵⁷ TENN. R. CRIM. P. 10(a).

¹⁵⁸ TENN. R. CRIM. P. 10(b).

¹⁵⁹ TENN. R. CRIM. P. 10(b) cmt.

¹⁶⁰ TENN. R. CRIM. P. 11(a)(1).

¹⁶¹ TENN. R. CRIM. P. 11(b)(2).

¹⁶² *Id.*

¹⁶³ TENN. R. CRIM. P. 11(a).

When the defendant pleads guilty or *nolo contendere* to the capital offense charge, the court, before accepting the plea, must find that the plea is “voluntary and is not the result of force, threats, or promises” apart from a plea agreement.¹⁶⁴ Before a defendant tenders his/her plea of guilty or *nolo contendere*, the court must also advise the defendant and ensure s/he understands:

- (1) The nature of the charge to which the plea is offered;
- (2) The maximum possible penalty and any mandatory minimum penalty;
- (3) If the defendant is not represented by an attorney, the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and every other stage of the proceeding;
- (4) The right to plead not guilty or, having already pleaded not guilty, to persist in that plea;
- (5) The right to a jury trial;
- (6) The right to confront and cross-examine adverse witnesses;
- (7) The right to be protected from compelled self-incrimination;
- (8) If the defendant pleads guilty or *nolo contendere*, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence; and
- (9) If the defendant pleads guilty or *nolo contendere*, the court may ask questions about the offense to which the defendant has plead. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or false statement.¹⁶⁵

7. Pre-Trial Motions

At the defendant’s arraignment or “as soon afterward as practicable,” the court may establish a schedule for filing pre-trial motions.¹⁶⁶ “Any defense, objection or request” that can be determined without a trial of the general issue may be raised by pre-trial

¹⁶⁴ The court must also examine whether the plea resulted from prior discussions with the State. TENN. R. CRIM. P. 11(b)(2). Where the State and defendant have reached a plea agreement prior to the arraignment, the State, in response to a defendant’s plea of guilty or *nolo contendere*, may:

- (1) Move for the dismissal of other charges;
- (2) Make a recommendation, or agree not to oppose the defendant’s request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (3) Agree that a specific sentence is the appropriate disposition of the case.

TENN. R. CRIM. P. 11(c)(1)(A)-(C). All plea agreements must be disclosed in open court, or, on a showing of good cause, in private, when the plea is made. TENN. R. CRIM. P. 11(e)(2). Except on a showing of good cause, the parties must notify the court of the existence of a plea agreement at the arraignment or at a time designated by the court before trial. TENN. R. CRIM. P. 11(c)(2)(B). The court, however, retains discretion to either accept or reject the agreement. TENN. R. CRIM. P. 11(c)(3).

¹⁶⁵ TENN. R. CRIM. P. 11(b)(1)(A)-(I).

¹⁶⁶ TENN. R. CRIM. P. 12(c).

motion.¹⁶⁷ Certain issues, however, must be raised prior to trial, including: (1) a motion alleging a defect in the institution of the prosecution; (2) a motion alleging a defect in the indictment, presentment, or information; (3) motions to suppress evidence; (4) requests for discovery; and (5) motion to sever or consolidate the charges or defendants.¹⁶⁸ Failure to raise these issues before trial constitutes waiver, unless the court finds good cause as to why these issues were not raised before trial.¹⁶⁹

If a defendant wishes to raise an insanity defense or to introduce expert testimony concerning any mental condition related to his/her guilt, the defendant must provide written notification to the State and file a copy of the notice with the clerk.¹⁷⁰ The notice must be provided “within the time provided for the filing of pretrial motions or at such later time as the court may direct.”¹⁷¹ Upon demonstrating good cause, the court may permit the notice to be filed late.¹⁷² Additionally, if a capital defendant intends to introduce expert testimony as mitigation evidence during the sentencing hearing, the defendant must provide pretrial written notice of this intent no later than the date set forth by the Court.¹⁷³

The court, upon the State’s request, may order a mental evaluation of the defendant by a psychiatrist or other designated expert.¹⁷⁴ The defense may have access to any expert reports prior to trial, but the State may not have access to the reports until after a jury finds the defendant guilty and the defendant confirms his/her intent to offer expert mental condition evidence in mitigation at the sentencing hearing.¹⁷⁵

B. The Capital Trial

Tennessee divides a capital trial into two phases: the guilt or innocence of the defendant and, when necessary, the sentencing of the defendant.¹⁷⁶

1. Guilt/Innocence Phase

All individuals charged with a capital offense possess the right to a trial by jury.¹⁷⁷ A defendant, however, may waive his/her right to a jury trial, provided the defendant consults his/her attorney and receives the consent of the court and the State.¹⁷⁸ Each jury

¹⁶⁷ TENN. R. CRIM. P. 12(b)(1). “Motions may be oral or written, at the discretion of the judge.” TENN. R. CRIM. P. 12(a).

¹⁶⁸ TENN. R. CRIM. P. 12(b)(2)(A)-(E).

¹⁶⁹ TENN. R. CRIM. P. 12(f).

¹⁷⁰ TENN. R. CRIM. P. 12.2(a)(1), (b)(1).

¹⁷¹ TENN. R. CRIM. P. 12.2(a)(2), (b)(2).

¹⁷² *Id.*

¹⁷³ *State v. Reid*, 981 S.W.2d 166, 174 (Tenn. 1998) (stating that “[s]erious difficulties for the defendant, the prosecution, and the judicial system would result if notice of a capital defendant’s intent to present expert mitigation proof is deferred until the conclusion of the guilt phase of the trial”).

¹⁷⁴ TENN. R. CRIM. P. 12.2(c)(1).

¹⁷⁵ *State v. Reid*, 981 S.W.2d 166, 174 (Tenn. 1998); *see also* TENN. R. CRIM. P. 12.2(c)(2).

¹⁷⁶ TENN. CODE ANN. § 39-13-204(a).

¹⁷⁷ TENN. R. CRIM. P. 23(a).

¹⁷⁸ TENN. CODE ANN. § 39-13-205(a) (2006).

is comprised of twelve individuals.¹⁷⁹ In selecting a jury for a capital trial, both the State and the defendant are entitled to fifteen peremptory challenges.¹⁸⁰

During the guilt/innocence phase, the State and defense may present witnesses and other evidence as well as opening and closing arguments, unless the parties mutually consent to waive their closing arguments.¹⁸¹ The number of closing arguments as well as the order and lengths of the closing arguments fall within the discretion of the trial judge.¹⁸² At the conclusion of this phase, the jury must decide whether the State has proved that the defendant is guilty of the capital offense beyond a reasonable doubt.¹⁸³

In rendering a verdict, the jury must do so unanimously and before the judge in open court.¹⁸⁴ If either party requests or the court so decides, the jury must be polled following the return of the verdict.¹⁸⁵ If, at such time, the jury is no longer unanimous in its decision, the court may discharge the jury or direct the jury to deliberate further.¹⁸⁶ If the jury finds the defendant innocent of the capital offense charge, the jury may still convict the defendant of a lesser-included offense,¹⁸⁷ in which case the defendant will proceed to a non-capital sentencing proceeding.¹⁸⁸ If the jury finds the defendant guilty of the capital offense, the case will proceed to the second phase of a death penalty trial, the sentencing phase.¹⁸⁹

2. Sentencing Phase

¹⁷⁹ See *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991) (“Among the essentials of the right to trial by jury is the right guaranteed by every litigant in jury cases to have the facts involved tried and determined by twelve jurors.”).

¹⁸⁰ TENN. CODE ANN. § 40-18-118 (2006); TENN. R. CRIM. P. 24(e)(1).

¹⁸¹ TENN. R. CRIM. P. 29.1(a)(1)–(2), (b)(1).

¹⁸² TENN. R. CRIM. P. 29.1(d)(1)(A)–(C).

¹⁸³ See TENN. CODE ANN. §§ 39-13-204(a), 39-13-202(a)(1)-(3), 39-11-201(a)(1)-(2) (2006). A conviction for a capital offense cannot stand if the State fails to prove the following beyond a reasonable doubt:

- (1) The conduct, circumstances surrounding the conduct, or a result of the conduct described in the definition of the offense;
- (2) The culpable mental state required;
- (3) The negation of any defense to an offense defined in [Title 39, Criminal Offenses,] if admissible evidence is introduced supporting the defense; and
- (4) The offense was committed prior to the return of the formal charge.

TENN. CODE ANN. § 39-11-202(a)(1)-(4).

¹⁸⁴ TENN. R. CRIM. P. 31(a)-(b).

¹⁸⁵ TENN. R. CRIM. P. 31(e).

¹⁸⁶ *Id.*

¹⁸⁷ TENN. R. CRIM. P. 31(d). A lesser included offense is “an offense necessarily included in the offense charged; or an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.” TENN. R. CRIM. P. 31(d)(1)(A)-(B).

¹⁸⁸ TENN. R. CRIM. P. 31(d).

¹⁸⁹ TENN. CODE ANN. § 39-13-204(a) (2006).

For a defendant convicted of a capital offense, the purpose of the sentencing phase is to determine the appropriate penalty: life imprisonment,¹⁹⁰ life imprisonment without the possibility of parole,¹⁹¹ or death.¹⁹² In this phase, any evidence deemed “to have probative value on the issue of punishment” may be considered regardless of its admissibility under the rules of evidence.¹⁹³ This includes the nature and circumstances of the crime as well as the defendant’s character, background history, and physical condition.¹⁹⁴ As in the guilt/innocence phase, both parties are afforded opportunities to present witnesses and other evidence as well as opening and closing arguments.¹⁹⁵

Before a sentence of death may be imposed, the State must prove beyond a reasonable doubt at least one statutory aggravating circumstance, and the jury must unanimously agree on the presence of the specified aggravated circumstance(s).¹⁹⁶ The statutory aggravating circumstances (which are the only aggravating circumstances that may be considered by the jury) are:

- (1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;
- (2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;
- (3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
- (4) The defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
- (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;
- (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
- (7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape,

¹⁹⁰ While section 39-13-204(e)(2) of the Tennessee Code Annotated states that an individual with a sentence of life imprisonment is eligible for parole after serving twenty-five years, an individual convicted of first-degree murder must serve at least 51 years, if the offense was committed on or after July 1, 1995. *See* TENN. CODE ANN. § 40-35-501(i)(1), (2) (2006) (requiring service of 100% of a sentence for first-degree murder, if the offense was committed on or after July 1, 1995, minus a 15% credit for good behavior); Tenn. Atty. Gen. Op. No. 97-098 (stating that the mandatory minimum term of a life sentence is 51 years); *see also* TENN. CODE ANN. § 40-35-501(h)(1) (2006) (serving sixty years makes a prisoner eligible for release from a sentence of life imprisonment).

¹⁹¹ A defendant sentenced to life imprisonment without the possibility of parole is not eligible for release. TENN. CODE ANN. § 40-35-501(h)(2) (2006).

¹⁹² TENN. CODE ANN. § 39-13-204(a) (2006).

¹⁹³ TENN. CODE ANN. § 39-13-204(c) (2006).

¹⁹⁴ *Id.*

¹⁹⁵ TENN. CODE ANN. § 39-13-204(b), (d) (2006).

¹⁹⁶ TENN. CODE ANN. § 39-13-204(i)(1)-(15) (2006).

- robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
- (8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;
 - (9) The murder was committed against any law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter engaged in the performance of official duties;
 - (10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;
 - (11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;
 - (12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight-month period;
 - (13) The defendant knowingly mutilated the body of the victim after death;
 - (14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability; and
 - (15) The murder was committed in the course of an act of terrorism.¹⁹⁷

If the jury unanimously finds at least one statutory aggravating circumstance, the jury may then consider any mitigating evidence.¹⁹⁸ The eight statutory mitigating circumstances are as follows:

- (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) The victim was a participant in the defendant's conduct or consented to the act;

¹⁹⁷ TENN. CODE ANN. § 39-13-204(i)(1)-(15) (2006).

¹⁹⁸ TENN. CODE ANN. § 39-13-204(e)(1), (f)(1)(2), (g)(1) (2006).

- (4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct;
- (5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
- (6) The defendant acted under extreme duress or under the substantial domination of another person;
- (7) The youth or advanced age of the defendant at the time of the crime;
- (8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's 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 affected the defendant's judgment; and
- (9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.¹⁹⁹

The jury also may consider any testimony presented in regards to the victim and the impact of the murder on any relevant persons.²⁰⁰

In instructing the jury, the trial judge must direct the jury to “weigh and consider” the statutory aggravators and any mitigators found to be presented at either phase of the trial.²⁰¹ The trial judge must also instruct the jury that a defendant “receiv[ing] a sentence of imprisonment for life without the possibility of parole shall never be eligible for release on parole.”²⁰²

If the jury unanimously determines that no statutory aggravating circumstance has been proven beyond a reasonable doubt by the State, a sentence of life imprisonment must be imposed.²⁰³ If the jury unanimously determines that the State has proven beyond a reasonable doubt the existence of one or more statutory aggravating circumstances, yet also finds that the State has not proven that the statutory aggravators outweigh the mitigating circumstance(s) beyond a reasonable doubt, the jury must impose a sentence of life imprisonment or life imprisonment without the possibility of parole.²⁰⁴ If the jury unanimously determines that at least one statutory aggravating circumstance has been proven by the State beyond reasonable doubt and that the statutory aggravating circumstance outweighs the mitigating circumstances beyond a reasonable doubt, then a sentence of death must be imposed.²⁰⁵

¹⁹⁹ TENN. CODE ANN. § 39-13-204(j)(1)-(9) (2006).

²⁰⁰ TENN. CODE ANN. § 39-13-204(c). Relevant persons include members of the victim's family. *Id.*

²⁰¹ TENN. CODE ANN. § 39-13-204(e)(1) (2006).

²⁰² TENN. CODE ANN. § 39-13-204(e)(2) (2006).

²⁰³ TENN. CODE ANN. § 39-13-204(f)(1) (2006).

²⁰⁴ TENN. CODE ANN. § 39-13-204(f)(2) (2006).

²⁰⁵ TENN. CODE ANN. § 39-13-204(g)(1)(A), (B) (2006).

In cases where the jury is unable to reach a consensus because the jury is “divided over imposing a sentence of death,” the judge must instruct the jury to consider only the sentences of life imprisonment or life imprisonment without parole in its further deliberations.²⁰⁶ If the jury still is unable to reach a unanimous decision, the judge is obligated to dismiss the jury and impose a sentence of life imprisonment.²⁰⁷

Regardless of the sentence imposed, for each defendant convicted of first-degree murder, the trial judge must complete a report, detailing information about the trial, the defendant, the victim, the defendant’s counsel, the case chronology, and general considerations, such as the race of the jurors.²⁰⁸

C. Motion for a New Trial, Direct Appeal, Review by the Tennessee Supreme Court, Rehearings, and Review by the United States Supreme Court

1. Motion for a New Trial

Following a conviction for a capital offense and a sentence of death, the defendant may challenge his/her conviction and/or death sentence by filing a motion for a new trial.²⁰⁹ A motion for a new trial must be made within thirty days of the entry of the sentencing order, and the court, up until the hearing date, must “liberally” allow each party to amend his/her motion.²¹⁰

During the hearing, the court may permit testimony on any issue raised in the motion for a new trial.²¹¹ If a party fails to raise an issue “predicated upon error in the admission of or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties, or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought,” the issue will be “treated as waived” on appeal.²¹² Any affidavits—in support of or opposing the motion—may be filed with the motion or the amended motion and may be considered as evidence.²¹³

The court, on the motion of either party, must state for the record any findings of facts and conclusions of law.²¹⁴ If the court differs with the jury on the weight of the

²⁰⁶ TENN. CODE ANN. § 39-13-204(h) (2006).

²⁰⁷ *Id.*

²⁰⁸ TENN. SUP. CT. R. 12(1), n.1. Despite this requirement, however, when conducting a proportionality review, appellate courts only review trial judge reports that were completed in cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined the defendant’s sentence—life imprisonment, life imprisonment without parole, or death. *See State v. Copeland*, 2005 WL 2008177, *59 (Tenn. Crim. App. Aug. 22, 2005) (unpublished opinion); *State v. Godsey*, 60 S.W.3d 759, 783 (Tenn. 2001); *State v. McKinney*, 74 S.W.3d 291, 311 (Tenn. 2002), *cert. denied*, 537 U.S. 926 (2002)

²⁰⁹ TENN. R. CRIM. P. 33(a). The court also may choose to grant a new trial “on its own initiative.” *Id.*

²¹⁰ TENN. R. CRIM. P. 33(b).

²¹¹ TENN. R. CRIM. P. 33(c)(1).

²¹² TENN. R. APP. P. 3(e).

²¹³ TENN. R. CRIM. P. 33(c)(2)(A), (B).

²¹⁴ TENN. R. CRIM. P. 33(c)(3).

evidence, it may grant a new trial.²¹⁵ The new trial must be presided over by a different judge than from the original trial, if so requested by either party.²¹⁶

2. Direct Appeal with the Tennessee Court of Criminal Appeals

The defendant also may challenge his/her conviction and/or death sentence by filing a direct appeal with the Court of Criminal Appeals.²¹⁷ In order to pursue an appeal, the defendant must file a notice of appeal with the trial court within thirty days of the entry of his/her judgment²¹⁸ or within thirty days of the trial court's entry of an order denying a new trial,²¹⁹ unless "in the interest of justice" the court waives the filing deadline.²²⁰

To ensure that the trial court transmits the record to the appellate court, the appellant must also file either (1) a transcript of the trial court proceedings or, if no transcript is available, a statement of evidence "convey[ing] a fair, accurate and complete account" of the issues being raised on appeal; or (2) a notice that no transcript or statement of evidence will be filed.²²¹ If, within ninety days from the filing of the notice of appeal, the appellant fails to make the appropriate filing, written notice of the appellant's omission must be provided to the appellate court and the parties, and the appellee may move to dismiss the appeal.²²² When a capital defendant fails to initiate any appellate review of the final judgment, the record relating to punishment must nonetheless be forwarded to the Court of Criminal Appeals.²²³ To facilitate the disposition of an appeal, the court may schedule a pre-hearing conference.²²⁴

²¹⁵ TENN. R. CRIM. P. 33(d).

²¹⁶ *Id.*

²¹⁷ TENN. CODE ANN. § 39-13-206(a)(1) (2006). During the direct appeal process, a defendant may retain his/her previously court-appointed counsel, provided one attorney qualifies as appellate counsel, or may be appointed new counsel. TENN. SUP. CT. R. 13(3)(g). To qualify as appellate counsel, an attorney must possess three years of experience in criminal trials and appeals, and either (1) capital appellate experience as counsel; or (2) criminal appellate experience as counsel in three felony convictions within the past three years and six hours of training in the trial and appeal of capital cases. *Id.* New counsel must be appointed if necessary to provide the defendant with effective assistance of counsel or if the best interest of the defendant mandates the appointment. *Id.* at (3)(e).

²¹⁸ TENN. R. APP. P. 4(a).

²¹⁹ TENN. R. APP. P. 4(c). Furthermore, if the defendant files a motion or petition under Rule 29(c) for a judgment of acquittal, under Rule 32(a) for a suspended sentence, under Rule 32(f) for withdrawal of a plea of guilty, or under Rule 34 for arrest of judgment, s/he must file a notice of appeal with the trial court within thirty days of the entry of the order denying a new trial "or granting or denying any other such motion or petition." *Id.*

²²⁰ TENN. R. APP. P. 4(a). A copy of the notice of appeal must also be served on the district attorney general of the county in which the judgment was entered and on the State's attorney general. TENN. R. APP. P. 5(b).

²²¹ TENN. R. APP. P. 24(b)-(d). The trial court clerk generally has forty-five days to prepare the record for appeal. After the record is complete, the record is transferred to the appellate court. TENN. R. APP. P. 25(b), (d).

²²² TENN. R. APP. P. 25(a), 26(b).

²²³ TENN. CODE ANN. § 39-13-206(a)(2) (2006).

²²⁴ TENN. R. APP. P. 33.

The appellant must file a brief within thirty days from the date the trial record is filed with the appellate clerk.²²⁵ The State, as the appellee, must, in turn, file its brief within thirty days of the filing of the appellant's brief.²²⁶ Additional reply briefs must be filed within fourteen days of one another.²²⁷

If either party wishes to present oral arguments, the party may request oral arguments on the cover page of its brief.²²⁸ If a party does not file a brief, then no argument may be made by the party.²²⁹ When no oral arguments are heard, the case is decided on the record and the briefs submitted.²³⁰ The court may, however, order the case to be argued, even where no request is made.²³¹

In all capital cases, regardless of whether the appellant filed a direct appeal, the court is mandated to determine whether:

- (1) The sentence of death was imposed in any arbitrary fashion;
- (2) The evidence supports the jury's finding of statutory aggravating circumstance(s);
- (3) The evidence supports the jury's finding that the statutory aggravating circumstance(s) outweigh any mitigating circumstances; and
- (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.²³²

The Court of Criminal Appeals may also review and provide relief for any question of law.²³³ Generally, the court's review includes only "issues presented for review,"²³⁴ but the court also may exercise its discretion to consider other issues, especially when necessary "to prevent needless litigation, to prevent injury to the interests of the public, and to prevent prejudice to the judicial process."²³⁵

Following its review, the court is authorized to correct any errors, and to provide any other appropriate relief, including re-sentencing the appellant to life imprisonment or life imprisonment without the possibility of parole.²³⁶ The Tennessee Rules of Appellate Procedure allow for the trial court's judgment to be set aside, when "considering the

²²⁵ TENN. R. APP. P. 29(a).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ TENN. R. APP. P. 35(a).

²²⁹ *Id.*

²³⁰ TENN. R. APP. P. 35(h).

²³¹ *Id.*

²³² TENN. CODE ANN. § 39-13-206(c)(1) (2006).

²³³ TENN. R. APP. P. 13(a). The appellate court must also consider whether the courts have subject matter jurisdiction. *Id.*

²³⁴ TENN. R. APP. P. 13(b).

²³⁵ *Id.* (numbers deleted).

²³⁶ TENN. CODE ANN. § 39-13-206(d)(1), (2) (2006); TENN. R. APP. P. 36(a).

whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.”²³⁷

3. Automatic Review by the Tennessee Supreme Court

If the Court of Criminal Appeals affirms the conviction and sentence, a capital defendant’s case is subject to automatic review by the Tennessee Supreme Court.²³⁸ Upon the Court of Criminal Appeals’ ruling, the appellate court clerk must forward the record to the Tennessee Supreme Court for immediate docketing and inform the parties of the docketing, the filing of the record, and the requisite deadlines for the filing and service of briefs.²³⁹ The court may schedule a pre-hearing conference to facilitate the disposition of the appeal.²⁴⁰

The Tennessee Supreme Court’s review encompasses both the capital offense conviction and the sentence of death.²⁴¹ Before oral arguments are set, the court must review “the record and briefs and consider *all* errors assigned,”²⁴² and enter an order indicating the issues to be addressed at oral argument.²⁴³ Like the Court of Criminal Appeals, the Tennessee Supreme Court is also mandated to review all capital cases to determine whether:

- (1) The sentence of death was imposed in any arbitrary fashion;
- (2) The evidence supports the jury’s finding of statutory aggravating circumstance(s);
- (3) The evidence supports the jury’s finding that the statutory aggravating circumstance(s) outweigh any mitigating circumstances; and
- (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.²⁴⁴

Following its review, the Tennessee Supreme Court has authority to correct any errors, and to grant any appropriate relief, including re-sentencing the appellant to life imprisonment or life imprisonment without the possibility of parole.²⁴⁵ If the Tennessee Supreme Court affirms the defendant’s conviction and sentence on direct appeal, the court must set an execution date, no less than four months from the date of the Court’s judgment.²⁴⁶

²³⁷ TENN. R. APP. P. 36(b).

²³⁸ TENN. CODE ANN. § 39-13-206(a)(1) (2006).

²³⁹ TENN. SUP. CT. R. 12(2).

²⁴⁰ TENN. R. APP. P. 33.

²⁴¹ TENN. CODE ANN. § 39-13-206(a)(1) (2006).

²⁴² TENN. SUP. CT. R. 12(2).

²⁴³ *Id.* The order also provides the parties with additional time to supplement their briefs to address the issues raised by the Supreme Court *Id.*

²⁴⁴ TENN. CODE ANN. § 39-13-206(c)(1) (2006).

²⁴⁵ TENN. CODE ANN. § 39-13-206(d)(1), (2) (2006).

²⁴⁶ TENN. CODE ANN. § 40-30-120(a) (2006).

4. Rehearings

Both the Court of Criminal Appeals and the Tennessee Supreme Court, either on their own motion or on the motion of a party, may grant a rehearing.²⁴⁷ A petition for a rehearing must be filed within ten days of the judgment's entry, except in "extreme and unavoidable circumstances."²⁴⁸ An answer to the petition and any oral arguments may be made only on the request of the court.²⁴⁹

In deciding to grant a rehearing, the Court of Criminal Appeals and the Tennessee Supreme Court may consider whether:

- (1) The court's opinion incorrectly states the material facts established by the evidence and set forth in the record;
- (2) The court's opinion is in conflict with a statute, prior decision, or other principle of law;
- (3) The court's opinion overlooks or misapprehends a material fact or proposition of law; and
- (4) The court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute.²⁵⁰

Both courts will simply rule to grant or deny the petition,²⁵¹ and will only grant the petition for rehearing if a majority of the court agrees.²⁵² "A rehearing will not be granted to permit reargument of matters fully argued."²⁵³ Once the Court of Criminal Appeals has acted on a petition for rehearing, no additional petitions may be filed in the Court of Criminal Appeals.²⁵⁴ In the Tennessee Supreme Court, a second petition, however, may be filed with the consent of the court.²⁵⁵

5. Discretionary Review by the United States Supreme Court

If the Tennessee Supreme Court affirms the death sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Tennessee Supreme Court's decision.²⁵⁶ If the United States Supreme Court reviews the case, it may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.²⁵⁷ If the United States Supreme Court affirms the

²⁴⁷ TENN. R. APP. P. 39(a); *see also* TENN. SUP. CT. R. 1 (stating that the Rules of Appellate Procedure govern Supreme Court proceedings).

²⁴⁸ TENN. R. APP. P. 39(b).

²⁴⁹ TENN. R. APP. P. 39(d).

²⁵⁰ TENN. R. APP. P. 39(a) (This list is "neither controlling nor fully measures the court's discretion.").

²⁵¹ TENN. R. APP. P. 39(d).

²⁵² TENN. R. APP. P. 39(d), (e).

²⁵³ TENN. R. APP. P. 39(a).

²⁵⁴ TENN. R. APP. P. 39(f).

²⁵⁵ *Id.*

²⁵⁶ 28 U.S.C. §§ 1257, 2101(c) (2004).

²⁵⁷ 28 U.S.C. § 2106 (2004).

conviction and sentence and the defendant wishes to continue challenging his/her conviction and sentence, s/he may initiate post-conviction relief under state law.²⁵⁸

D. State Post-Conviction Relief

1. Initial Post-Conviction Petitions

In order to apply for state post-conviction relief, a death-row inmate must file a petition for post-conviction relief within one year of the Tennessee Supreme Court's final ruling on the conviction and sentence.²⁵⁹ A petition filed after this specified period may still be considered when:

- (1) The claim is rooted in an appellate court's final ruling establishing a constitutional right not previously recognized at the time of trial, and the retroactive application of the right is mandated;²⁶⁰
- (2) The claim is founded on new scientific evidence establishing that the petitioner is actually innocent; or
- (3) The claim seeks relief from a sentence that was enhanced due to a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid.²⁶¹

The petition, which must be verified under oath, must also state all claims and factual allegations for granting post-conviction relief and, when necessary, explain why the claims were not previously raised.²⁶² Claims, which could have been raised in a previous court proceeding, but were not until the petitioner's post-conviction petition, are considered waived unless (1) the claim is predicated on a constitutional right not recognized at the time of the trial and whose retroactive application is required by the Tennessee or United States Constitution; or (2) the petitioner's failure to raise the claim was due to state action in violation of the Tennessee or United States Constitution.²⁶³

²⁵⁸ TENN. CODE ANN. § 40-30-102(a) (2006).

²⁵⁹ TENN. CODE ANN. § 40-30-102(a) (2006). The filing of the petition automatically stays the execution. TENN. CODE ANN. § 40-30-120(a) (2006). The petition must be filed with the clerk of the court where the petitioner was convicted and name the State as respondent. TENN. CODE ANN. § 40-30-104(a) (2006).

²⁶⁰ TENN. CODE ANN. § 40-30-102(b)(1) (2006). In such instance, a petition must be filed within a year of the highest state appellate court or the United States Supreme Court establishing that right. *Id.*

²⁶¹ TENN. CODE ANN. § 40-30-102(b)(1)-(3) (2006). A petition, based upon a prior conviction being held invalid, must be filed within a year of the final ruling holding the conviction to be invalid. TENN. CODE ANN. § 40-30-102(b)(3) (2006).

²⁶² TENN. CODE ANN. § 40-30-104(d), (e) (2006). "A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." TENN. CODE ANN. § 40-30-106(d) (2006).

²⁶³ TENN. CODE ANN. § 40-30-106(g)(1), (2) (2006).

Within thirty days of the petition's filing, the court must either preliminarily dismiss the petition or enter a preliminary order.²⁶⁴ A petition must be preliminarily dismissed if:

- (1) The petition was not filed in the proper court;
- (2) The petition was not timely filed;
- (3) A prior petition attacking the conviction was filed and resolved on the merits;
- (4) A petition is pending in another court;
- (5) The petition does not contain a clear and specific statement of all grounds for which relief is sought, including full disclosure of the factual basis for those grounds;²⁶⁵ or
- (6) The petition alleges claims that have been waived or previously determined.²⁶⁶

If the petition is not dismissed and the court issues a preliminary order, then counsel must be appointed if a defendant requests counsel and the defendant is determined to be indigent by the court. Additionally, counsel for the defendant or a defendant representing themselves must file an amended petition or a written notice stating that there will be no amended petition filed.²⁶⁷ The amended petition or notice must be filed, within thirty days of the entry of the preliminary order.²⁶⁸ This filing deadline can be extended for good cause.²⁶⁹

The State is obligated to file a reply within thirty days of the petition's filing unless good cause permits an extension.²⁷⁰ After the filing of the State's reply, the court must examine the petition, the response, and any files and records from the case.²⁷¹ If the court determines "conclusively that the petitioner is entitled to no relief," the court must

²⁶⁴ TENN. CODE ANN. § 40-30-106(a) (2006). If the petition is amended to correct defects in the original petition, the preliminary order or dismissal must be issued within thirty days of the filing of the amended petition. TENN. CODE ANN. § 40-30-106(a), (d) (2006).

²⁶⁵ If a petitioner files a defective petition without counsel, the court must determine if the client is indigent and in need of appointed counsel. Upon appointing counsel to represent an indigent defendant, the court may permit the filing of an amended, corrected petition. TENN. CODE ANN. § 40-30-106(d), (e) (2006).

²⁶⁶ TENN. CODE ANN. § 40-30-106(b)-(f) (2006).

²⁶⁷ TENN. CODE ANN. § 40-30-107(b)(1), (2) (2006). To be appointed counsel in post-conviction proceedings, an attorney must qualify as appellate counsel, or possess trial and appellate experience as counsel in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. TENN. SUP. CT. R. 13(3)(h). Counsel must also possess knowledge of federal *habeas corpus* practice. *Id.* Post-conviction counsel must also differ from defendant's counsel at trial or on direct appeal, unless both the defendant and counsel consent to the continued representation. *Id.*

²⁶⁸ TENN. CODE ANN. § 40-30-107(b)(2) (2006). "The written notice, if filed by counsel, [must] state that counsel has consulted the petitioner and that the petitioner agrees there is no need to amend the petition. Good cause will not be met by a routine statement that the press of other business prevents the filing of the appropriate pleadings within the designated time." *Id.*

²⁶⁹ *Id.*

²⁷⁰ TENN. CODE ANN. § 40-30-108(a) (2006). "Good cause will not be met by a routine statement that the press of other business prevents a response within the thirty (30) day period." *Id.*

²⁷¹ TENN. CODE ANN. § 40-30-109(a) (2006).

dismiss the petition.²⁷² If, however, the petition is not dismissed, then the court must issue an order scheduling an evidentiary hearing.²⁷³ The evidentiary hearing must be held within four months of the order's entry scheduling the hearing.²⁷⁴ During the evidentiary hearing, the petitioner may provide testimony to clarify any questions of fact.²⁷⁵ The burden rests with the petitioner to prove the factual allegations of the petition "by clear and convincing evidence."²⁷⁶

Post-conviction relief may only be granted upon a violation of a petitioner's state or federal constitutional rights.²⁷⁷ If the court concludes that a denial or infringement of the petitioner's rights existed so as to render the judgment "void or voidable," the court must set aside the judgment or order a delayed appeal.²⁷⁸

Upon the disposition of a petition, the court must enter a final order stating the findings of fact and conclusions of law for each claim asserted.²⁷⁹ The court must issue its ruling within sixty days of the evidentiary hearing, except where "unforeseeable circumstances render a continuance a manifest necessity."²⁸⁰ However, the court must enter a final disposition of a capital post-conviction case within a year of the filing of the post-conviction petition.²⁸¹

2. Motions to Reopen

A petitioner may also use the post-conviction process to reopen a previously filed post-conviction petition if:

- (1) The claim is based on an appellate court's final ruling establishing a constitutional right not previously recognized at the time of petitioner's trial and retroactive application of the right is mandated;²⁸²
- (2) The claim is founded on new scientific evidence establishing that the petitioner is actually innocent;²⁸³ or

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* The four-month deadline may only be extended by order of the court finding "that unforeseeable circumstances render a continuance a manifest necessity." *Id.* The extension may not exceed sixty days. *Id.* A petitioner is free to withdraw his/her petition without prejudice any time before the hearing. TENN. CODE ANN. § 40-30-109(c) (2006).

²⁷⁵ TENN. CODE ANN. § 40-30-110(a) (2006). If a petitioner is imprisoned outside of Tennessee, the court may permit the introduction of affidavits or depositions. *Id.*

²⁷⁶ TENN. CODE ANN. § 40-30-110(f) (2006).

²⁷⁷ *See* TENN. CODE ANN. § 40-30-103 (2006).

²⁷⁸ *Id.*; TENN. CODE ANN. § 40-30-111(a) (2006); *see also* Stokes v. State, 146 S.W.3d 56, 59 (Tenn. 2004) ("The Post-Conviction Procedure Act provides for a delayed appeal where the petitioner has been "denied the right to an appeal from the original conviction.").

²⁷⁹ TENN. CODE ANN. § 40-30-111(b) (2006). In cases allowing for a delayed appeal, the final order need not delineate the findings of fact and conclusions of law with regard to each claim asserted. *Id.*

²⁸⁰ TENN. CODE ANN. § 40-30-111(d) (2006). The extension may not exceed thirty days. *Id.*

²⁸¹ *Id.* The administrative office of the courts must report annually to the general assembly on the courts' compliance with these time limits and any reasons for noncompliance. *Id.*

²⁸² TENN. CODE ANN. § 40-30-117(a)(1) (2006). In such instance, a petition must be filed within a year of the highest state appellate court or the United States Supreme Court establishing that right. *Id.*

- (3) The claim seeks relief from a sentence that was enhanced due to a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid;²⁸⁴ and
- (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.²⁸⁵

When a motion to reopen a post-conviction petition is denied, the petitioner has ten days to seek permission to appeal the decision to the Court of Criminal Appeals.²⁸⁶ The Court of Criminal Appeals will only grant the petitioner’s request when the trial court appears to have abused its discretion in the denying the motion to reopen.²⁸⁷

A petitioner may seek a rehearing or appeal of an order denying post-conviction relief.²⁸⁸ The determination to rehear the petition must be made within thirty days of its filing.²⁸⁹ If an appeal is taken, the appellate court has nine months from the date that oral arguments are heard to issue a ruling.²⁹⁰ If no oral arguments are heard, the appellate court must issue its opinion within nine months of the date of the case’s submission for a decision.²⁹¹ When the appellate court cannot abide by these timelines, it must enter an order stating the circumstances that render an extension a “necessity.”²⁹²

At the end of the state post-conviction proceedings, the State Attorney General must file a motion requesting that the Tennessee Supreme Court set an execution date, if one is not in effect.²⁹³

E. Federal Habeas Corpus

A petitioner wishing to challenge his/her conviction and death sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* with the appropriate federal judicial district.²⁹⁴ Tennessee has three federal judicial districts: the Eastern, Western, and Middle Districts. The petitioner may be entitled to appointed counsel to prepare his/her petition if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary

²⁸³ TENN. CODE ANN. § 40-30-117(a)(2) (2006).
²⁸⁴ TENN. CODE ANN. § 40-30-117(a)(3) (2006). A petition, based upon a prior conviction being held invalid, must be filed within a year of the final ruling holding the conviction to be invalid. *Id.*
²⁸⁵ TENN. CODE ANN. § 40-30-117(a)(4) (2006).
²⁸⁶ TENN. CODE ANN. § 40-30-117(c) (2006).
²⁸⁷ *Id.*
²⁸⁸ TENN. CODE ANN. § 40-30-116 (2006).
²⁸⁹ *Id.*
²⁹⁰ *Id.*
²⁹¹ *Id.*
²⁹² *Id.*
²⁹³ TENN. SUP. CT. R. 12(3), (4)(A). A response may be filed to the motion, but must be made within ten days. *Id.*
²⁹⁴ *See infra* note 302 and accompanying text.

services.”²⁹⁵ If a defendant files a federal *habeas* petition, the execution is again automatically stayed.²⁹⁶

Prior to filing a petition for a writ of *habeas corpus*, the petitioner must have raised all relevant federal claims in state court, as the failure to exhaust all state remedies available on appeal and collateral review is grounds to dismiss the petition.²⁹⁷ The district court cannot consider an unexhausted claim presented in the petition unless it is plainly meritless.²⁹⁸

In a petition for a writ of *habeas corpus*, the petitioner must identify and raise all possible grounds of relief and identify the facts supporting each ground.²⁹⁹ If the petitioner challenges a state court’s determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that state court factual determinations are correct.³⁰⁰ If the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court’s decision of the claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based on an unreasonable determination of the facts in light of the evidence presented in state court.³⁰¹

The petition must be filed in the federal district court in the district in which the petitioner is in custody or in the district where the petitioner was convicted and sentenced.³⁰² The deadline for filing the petition is one year³⁰³ from the date on which: (1) the judgment

²⁹⁵ 21 U.S.C. § 848(q)(4)(B) (2004); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

²⁹⁶ 28 U.S.C. § 2262(a), (b) (2006).

²⁹⁷ 28 U.S.C. § 2254(b)(1) (2006). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. *Rhines v. Weber*, 544 U.S. 269 (2005).

²⁹⁸ 28 U.S.C. § 2254(b)(1), (2) (2006).

²⁹⁹ RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³⁰⁰ 28 U.S.C. § 2254(e)(1) (2006).

³⁰¹ 28 U.S.C. § 2254(d)(1)-(2) (2006).

³⁰² 28 U.S.C. §§ 2254, 2241(d) (2006); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

³⁰³ In states that have “opted-in” to the “Special Habeas Corpus Procedures in Capital Cases,” 28 U.S.C. §§ 2261 through 2266, the deadline for federal *habeas corpus* petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2006). A state may only “opt-in” to these expedited procedures if it has established by state law, rule of the court of last resort, or by another agency authorized by state law a mechanism for appointing, compensating, and reimbursing competent counsel for indigent prisoners in state post-conviction proceedings. *See* 28 U.S.C. § 2261(b) (2006). The state also must provide either through court rule or statute standards of competency for the appointment of counsel. *See id.* The mechanism for appointing, compensating, and reimbursing competent counsel must:

- (1) Offer counsel to all state prisoners under capital sentence, and
- (2) Provide the court of record the opportunity to enter an order (a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.

became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.³⁰⁴ The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.³⁰⁵

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.³⁰⁶ If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.³⁰⁷ In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.³⁰⁸ In addition to the answer, the respondent must file all portions of the state court transcripts it deems relevant to the petition.³⁰⁹ The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be made part of the record.³¹⁰

Additionally, either party may submit a request for discovery.³¹¹ The judge may grant the request if the requesting party establishes “good cause.”³¹² The judge also may direct, or the parties may request, expansion of the record by providing additional evidence relevant to the merits of the petition.³¹³ This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.³¹⁴

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.³¹⁵ The judge may not hold an evidentiary hearing on a claim on which a petitioner failed to develop the underlying facts in the state court proceedings unless: (1) the facts support a newly recognized constitutional rule, made retroactive by the United States Supreme Court, that was previously unavailable, or a factual predicate could not have been previously discovered through the exercise of due diligence, and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional

See 28 U.S.C. § 2261 (2006). As of February 16, 2007, the State of Tennessee has not “opted-in” to the Special Habeas Corpus Procedures in Capital Cases. It is important to note that “opt-in” criteria are currently under revision by the U.S. Attorney General. *See* 28 U.S.C. § 2261-65 (2006).

³⁰⁴ 28 U.S.C. § 2244(d)(1) (2006).

³⁰⁵ 28 U.S.C. § 2244(d)(2) (2006).

³⁰⁶ RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³⁰⁷ *Id.*

³⁰⁸ RULES 4 & 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³⁰⁹ RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹⁰ *Id.*

³¹¹ RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹² *Id.*

³¹³ RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹⁴ RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹⁵ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

error no reasonable fact finder would have found the applicant guilty of the underlying offense.³¹⁶ If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.³¹⁷ If an evidentiary hearing is required, the judge should conduct the hearing as promptly as possible.³¹⁸

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner's claims. If the judge concludes that the petitioner's federal constitutional rights have been violated in securing the conviction or sentence, it typically gives the State the choice of either convening an appropriate proceeding in which the defendant's rights can be respected or releasing the prisoner.

In order to appeal the district court judge's decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.³¹⁹ If the petitioner seeks to appeal, s/he must also request a "certificate of appealability" from either a district or circuit court judge.³²⁰ A judge may issue a "certificate of appealability" only for those claims on which the petitioner has made a substantial showing of the denial of a constitutional right.³²¹ If the "certificate of appealability" is granted, the appeal will proceed to the Sixth Circuit Court of Appeals.

In rendering its decision, the Sixth Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments. Based on the evidence, the Sixth Circuit may order a new appeal, an evidentiary hearing by the federal district court, or a new guilt/innocence or sentencing phase in the state trial court.

If unsuccessful in any respect in the Sixth Circuit, a party may file a petition for a writ of *certiorari* in the United States Supreme Court.³²² The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence phase, a new sentencing phase, or other procedures in the lower federal courts or the state court.

If the petitioner wishes to file a second or successive *habeas corpus* petition with the district court, s/he must submit a motion to the Sixth Circuit Court of Appeals requesting an order authorizing the petitioner to file and the district court to consider the petition.³²³ A three-judge panel of the Sixth Circuit must consider the motion.³²⁴ The panel must specifically assess whether the petition makes a *prima facie* showing that the claim presented in the second or successive petition was not previously raised and that the new

³¹⁶ 28 U.S.C. § 2254(e)(2) (2006); *Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner of the prisoner's counsel.").

³¹⁷ RULE 8(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹⁸ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

³¹⁹ FED. R. APP. P. 4(a)(1)(A).

³²⁰ 28 U.S.C. § 2253(c)(1) (2006); FED. R. APP. P. 22(b)(3).

³²¹ 28 U.S.C. § 2253(c)(2) (2006).

³²² 28 U.S.C. § 1254(1) (2006).

³²³ 28 U.S.C. § 2244(b)(3)(A) (2006).

³²⁴ 28 U.S.C. § 2244(b)(3)(B) (2006).

claim: (1) relies on a new, previously unavailable constitutional rule that was made retroactive by the United States Supreme Court, or (2) the factual predicate of the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.³²⁵ Claims of factual innocence (“actual innocence”) must meet the requirements of the latter provision.³²⁶ Any second or successive petition that presents a claim raised in a prior petition will be dismissed.³²⁷

If the Sixth Circuit denies the motion for authorization to file a second or successive petition, the petitioner may not seek appellate review of the decision.³²⁸ If the Sixth Circuit grants the motion, then the second or successive motion will proceed through the same process as the initial petition.

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency.³²⁹

F. Executive Clemency

The power to grant clemency rests exclusively with the Governor.³³⁰ Specifically, the Governor has the authority to grant reprieves, commutations, pardons and exonerations for all criminal convictions, except impeachment.³³¹ In reaching a decision on clemency, the Governor may request the advice of the Tennessee Board of Probation and Parole, which, upon the Governor’s request, must issue a non-binding clemency recommendation.³³²

G. Execution

At the conclusion of an unsuccessful challenge to the prisoner’s conviction and sentence through each tier of the appeals process—direct appeal, state post-conviction and federal *habeas corpus* proceedings—the State Attorney General must file a motion requesting

³²⁵ 28 U.S.C. § 2244(b)(2)(A)-(B) (2004).

³²⁶ 28 U.S.C. § 2244(b)(2)(B) (2004); *Ross v. Berghuis*, 417 F.3d 552, 556-57 n.4 (6th Cir. 2005); *see also Habeas Relief for State Prisoners*, 91 GEO. L.J. 817, 843-45 n.2617 (2003).

³²⁷ 28 U.S.C. § 2244(b)(1) (2004).

³²⁸ 28 U.S.C. § 2244(b)(3)(E) (2004).

³²⁹ TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, CAPITAL PUNISHMENT IN TENNESSEE: A BRIEF TIMELINE & OVERVIEW OF THE LEGAL PROCESS, *available at* <http://www.tsc.state.tn.us/geninfo/Publications/dpbrochure.pdf> (last visited Feb. 14, 2007).

³³⁰ TENN. CODE ANN. § 40-27-101 (2006).

³³¹ *Id.*; *see also* TENN. CONST. art. III, § 6.

³³² TENN. CODE ANN. § 40-28-104(a)(10) (2006); *see also* TENN. CODE ANN. § 40-28-126(a) (2006) (stating that it is the duty of the Tennessee Board of Probation and Parole to advise and make recommendations to the Governor addressing clemency). In making a recommendation, the Board uses guidelines promulgated by the governor and may also hold a hearing. *See* TENN. BD. PAROLES r. 11-1-1-.15(b)-(d).

that the Tennessee Supreme Court set an execution date.³³³ The death-row inmate may file a response to the motion within ten days of the State's filing.³³⁴ If the Court grants the State's motion, an execution date must be set at least thirty days from the date of the order granting the motion.³³⁵ If the Governor grants the inmate a stay or reprieve or an appropriate authority grants a stay, the court, on its own motion, may order another execution date no less than seven days from the date of the order.³³⁶

Three days prior to his/her execution, the inmate must be transferred to a cell adjacent to the execution chamber.³³⁷ The only witnesses entitled to be present at the execution are the warden of the state penitentiary (or his/her deputy), the sheriff of the county in which the crime was committed, a priest or minister who has been preparing the condemned person for death, the prison physician, any attendants deemed necessary to properly carry out the execution, seven members of the news media, immediate family members of the victims over the age of eighteen, a defense attorney of the inmate's choosing, and the State Attorney General and reporter (or reporter's designee).³³⁸

The warden of the state penitentiary is charged with ensuring the death sentence is executed properly.³³⁹ For offenses committed on or after January 1, 1999, lethal injection is the only legal method of execution.³⁴⁰ If, however, the death-row inmate committed a capital offense prior to January 1, 1999, s/he may opt to be executed by electrocution.³⁴¹ If an execution method is found unconstitutional, the death sentence must stand until it may be lawfully executed.³⁴²

³³³ TENN. SUP. CT. R. 12 § 4(A).

³³⁴ *Id.* The motion may oppose the setting of an execution date or an execution, may ask the date of execution be delayed, or request that the Tennessee Supreme Court issue a certificate of commutation. *Id.*

³³⁵ TENN. SUP. CT. R. 12 § 4(E).

³³⁶ *Id.*

³³⁷ Tenn. Dep't of Corr., Execution Facts: Tennessee Department of Correction Deathwatch, at <http://www.state.tn.us/correction/newsreleases/deathwatch.htm> (last visited Feb. 14, 2007); *see also* TENN. CODE ANN. § 40-23-116(a) (2006).

³³⁸ TENN. CODE ANN. § 40-23-116(a)(1)-(9) (2006).

³³⁹ TENN. CODE ANN. § 40-23-116(a) (2006).

³⁴⁰ TENN. CODE ANN. § 40-23-114(a) (2006).

³⁴¹ TENN. CODE ANN. § 40-23-114(b) (2006).

³⁴² TENN. CODE ANN. § 40-23-114(d) (2006).

CHAPTER TWO

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.¹ Since then, over forty-one jurisdictions have adopted laws concerning post-conviction DNA testing.² However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.³ The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.⁴

Thoroughness in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,⁵ and through the priorities and practices of other police oversight groups.⁶

¹ See ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115> (last visited Feb. 6, 2007).

² See National Conference of State Legislatures, DNA & Crime, *at* <http://www.ncsl.org/programs/health/genetics/dna.htm> (last visited Feb. 14, 2007); *see also* Innocence Project, Legislative Page, *at* <http://www.innocenceproject.org/policy/index.php#testing> (last visited Dec. 15, 2006).

³ See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *Id.* (Standard 1-5.1) (Police should be “made fully accountable” to their supervisors and to the public for their actions.).

⁴ See *id.* (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

⁵ Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

⁶ Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the “Pattern and Practice” provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. See *generally* CALEA Online, *at* <http://www.calea.org/> (last visited Feb.

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.⁷

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or state law are unavailable.⁸ Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice calls for them.⁹

14, 2007). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD/LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, at <http://www.ascl-d-lab.org> (last visited Feb. 14, 2007); NFSTC, at <http://www.nfstc.org/> (last visited Feb. 14, 2007).

⁷ Standard 1-7.3 provides:

- (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
- (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-7.3); *see also id.* (Standard 1-5.2(a)) (noting the value of “education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society”).

⁸ *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) (“Adequate Police Resources”).

⁹ *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

In 2001, to protect against wrongful convictions and sentences,¹⁰ the Tennessee Legislature adopted sections 40-30-301 through 40-30-313 of the Tennessee Code Annotated (T.C.A.) to require the preservation of certain types of evidence and provide mechanisms for individuals to challenge their convictions and sentences by filing post-conviction petitions for DNA testing.

A. *Preservation of DNA Evidence*

1. Preservation Requirements

In limited circumstances, the State of Tennessee requires the preservation of certain types of evidence for specific durations of time. Specifically, the Tennessee Supreme Court has found that the State has a duty to preserve all evidence subject to discovery or inspection under Rule 16 of the Tennessee Rules of Criminal Procedure or other applicable laws, including case law.¹¹ The Court has limited this duty to include only “evidence that might be expected to play a significant role in the suspect’s defense.”¹² In other words, the evidence must: (1) “possess an exculpatory value that was apparent before the evidence was destroyed,” and (2) “be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”¹³ Tennessee courts have yet to determine whether this preservation duty exists beyond the trial level (i.e., through post-conviction proceedings).

However, in cases in which an inmate files a post-conviction petition for DNA testing and the petition is not summarily dismissed, section 40-30-309 of the T.C.A. does require the court to order the prosecution, law enforcement agency, laboratory, and/or the relevant court to preserve all evidence in its possession that “could be subjected to DNA analysis.”¹⁴ Such evidence must be preserved during the pendency of the post-conviction proceeding, and its intentional destruction may result in sanctions.¹⁵

2. Agencies Responsible for the Preservation of Evidence

a. Pre-Trial Preservation of Evidence

Law enforcement agencies in Tennessee that collect evidence during a criminal investigation appear to be responsible for holding and maintaining that evidence during the pre-trial phase. All police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies,

¹⁰ See, e.g., *Alley v. State*, 2004 WL 1196095, *5 (Tenn. Crim. App. Oct. 4, 2004) (unpublished opinion); *Shuttle v. State*, 2004 WL 199826, *5 (Tenn. Crim. App. Feb. 3, 2004) (unpublished opinion); *Brown v. State*, 2003 WL 21362197, *2 (Tenn. Crim. App. June 13, 2003) (unpublished opinion).

¹¹ *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999).

¹² *Id.*

¹³ *Id.*

¹⁴ TENN. CODE ANN. § 40-30-309 (2006).

¹⁵ *Id.*

and university police departments in Tennessee certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹⁶ are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.¹⁷

In addition to the requirements for law enforcement agency accreditation, the Tennessee Peace Officer Standards and Training Commission (POST Commission) is responsible for setting the rules and procedures for training all law enforcement officers in Tennessee.¹⁸ Individual law enforcement officers are required to meet certain criteria¹⁹ and complete a training course at the Tennessee Law Enforcement Training Academy.²⁰ The course consists of 400 hours of training,²¹ including instruction in such relevant areas as crime scene evidence collection and protection, which, in turn, includes instruction on maintaining the chain of evidence.²²

¹⁶ Thirty-five police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 13, 2007) (using second search function and designating "U.S." and "Tennessee" and "Law Enforcement Accreditation" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program); *see also* CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 14, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). The accreditation process consists of five phases: (1) application; (2) self-assessment; (3) on-site assessment; (4) commission review; and (5) maintaining compliance and reaccreditation. *See* CALEA Online, The Accreditation Process, at <http://www.calea.org/Online/CALEAPrograms/Process/accprocess.htm> (last visited Dec. 15, 2006).

¹⁷ COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1).

¹⁸ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-1.01.

¹⁹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-2-.03(1), (2). The criteria includes, but is not limited to: (1) being at least eighteen years of age; (2) a United States citizen; and (3) a high school graduate. *Id.*

²⁰ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N chs. 1110-2-.01(1), 1110-7-.01(1).

²¹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N chs. 1110-2-.01(1), 1110-3-.01(1)(a), 1110-7-.01(1).

²² RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-7-.01(1). Law enforcement officers must also participate in a forty-hour in-service program approved by the Tennessee Peace Officer Standards and Training Commission (POST Commission) every calendar year. RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-4-.01(1).

Additionally, the Tennessee Bureau of Investigation (TBI), which controls the State's three crime laboratories—Nashville Crime Laboratory, Knoxville Regional Crime Laboratory, and Memphis Regional Crime Laboratory²³—is statutorily required to:

- (1) Establish, authorize, approve and certify techniques, methods, procedures and instruments for the scientific examination and analysis of evidence, including blood, urine, breath or other bodily substances, and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for the admissibility of evidence;²⁴
- (2) Develop uniform procedures for the collection and preservation of human biological specimens for DNA analysis in cases involving alleged or suspected sex crimes, such as rape, incest, and sexual battery;²⁵ and
- (3) Maintain, preserve, and analyze human biological specimens for DNA.²⁶

Apart from these statutory requirements, the TBI's three crime laboratories have voluntarily obtained accreditation through the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).²⁷ The ASCLD/LAB specifically requires laboratories to have a written or secure electronic chain of custody record with all necessary data and a secure area for overnight and/or long-term storage of evidence.²⁸ All evidence also must be marked for identification; stored under proper seal, meaning that the contents cannot readily escape; and be protected from loss, cross transfer, contamination and/or deleterious change.²⁹

In order to comply with these statutory and ASCLD/LAB accreditation requirements, the TBI has created the *Tennessee Bureau of Investigation Evidence Guide (Evidence Guide)*, which includes methods for the proper “collection, preservation, and submission of evidence to the TBI Forensic Services Division.”³⁰ Specifically, the *Evidence Guide* sets out procedures for:

- (1) Locating and collecting biological evidence, such as items possibly containing semen, saliva, and blood, as well as biological standards to test against these items;³¹

²³ Tennessee Bureau of Investigation, Forensic Services Division, Crime Laboratory Locations, at http://www.tbi.state.tn.us/divisions/lab_locations.htm (last visited Feb. 14, 2007).

²⁴ TENN. CODE. ANN. § 38-6-103(g) (2006).

²⁵ TENN. CODE. ANN. § 38-6-113(b) (2006).

²⁶ TENN. CODE. ANN. § 38-6-113(c) (2006).

²⁷ See American Society of Crime Laboratories Directors, Laboratories Accredited by ASCLD/LAB, at <http://www.asclcd-lab.org/legacy/asclcdlegacylaboratories.html#TN> (last visited Feb. 14, 2007). In addition to the three TBI laboratories, a private Tennessee laboratory—Orchid Cellmark Nashville Laboratory—has also obtained ASCLD/LAB accreditation. *Id.*; see also Orchid Cellmark, at <http://www.cellmark-labs.com/> (last visited Feb. 14, 2007).

²⁸ ASCLD/LAB LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (2003) (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

²⁹ *Id.*

³⁰ TENNESSEE BUREAU OF INVESTIGATION, EVIDENCE GUIDE 1 (2003) (on file with author), available at <http://www.tbi.state.tn.us/Lab/TBIEvidenceGuide.pdf> (last visited Feb. 14, 2007).

³¹ *Id.* at 12.

- (2) Properly packaging and sealing any evidence to be submitted to TBI in order to prevent contamination of evidence and maintain proper identification and chain of evidence;³² and
- (3) Handling evidence during testing in order to maintain the integrity of the samples.³³

b. Agencies Responsible for the Preservation of Evidence During and After Trial

It is unclear which agency is responsible for preserving evidence during and after trial. However, section 40-30-309 of the T.C.A., which permits a post-conviction petitioner to request the preservation of evidence under certain circumstances, implies that evidence may be held after trial by the prosecution, law enforcement agencies, a laboratory, or the court.³⁴

B. Post-Conviction Petitions for DNA Testing

Section 40-30-303 of the T.C.A. provides that any individual who is convicted and sentenced for first-degree murder³⁵ may file a petition requesting the “DNA analysis of any evidence that is [1] in the possession or control of the prosecution, law enforcement, laboratory, or court, and . . . [2] related to the investigation or prosecution that resulted in [his/her] conviction and that may contain biological evidence.”³⁶

1. Timeline for Filing Post-Conviction Petitions for DNA Testing

A post-conviction petition for DNA testing may be filed “at any time” after an individual has been convicted and sentenced for first-degree murder.³⁷ Once a petition has been filed, the court must provide the prosecution with an opportunity to respond before making its decision.³⁸

2. Standards for Obtaining an Order for DNA Testing

To obtain DNA testing, the petitioner must establish and the court must find that the petitioner meets the four factors contained within either section 40-30-304 or section 40-30-305 of the T.C.A.

³² *Id.* at 3, 18-27. The TBI reserves the ability to reject any evidence submitted improperly. *Id.*

³³ *Id.* at 29 (requiring that latex gloves should be worn at all times and changed between the collection of each item).

³⁴ TENN. CODE ANN. § 40-30-309 (2006).

³⁵ Section 40-30-303 also includes the following offenses: “second degree murder, aggravated rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense.” *See* TENN. CODE ANN. § 40-30-303 (2006).

³⁶ *Id.*

³⁷ *Id.*; *see also* Griffin v. State, 182 S.W.3d 795, 799 (Tenn. 2006) (finding that the filing of a post-conviction petition for DNA testing may not be implicitly waived, but that it may be expressly waived and even abandoned).

³⁸ TENN. CODE ANN. §§ 40-30-304, -305 (2006).

Under section 40-30-304, the petitioner must establish and the court must find the following four factors:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence³⁹ and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.⁴⁰

The Tennessee Court of Criminal Appeals has interpreted the meaning of a number of terms found in factor #1. Specifically, the court has found that a “reasonable probability” of a different result—for example, that the defendant would not have been prosecuted or convicted—exists when “the evidence at issue . . . undermines confidence in the outcome of the prosecution.”⁴¹ The court has also found that the term “exculpatory results” does not mean that the “contemplated DNA analysis must indicate with certainty that the petitioner is innocent of the crime in question.”⁴²

The factors delineated in section 40-30-304 are similar to those factors outlined in section 40-30-305 of the T.C.A. However, under section 40-30-305, in addition to factors #2 through #4 discussed above, the petitioner also must establish and the court also must find that a “reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner’s verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction.”⁴³

3. Disposition of a Post-Conviction DNA Petition

The Tennessee Court of Criminal Appeals has noted that in determining whether to grant a post-conviction DNA petition, the court must consider “all the available evidence, including the evidence presented at trial and any stipulations of fact made by either

³⁹ The court need not hold an evidentiary hearing to resolve disputes of fact as to the existence of the evidence at an appropriate evidence-holding agency. *Buford v. State*, 2003 WL 1937110, *6 (Tenn. Crim. App. Apr. 24, 2003) (unpublished opinion). Rather, the court may find the non-existence of biological specimens and deny the petition based simply on affidavits filed by the state addressing the records of law enforcement agencies, the prosecution, laboratories, and clerks of court as to the non-existence of biological specimens. *Id.*

⁴⁰ TENN. CODE ANN. § 40-30-304 (2006).

⁴¹ *Alley v. State*, 2004 WL 1196095, *9 (Tenn. Crim. App. Oct. 4, 2004) (unpublished opinion).

⁴² *Haddox v. State*, 2004 WL 2544668, *5 (Tenn. Crim. App. Nov. 10, 2004) (unpublished opinion).

⁴³ TENN. CODE ANN. § 40-30-305 (2006).

party,”⁴⁴ but that the court is not required to hold a hearing to make this determination.⁴⁵ If, after the State’s response, the court finds that the contents of the petition demonstrate the *prima facie* existence of the four factors outlined in section 40-30-304, it is required to order DNA testing.⁴⁶ Alternatively, if the court finds the existence of the four factors outlined in section 40-30-305, it has the discretion, but is not required, to order DNA testing.⁴⁷ If the State contests the presence of any of the four factors found in section 40-30-404 or section 40-30-405 and, based on the evidence, the court finds that the petitioner has not established the requirements of either section, the court must summarily dismiss the petition.⁴⁸ Trial courts have considerable latitude to make any orders necessary to gathering the information and evidence required to make an informed decision about the existence of the DNA testing petition’s pleading requirements.⁴⁹

In cases in which the court orders DNA testing and the results prove not favorable to the petitioner, the court must dismiss the petition.⁵⁰ Conversely, if the results are favorable to the petitioner, the court must order a hearing to determine the necessary relief.⁵¹ The court is not, however, required to grant the petitioner relief solely upon the finding of favorable results.⁵²

C. Location and Type of DNA Testing

When the court grants an inmate’s petition for post-conviction DNA testing, the court must select a laboratory to perform the DNA testing.⁵³ The laboratory must meet the quality assurance and proficiency testing standards contained in 42 U.S.C. § 141131 *et seq.*⁵⁴ Once the laboratory is selected, it must perform the DNA analysis defined by section 40-30-302, which states: “the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from

⁴⁴ *Alley*, 2004 WL 1196095, at *3. The court may summarily deny the petition based on the fact that the petitioner entered a plea to the underlying conviction or that s/he stipulated to certain facts (e.g., asserting the defense of consent to a rape charge at trial). *Buford*, 2003 WL 1937110, at *3, 6.

⁴⁵ *Buford*, 2003 WL 1937110, at *3, 6 (noting that Tennessee’s post-conviction DNA testing scheme, the Post-conviction DNA Analysis Act of 2001, does not specifically provide for a hearing as to the existence of the pleading requirements and, in fact, authorizes a hearing in section 40-30-312 only after DNA analysis produces a favorable result).

⁴⁶ TENN. CODE ANN. § 40-30-304 (2006); *Buford*, 2003 WL 1937110, at *6.

⁴⁷ TENN. CODE ANN. § 40-30-305 (2006).

⁴⁸ *See Haddox v. State*, 2004 WL 2544668, *4-6 (Tenn. Crim. App. Nov. 10, 2004) (unpublished opinion); *Alley*, 2004 WL 1196095, at *2; *Buford*, 2003 WL 1937110, at *6.

⁴⁹ *Buford*, 2003 WL 1937110, at *6. (citing TENN. CODE ANN. § 40-30-311 (2006), and noting that the court may, in its discretion, make other orders as are necessary to gather the appropriate evidence in order to properly rule on the post-conviction DNA testing petition).

⁵⁰ TENN. CODE ANN. § 40-30-312 (2006).

⁵¹ *Id.*

⁵² *See Wiley v. State*, 183 S.W.3d 317, 329 (Tenn. 2006).

⁵³ TENN. CODE ANN. § 40-30-310 (2006). The TBI’s *Evidence Guide* states that post-conviction DNA testing will not be performed by any TBI laboratory without receipt of a court order or an agreement between the State and the petitioner. EVIDENCE GUIDE, *supra* note 30, at 28. Additionally, before testing can be performed, the TBI must receive the evidence to be tested and the subject standards, victim standards, and any other standards necessary for comparison. *Id.* at 28-29.

⁵⁴ TENN. CODE ANN. § 40-30-310 (2006).

another biological specimen for identification purposes.”⁵⁵ The Tennessee Court of Criminal Appeals has interpreted section 40-30-302 to “permit only the performance of a DNA analysis which compares the petitioner’s DNA samples to DNA samples taken from biological specimens gathered at the time of the offense.” The court further has stated: “The statute does not authorize the trial court to order the victim to submit new DNA samples years after the offense nor does the statute open the door to any other comparisons the petitioner may envision.”⁵⁶

D. Costs of DNA Testing

If the court orders testing under section 40-30-304 of the T.C.A., “the court shall order the analysis and payment, if necessary.”⁵⁷ However, if the court orders testing under section 40-30-305, “the court may require the petitioner to pay for the analysis.”⁵⁸ If an order is issued requiring that DNA testing be at the State’s expense, then the appropriate payment must be made from funding in the annual appropriations act provided for indigent defense.⁵⁹

⁵⁵ TENN. CODE ANN. § 40-30-302 (2006).

⁵⁶ Crawford v. State, 2003 WL 21782328, *3 (Tenn. Crim. App. Aug. 4, 2003) (unpublished opinion); Alley v. State, 2004 WL 1196095, *10 (Tenn. Crim. App. Oct. 4, 2004) (unpublished opinion).

⁵⁷ TENN. CODE ANN. § 40-30-306 (2006).

⁵⁸ *Id.*

⁵⁹ TENN. CODE ANN. § 40-30-313 (2006).

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence⁶⁰ for as long as the defendant remains incarcerated.

The State of Tennessee does not statutorily require the preservation of evidence for as long as the defendant remains incarcerated. In fact, the State of Tennessee—specifically, section 40-30-309 of the Tennessee Code Annotated (T.C.A.)—only requires the preservation of evidence in cases in which an inmate files a post-conviction petition for DNA testing *and* the petition is not summarily dismissed.⁶¹ In these cases, the court is only required to preserve evidence that “could be subjected to DNA analysis”⁶² and such evidence is only required to be preserved during the pendency of the post-conviction proceeding. Therefore, before the post-conviction proceeding is initiated or after the post-conviction proceeding is concluded, any and all biological evidence could be destroyed.

A recent Tennessee Court of Criminal Appeals decision is illustrative of the inadequacies of section 40-30-309 of the T.C.A. in maintaining the DNA testing scheme as a viable avenue of relief for post-conviction litigants. This decision stated that “the [post-conviction DNA testing scheme] does not provide relief if evidence is lost or destroyed prior to the filing of the post-conviction DNA analysis petition.”⁶³ The court reasoned that granting relief on the basis of evidence lost or destroyed before the initiation of such a post-conviction proceeding, or requiring continual preservation of biological evidence, would place “an unreasonable burden on the State to forever preserve each article of evidence collected in every investigation on the chance that it may later be called upon for further analysis.”⁶⁴ While we certainly understand the administrative burden such a continual preservation requirement may put on evidence-holding agencies, the effect of that burden must be weighed against the supreme concern on which this Recommendation is premised: that premature destruction of biological evidence could contribute to the execution of a wrongfully convicted, innocent individual.

While the State of Tennessee requires the preservation of some types of evidence under certain circumstances, it does not require the preservation of all biological evidence for as long as the defendant remains incarcerated. Consequently, the State of Tennessee fails to comply with Recommendation #1.

⁶⁰ “Biological evidence” includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute.html (last visited Feb. 14, 2007).

⁶¹ TENN. CODE ANN. § 40-30-309 (2006).

⁶² *Id.*

⁶³ *Ali v. State*, 2006 WL 1626652, *3 (Tenn. Crim. App. June 2, 2006) (unpublished opinion).

⁶⁴ *Id.*

The Tennessee Death Penalty Assessment Team, therefore, recommends that all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated.

Furthermore, it should be noted, that the State of Tennessee did not require the preservation of biological evidence in capital post-conviction proceedings initiated for the purpose of DNA testing until the legislature passed the Post-Conviction DNA Analysis Act of 2001 on August 1, 2001.⁶⁵ Prior to that time, there was no uniform rule among evidence-holding agencies on the proper length of time to preserve physical evidence after an individual's conviction and sentence became final.

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.

The State of Tennessee provides two potential opportunities for individuals to obtain DNA testing of biological evidence in their case: (1) defendants may obtain physical evidence for DNA testing during pre-trial discovery; and (2) inmates may seek post-conviction DNA testing.

DNA Testing During Pre-Trial Discovery

Tennessee law provides that during the pre-trial stage, the defendant may request and the prosecuting attorney must permit the defendant to “inspect” tangible objects-- including any biological evidence-- in the State's possession, custody or control, so long as: (1) the object is material to preparing the defense, (2) the State intends to use the object in its case at trial, or (3) the object was obtained from or belongs to the defendant.⁶⁶ It is unclear, however, whether in practice such biological evidence is made available under this pre-trial discovery procedure for the purpose of independent DNA testing by the defense.

Post-Conviction DNA Testing

Tennessee law, pursuant to section 40-30-303 of the Tennessee Code Annotated (T.C.A.), authorizes the filing of post-conviction DNA testing petitions by all death-sentenced inmates.⁶⁷ Specifically, such an individual may file a petition requesting the “DNA analysis of any evidence that is [1] in the possession or control of the prosecution, law

⁶⁵ See TENN. CODE ANN. § 40-30-309 (2006).

⁶⁶ TENN. R. CRIM. P. 16(a)(1)(F).

⁶⁷ In addition to first-degree murder, section 40-30-303 allows an individual convicted of the following offenses to seek post-conviction DNA testing: “second degree murder, aggravated rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense.” See TENN. CODE ANN. § 40-30-303 (2006).

enforcement, laboratory, or court, and . . . [2] related to the investigation or prosecution that resulted in [his/her] conviction and that may contain biological evidence.”⁶⁸

The State of Tennessee allows individuals to file for post-conviction DNA testing “at any time” after their conviction and sentence become final.⁶⁹ Section 40-30-304 of the T.C.A., however, requires petitioners to comply with stringent pleading requirements in order to obtain a hearing on the petition and DNA testing.⁷⁰ Courts are never required to hold hearings on inmates’ petitions requesting post-conviction DNA testing, even where (1) the petitioner sufficiently alleges each pleading requirement,⁷¹ (2) the State creates an issue of fact by disputing the existence of one or more of the pleading requirements,⁷² or (3) there is a dispute regarding the existence of biological evidence.⁷³ The court is only statutorily required to hold a hearing in order to determine the necessary relief, if any, once DNA testing has proven favorable to the petitioner.⁷⁴ However, if the petitioner fails to allege any of the pleading requirements, it will result in the summary dismissal of his/her petition without an evidentiary hearing. Additionally, the court must summarily deny the motion if (1) the State contests the presence of any of the pleading requirements, and (2) based on the evidence, the court finds that the petitioner has not established all four pleading requirements.⁷⁵

We commend the State of Tennessee for providing an avenue for post-conviction DNA testing that is free of any time restrictions. However, petitioners must comply with stringent pleading requirements in order to receive review on the merits of their claim for DNA testing, and it is unclear whether biological evidence is available to the defense for DNA testing through the pre-trial discovery procedure. The State of Tennessee, therefore, is only in partial compliance with Recommendation #2.

Accordingly, the Tennessee Death Penalty Assessment Team recommends (1) that Rule 16 of the Tennessee Rules of Criminal Procedure be amended to make biological evidence explicitly subject to the pre-trial discovery process; and (2) that Section 40-30-

⁶⁸ *Id.*

⁶⁹ TENN. CODE ANN. § 40-30-303 (2006); *see also* Griffin v. State, 182 S.W.3d 795, 799 (Tenn. 2006) (finding that the filing of a post-conviction petition for DNA testing may not be implicitly waived, but that it may be expressly waived and even abandoned).

⁷⁰ TENN. CODE ANN. § 40-30-304 (2006).

⁷¹ Buford v. State, 2003 WL 1937110, *3, 6 (Tenn. Crim. App. Apr. 24, 2003) (unpublished opinion). (noting that the post-conviction DNA testing statute does not specifically provide for a hearing as to the existence of the pleading requirements and, in fact, authorizes a hearing only after DNA analysis produces a favorable result).

⁷² *See* Haddox v. State, 2004 WL 2544668, *4-6 (Tenn. Crim. App. Nov. 10, 2004) (unpublished opinion); Alley v. State, 2004 WL 1196095, *2 (Tenn. Crim. App. Oct. 4, 2004) (unpublished opinion); Buford, 2003 WL 1937110, at *6.

⁷³ The court need not hold an evidentiary hearing to resolve disputes of fact as to the existence of the evidence at an appropriate evidence-holding agency. Buford, 2003 WL 1937110, at *6. Rather, the court may find the non-existence of biological specimens and deny the petition based simply on affidavits filed by the State addressing the records of law enforcement agencies, the prosecution, laboratories, and clerks of court as to the non-existence of biological specimens. *Id.*

⁷⁴ Buford, 2003 WL 1937110, at *3, 6.

⁷⁵ Haddox, 2004 WL 2544668, at *4; Alley, 2004 WL 1196095, at *2; Buford, 2003 WL 1937110, at *6.

304 of the T.C.A. be amended to require the courts to hold hearings on petitions seeking DNA testing under broader circumstances.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) requires accredited law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing and avoiding contamination of physical evidence.⁷⁶ Thirty-five law enforcement agencies in Tennessee have obtained accreditation or are in the process of obtaining accreditation by CALEA.⁷⁷ All Tennessee accredited agencies, therefore, should have a written directive establishing procedures governing the preservation of biological evidence.

Additionally, Tennessee law requires the Tennessee Bureau of Investigation (TBI) to: (1) establish, authorize, approve and certify techniques, methods, procedures and instruments for the scientific examination and analysis of evidence, including blood, urine, breath or other bodily substances, and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for the admissibility of evidence;⁷⁸ (2) develop uniform procedures for the collection and preservation of human biological specimens for DNA analysis in cases involving alleged or suspected sex crimes, such as rape, incest, and sexual battery;⁷⁹ and (3) maintain, preserve, and analyze human biological specimens for DNA.⁸⁰

Similarly, all three TBI crime laboratories are required, as a prerequisite to voluntary ASCLD/LAB accreditation, to adopt specific procedures relating to the preservation of evidence.⁸¹ In light of these statutory and accreditation requirements, TBI has established the *Tennessee Bureau of Investigation Evidence Guide*, which includes methods for the proper “collection, preservation, and submission of evidence to the TBI Forensic Services Division.”⁸²

All thirty-five accredited agencies in Tennessee should have a written directive establishing procedures governing the preservation of biological evidence, but because we were unable to obtain copies of these directives, the extent to which these procedures comply with Recommendation #3 is unknown. Furthermore, although all TBI crime laboratories have written procedures and policies that govern the preservation of biological evidence, it is unclear how many Tennessee law enforcement agencies,

⁷⁶ CALEA STANDARDS, *supra* note 17, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1).

⁷⁷ *See supra* note 16.

⁷⁸ TENN. CODE. ANN. § 38-6-103(g) (2006).

⁷⁹ TENN. CODE. ANN. § 38-6-113(b) (2006).

⁸⁰ TENN. CODE. ANN. § 38-6-113(c) (2006).

⁸¹ ASCLD/LAB 2003 MANUAL, *supra* note 28, at 20-23.

⁸² EVIDENCE GUIDE, *supra* note 30, at 1.

accredited or otherwise, have adopted such procedures. Therefore, the State of Tennessee is only in partial compliance with Recommendation #3.

We also note that while all TBI crime laboratories have procedures and policies on the preservation of biological evidence, the ability of these laboratories to properly preserve and test such evidence is questionable. For a discussion on the validity and reliability of the work completed by these crime laboratories, see Chapter 4: Crime Laboratories and Medical Examiner Offices.

D. Recommendation #4

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Tennessee law mandates that every law enforcement officer complete a basic training course offered at the Tennessee Law Enforcement Training Academy,⁸³ which is overseen by the Tennessee Peace Officer Standards and Training Commission.⁸⁴ The course must provide instruction on crime scene evidence collection and protection, including maintaining the chain of evidence.⁸⁵ The Tennessee Bureau of Investigation (TBI) requires that all forensic scientists have earned a minimum of a baccalaureate degree in chemistry or a closely related scientific field, and have completed extensive training related to forensic science and crime scene investigation.⁸⁶ The TBI *Evidence Guide* also sets out complementary procedures for its technicians concerning:

- (1) Locating and collecting biological evidence such as items possibly containing semen, saliva, and blood, as well as biological standards to test against these items;⁸⁷
- (2) Properly packaging and sealing any evidence to be submitted to TBI in order to prevent contamination of evidence and maintain proper identification and chain of evidence;⁸⁸ and
- (3) Proper methods of handling evidence during testing to maintain the integrity of the samples.⁸⁹

⁸³ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N chs. 1110-2-.01(1), 1110-7-.01(1).

⁸⁴ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N chs. 1110-1-.01.

⁸⁵ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-7-.01(1). Law enforcement officers must also participate in a forty-hour in-service program approved by the Tennessee Peace Officer Standards and Training Commission (POST Commission) every calendar year. RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-4-.01(1).

⁸⁶ TENNESSEE BUREAU OF INVESTIGATION, ANNUAL REPORT, FISCAL YEAR 2005-2006, at 39 (2006) [hereinafter 2005-2006 ANNUAL REPORT], available at http://www.tbi.state.tn.us/Info%20Systems%20Div/TIBRS_unit/Publications/Crime%20in%20TN%202003/TBI%2005-06%20Annual%20Report%20-%20color.pdf (last visited Feb. 14, 2007).

⁸⁷ EVIDENCE GUIDE, *supra* note 30, at 12.

⁸⁸ *Id.* at 3, 18-27. The TBI reserves the ability to reject any evidence submitted improperly. *Id.*

⁸⁹ *Id.* at 29 (requiring that latex gloves should be worn at all times and changed between the collection of each item).

Additionally, law enforcement agencies in Tennessee accredited under CALEA are required to establish written directives requiring a training program⁹⁰ and an annual, documented performance evaluation of each employee.⁹¹

In conclusion, all law enforcement investigative personnel receive mandatory basic training on proper techniques for the collection and handling of different types of evidence, as well as proper methods to maintain chain of evidence, and the TBI has specific procedures for its employees to follow concerning the collection, packaging, and handling of evidence. We were unable, however, to determine whether law enforcement agencies in the State of Tennessee have adopted procedures providing for quality assurance reviews of work performed by law enforcement and crime laboratory employees relating to the collection, handling, and testing of evidence and appropriate disciplinary procedures in order to make those employees accountable for their performance. Therefore, the State of Tennessee is only in partial compliance with Recommendation #4.

E. Recommendation #5

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Law enforcement agencies in Tennessee accredited under CALEA must establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.⁹² All Tennessee accredited law enforcement agencies should therefore have adopted written directives governing complaints against the agency and/or its employees. However, we did not obtain copies of these directives, and therefore are unable to assess the extent to which these procedures, or others adopted by non-accredited law enforcement agencies, comply with Recommendation #5.

F. Recommendation #6

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

The amount of funding specifically dedicated to the preservation and testing of biological evidence in Tennessee is unknown.

In Fiscal Year 2005-2006, the Tennessee Bureau of Investigation received appropriations of: (1) \$30,723,600 from the Tennessee Legislature; (2) \$7,878,100 from the federal government; and (3) \$15,322,100 from revenue generating services.⁹³ Of this federal funding provided to TBI in 2005, the Department of Justice awarded the following grants

⁹⁰ CALEA STANDARDS, *supra* note 17, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2).

⁹¹ *Id.* at 35-1 (Standard 35.1.2).

⁹² *Id.* at 52-1 (Standard 52.1.1).

⁹³ STATE OF TENNESSEE, THE BUDGET, FISCAL YEAR 2006-2007 (2006), *available at* <http://www.tnanytime.org/govfiles/0607%20Budget%20Volume%20I.pdf> (last visited Feb. 14, 2007).

pursuant to President Bush's DNA Initiative: \$445,803 for DNA Capacity Enhancement in 2005⁹⁴ and \$470,033 for Forensic Casework DNA Backlog Reduction in 2005.⁹⁵ For Fiscal Year 2006-2007, Governor Bredesen recommended appropriations to the TBI of (1) \$31,922,100 from the Tennessee Legislature, (2) \$7,878,100 from the federal government, and (3) \$12,113,900 from revenue generating services.⁹⁶ More specifically, in FY 2005, the Tennessee Bureau of Investigation's Forensic Services Unit, which in part handles the preservation and testing of DNA, received \$9,409,918 in funding and in FY 2006, the Forensic Services Unit received \$11,783,729 in funding.⁹⁷ Additionally, the Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively,⁹⁸ awarded \$445,803 to the TBI in FY 2005.⁹⁹ The Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases,¹⁰⁰ awarded \$470,033 to the TBI in FY 2005.¹⁰¹ The TBI also received federal Coverdell Program grants to improve the quality, timeliness, and credibility of forensic science services totaling \$191,389 in FY 2005 and \$203,375 in FY 2006.¹⁰² It is unclear whether these grants are included within the Forensic Services Unit's funding for FY 2005 and 2006.

Although we were unable to determine the portion of these appropriations used specifically for serology/DNA services, Governor Bredesen did propose funding increases in the Fiscal Year 2006-2007 budget specifically for forensic scientists and technicians in the TBI laboratories in order to reduce DNA testing backlogs and provide timely DNA examinations.¹⁰³

⁹⁴ See U.S. Dep't of Justice, The President's DNA Initiative, Advancing Justice Through DNA Technology, Capacity Enhancement Funding Chart, *available at* <http://www.dna.gov/funding/labcapacity/capfunding/#Tennessee> (last visited Feb. 14, 2007). For a description of the President's DNA Initiative, see U.S. Dep't of Justice, The President's DNA Initiative, *available at* <http://www.dna.gov/info/> (last visited Feb. 14, 2007).

⁹⁵ U.S. Dep't of Justice, The President's DNA Initiative, Advancing Justice Through DNA Technology, Forensic Casework DNA Backlog Reduction Funding Chart, *available available at* <http://www.dna.gov/funding/casework/fcfunding/#Tennessee> (last visited Feb. 14, 2007).

⁹⁶ STATE OF TENNESSEE, THE BUDGET, FISCAL YEAR 2006-2007 (2006), *available at* <http://www.tnanytime.org/govfiles/0607%20Budget%20Volume%20I.pdf> (last visited Feb. 14, 2007).

⁹⁷ 2005-2006 ANNUAL REPORT, *supra* note 86, at 13.

⁹⁸ See President's DNA Initiative, Capacity Enhancement Funding Chart, *available at* <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Jan. 25, 2007).

⁹⁹ *Id.*

¹⁰⁰ See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, *available at* <http://www.dna.gov/funding/casework/fcfunding> (last visited Jan. 25, 2007).

¹⁰¹ *Id.*

¹⁰² See National Institute of Justice, NIJ Awards in FY 2005, *available at* http://www.ojp.usdoj.gov/nij/awards/2005_topic.htm#paul_coverdell (last visited Jan. 25, 2007); National Institute of Justice, NIJ Awards in FY 2006, *available at* http://www.ojp.usdoj.gov/nij/awards/2006_topic.htm#paul_coverdell (last visited Jan. 25, 2007).

¹⁰³ *Id.*

Even with this funding, however, it appears that the TBI's crime laboratories are overburdened with an increasing caseload and a backlog of cases, as evidenced by TBI's receipt of federal funding designed to increase capacity and reduce backlog, as well as its proposed 2006-2007 funding for additional technicians to reduce its DNA backlog.¹⁰⁴ In light of this information, it is questionable whether the State of Tennessee provides the TBI with adequate funding to ensure the proper preservation and testing of biological evidence.

Additionally, separate and apart from the backlog, the services provided by TBI laboratories appear to be limited. Specifically, TBI laboratories do not perform Mitochondrial DNA testing of hair without roots or Y-STR testing, which is especially effective for obtaining conclusive male profiles from old, degraded biological samples.¹⁰⁵

Based on the information we were able to gather, it does not appear that the State of Tennessee provides adequate funding to ensure the proper preservation and testing of biological evidence. Consequently, the State of Tennessee is not in compliance with Recommendation #6.

In addition, the Tennessee Death Penalty Assessment Team recommends that TBI expand its services to include Mitochondrial DNA testing of hair without roots or Y-STR testing.

¹⁰⁴ *Id.*

¹⁰⁵ ANNUAL REPORT, *supra* note 86, at 41 (noting that the Serology Unit only performs STR DNA testing).

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1989 and 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.¹ In about 50 percent of these cases, there was at least one eyewitness misidentification, and 20 percent involved false confessions.²

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, a lineup should include foils who resemble the suspect, and the administering officer should be unaware of the suspect’s identity. Caution in administering lineups and showups is especially important because flaws can easily taint later lineup and at-trial identifications.³

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.⁴ In the sequential approach, the witness views one person at a time and is unaware of the number of individuals s/he will see.⁵ As each person is presented, the eyewitness states whether or not that person is the perpetrator.⁶ Once an identification is made in a sequential procedure, the procedure stops.⁷ The witness thus is encouraged to compare the features of each person viewed to the witness’ recollection of the perpetrator, rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the “best match.”

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness’ statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Audio or Videotaping of Custodial Interrogations

¹ See Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 528-29 (2005), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (last visited Feb. 16, 2007).

² *Id.* at 544.

³ See BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES 13-17, 42-44 (2002).

⁴ *Id.* at 39.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Electronically recording interrogations from their outset– not just from when the suspect has agreed to confess– can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those police departments who make complete recordings have found the practice beneficial to law enforcement.⁸

Complete recordings may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

⁸ See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

The Tennessee Peace Officers Standard and Training Commission (POST Commission), as the chief regulatory body of Tennessee law enforcement, is entrusted with developing and enforcing statewide law enforcement standards, including those on training.⁹ A number of Tennessee law enforcement agencies also have chosen to comply with the standards promulgated by the Tennessee Law Enforcement Training Academy and the Commission on Accreditation for Law Enforcement Agencies, Inc.; both of which require law enforcement agencies to develop procedures for identifying and interrogating suspects during investigations. Additionally, Tennessee courts have created a body of case law to govern pre-trial identifications and interrogations conducted by law enforcement officers.

A. *Tennessee Law Enforcement Training Commissions and Programs*

1. Tennessee Peace Officers Standard and Training Commission

In order to be certified as a law enforcement officer in the State of Tennessee,¹⁰ the POST Commission mandates that candidates complete a course consisting of at least 400 hours of training, encompassing instruction in such relevant areas as constitutional law, human relations, and interpersonal communications, which include instruction on interviewing witnesses and victims.¹¹ In addition to the training course, law enforcement candidates must meet certain criteria, including but not limited to: being at least eighteen years of age, a United States citizen, and a high school graduate.¹²

2. Tennessee Law Enforcement Training Academy

Law enforcement candidates may complete the required POST training at the Tennessee Law Enforcement Training Academy (Academy). In 1963, the Tennessee Legislature created this statewide academy in order to train state, county and city law enforcement officers.¹³ Specifically, the Tennessee Law Enforcement Training Academy serves to:

- (1) Provide excellent instruction in basic, advanced and technical subjects for the Tennessee law enforcement community;

⁹ TENNESSEE.GOV, Dep't of Commerce & Insurance, Peace Officer Standards & Training Comm'n, ABOUT P.O.S.T., at <http://www.state.tn.us/commerce/let/post/index.html> (last visited Feb. 16, 2007).

¹⁰ The Tennessee POST Commission may waive this requirement under limited circumstances, such as a candidate's prior experience as an officer in good standing. See RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-9.

¹¹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N chs. 1110-2-.01(1), 1110-7-.01(1).

¹² RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM'N ch. 1110-2-.03(1), (2).

¹³ TENNESSEE.GOV, Dep't of Commerce & Insurance, Tennessee Law Enforcement Training Academy, Philosophy and Goals, at <http://www.state.tn.us/commerce/let/tleta/index.html> (last visited Feb. 16, 2007). For a discussion of the Commission on Law Enforcement Accreditation, Inc., see *infra* notes 16-22 and accompanying text.

- (2) Employ teaching methods best suited for the subject taught and the student's particular learning needs;
- (3) Continually upgrade course content with the latest research and recommended professional practices; and
- (4) Simulate inquiry and provide fresh perspectives on the law enforcement career.¹⁴

The Academy also offers courses on "Interviews and Interrogations" as well as "Criminal Investigations," which cover interview and interrogation techniques.¹⁵

B. Law Enforcement Accreditation Programs

1. Commission on Accreditation for Law Enforcement Agencies, Inc.

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent accrediting authority established by the four major law enforcement membership associations in the United States.¹⁶ Twenty-seven law enforcement agencies in Tennessee have been accredited by CALEA, while another eight are in the process of obtaining accreditation.¹⁷

To obtain accreditation, a law enforcement agency must complete a comprehensive process that consists of: (1) enrolling in the program by completing an Agency Profile

¹⁴ TENNESSEE.GOV, Dep't of Commerce & Insurance, Tennessee Law Enforcement Training Academy, Philosophy and Goals, at <http://www.state.tn.us/commerce/let/tleta/index.html> (last visited Feb. 16, 2007).

¹⁵ TENNESSEE.GOV, Dep't of Commerce & Insurance, Tennessee Law Enforcement Training Academy, Calendar of Schools, available at <http://www.state.tn.us/commerce/let/tleta/calendar.html> (last visited Feb. 16, 2007).

¹⁶ CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited Feb. 5, 2007) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

¹⁷ CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Feb. 5, 2007) (using second search function and designating "U.S." and "Tennessee" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program). The following law enforcement agencies have been awarded certification by the CALEA: Alcoa Police Department, Brentwood Police Department; Bristol Police Department; Chattanooga Police Department; Collierville Police Department; Cookeville Police Department; Dyersburg Police Department; Franklin Police Department; Gatlinburg Police Department; Johnson City Police Department; Kingsport Police Department; Knoxville Police Department; Lebanon Department of Public Safety, Police Division; Maryville Police Department; Metropolitan Nashville Police Department; Morristown Police Department; Pigeon Forge Police Department; Sevierville Police Department; Blount County Sheriff's Office; Sullivan County Sheriff's Office; Washington County Sheriff's Office; Office of Inspector General State of Tennessee; Tennessee Bureau of Investigation; Tennessee Dep't of Safety; Memphis International Airport Police Department; Metropolitan Nashville Airport Authority DPS; and Tennessee Valley Authority Police. *Id.* The following law enforcement agencies are in the process of being accredited by the CALEA: Columbia Police Department; Gallatin Police Department; LaVergne Police Department; Memphis Police Department; White House Police Department; Shelby County Sheriff's Office; University of Tennessee Police Department; Vanderbilt Univ., Police & Security Department. *Id.*

Questionnaire; (2) completing a self-assessment to determine whether the law enforcement agency complies with the accreditation standards and, if not, developing a plan for compliance; and (3) participating in an on-site assessment by CALEA.¹⁸ After these steps have been completed, the Commission will hold a hearing to render a final decision on the agency's accreditation.¹⁹

The CALEA standards are used to “certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training.”²⁰ Specifically, CALEA Standard 42.2.3 requires the creation of a written directive that “establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects,”²¹ which means that twenty-seven CALEA-accredited law enforcement agencies throughout the State of Tennessee should have adopted such written directives.²²

C. Tennessee Bureau of Investigation's Policies on Conducting Interviews and Interrogations

The Tennessee Bureau of Investigation (TBI) is the State's primary criminal investigative agency and is divided into five divisions: Criminal Investigation, Drug Investigation, Information Systems, Forensic Services, and Administrative Services.²³ The TBI manages the State's three crime laboratories—Nashville Crime Laboratory, Knoxville Regional Crime Laboratory, and Memphis Regional Crime Laboratory—and investigates crimes related to illegal drugs, fugitives, public corruption, official misconduct, organized crime, domestic terrorism, Medicaid fraud and patient abuse.²⁴ The TBI also offers, upon request, investigative support to local law enforcement.²⁵

Significantly, the TBI has developed policies on a number of investigative practices, including policies on conducting interviews and interrogations. Although the TBI's policies are not binding on local law enforcement agencies, they are illustrative of the practices sanctioned and employed by the State of Tennessee.

1. Interviews and Interrogations

¹⁸ CALEA Online, The Law Enforcement Accreditation Process, at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Feb. 6, 2007).

¹⁹ *Id.*

²⁰ COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

²¹ *Id.* at 42-3 (Standard 42.2.3).

²² *See supra* note 17.

²³ *See* Tennessee Bureau of Investigation, at <http://www.tbi.state.tn.us/> (last visited Feb. 5, 2007).

²⁴ *Id.*; Tennessee Bureau of Investigation, Forensic Services Division, Crime Laboratory Locations, at http://www.tbi.state.tn.us/divisions/lab_locations.htm#Nashville (last visited Feb. 16, 2007).

²⁵ *See supra* note 23.

a. *Miranda*²⁶ Warnings

TBI Written Policy 8-3-004 indicates that its special agents must inform all individuals who are subject to “custodial interrogation” of their *Miranda* rights.²⁷ In order for the individual’s statements to be admissible, the individual must, in turn, demonstrate an understanding of these rights and “indicate [his/her] affirmative waiver.”²⁸

The policy, without further explanation, states that “[i]f either the ‘custodial’ or ‘interrogation’ element is not present, the situation is not one of custodial interrogation,” and thereby the agents generally need not issue *Miranda* warnings.²⁹ However, the policy warns that certain facts and circumstances may give rise to a “constructive custodial interrogation”— in other words, “a reasonable person in the subject’s position [would] think that s/he was not free to leave.”³⁰ The policy indicates that a “police dominated atmosphere” or a “lengthy and intimidating” interrogation as well as an interrogation that leads to a confession may amount to a constructive custodial interrogation.³¹

Under the TBI’s policy, *Miranda* warnings need not be given during:

- (1) A typical “stop and frisk;”
- (2) Ordinary field or “on the scene” investigations (e.g., when asking questions like: “What happened here?” or “Did anyone see what happened to the gun?”);
- (3) “Citizen encounters” when the subject has reason to believe that s/he is free to leave;
- (4) Voluntary appearances at TBI Headquarters or offices, when the subject has no reason to believe that s/he is not free to leave;
- (5) Interviews at the subject’s home or office, when the subject has no reason to believe that s/he is not free to terminate the interview and dismiss the special agent;
- (6) Interviews in stores, restaurants, or other places of public accommodations, when the subject has reason to believe s/he is free to leave;
- (7) The subject’s confinement in a hospital, while s/he is not under arrest (except when the subject is in pain and/or under sedation); and
- (8) Questioning that is routine or administrative in nature, such as name, address, etc. and is not calculated to elicit incriminating responses.³²

²⁶ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

²⁷ TENNESSEE BUREAU OF INVESTIGATION WRITTEN POLICY 8-3-004 (revised June 28, 2004).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Miranda warnings also need not be issued when the “the interrogator is not a law enforcement officer and is not acting under the direction of a [s]pecial [a]gent.”³³

To avoid any inconsistency, TBI special agents are required to read *Miranda* warnings from a “form or card issued by the Bureau,” even if the subject asserts that s/he is familiar with the warnings and his/her constitutional rights.³⁴ Before questioning begins, the special agent must receive acknowledgment that the subject understands his/her rights.³⁵ When possible, this must be done by having the subject sign the *TBI Warnings as to Constitutional Rights* form.³⁶

b. Coerced or Involuntary Confessions

TBI Written Policy 8-3-004 indicates that a special agent must “be prepared to establish through his/her testimony that the subject’s waiver of rights was knowingly and voluntarily given.”³⁷ As a result, special agents are prohibited from:

- (1) Coercing a subject or offering an inducement to a subject to participate in an interview;
- (2) Assuring the subject in regards as to what will transpire during any phase of the handling of the subject’s case; and
- (3) Taking any action of any type to force or induce a subject to make a statement or confession.³⁸

c. Invoking the Right to Counsel

Under TBI Written Policy 8-3-004, at any time a subject invokes his/her right to counsel, questioning must cease until counsel is available or the subject “initiates further conversation.”³⁹ If the subject initiates further conversation, regardless of counsel having been made available, the special agent must reissue *Miranda* warnings, and before resuming questioning, have the subject sign the *TBI Warnings as to Constitutional Rights* form.⁴⁰

If the subject refers to counsel, but does not unequivocally request counsel, the special agent must pose further questions to determine whether the subject is, in fact, requesting counsel.⁴¹ If the special agent determines the subject prefers counsel, questioning must

³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
³⁶ *Id.*
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.*

stop until counsel is made available or the subject initiates further conversation.⁴² Otherwise, the interrogation may proceed.⁴³

d. Invoking the Right to Silence

Under TBI Written Policy 8-3-004, at any time a subject invokes his/her right to remain silent, questioning must immediately cease.⁴⁴ Only after a “significant period of time”—which “may be as little as two hours”—has lapsed may a special agent “re-contact” a subject who has no counsel or has not requested counsel.⁴⁵ The special agent is required to reiterate *Miranda* warnings and when possible, have the subject sign a *TBI Warnings as to Constitutional Rights* form before resuming the interview.⁴⁶ If a subject wishes to speak to a special agent, the agent must reissue *Miranda* warnings and if possible, have the subject sign a *TBI Warnings as to Constitutional Rights* form before questioning him/her.⁴⁷

2. Audio or Video Tape Recording of Statements

Audio and/or video recording of interviews is not standard procedure for the TBI.⁴⁸ Indeed, audio and/or video recording of interviews, including interviews of witnesses, suspects, and subjects, is allowed only “on a limited basis” and must be authorized.⁴⁹

When agents do utilize audio or video recording, they must first obtain the interviewee’s consent; this consent must be “clearly indicated on the tape” and includes, if it is a custodial interrogation, *Miranda* warnings being provided to the interviewee.⁵⁰

Recorded tapes cannot be altered in any manner.⁵¹ The original recording must be “sealed” after being transcribed to ensure its integrity, and will be held by the case agent and treated as evidence.⁵² To protect the chain of custody, a copy of the audio/video tape must be given to the District Attorney General.⁵³

D. *Constitutional Standards Relevant to Identifications and Interrogations*

Pre-trial witness identifications, such as those taking place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.⁵⁴ A due process violation occurs and suppression of an out-of-court pre-trial identification is

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See Neil v. Biggers*, 409 U.S. 188, 196-99 (1972).

required where (1) the identification procedure employed by law enforcement was unnecessarily suggestive,⁵⁵ and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.⁵⁶ A court need only consider whether there was a substantial likelihood of irreparable misidentification if it first determines that the pre-trial identification procedures used by law enforcement were unnecessarily suggestive.⁵⁷ Tennessee courts have found pre-trial identification procedures suggestive when, for example, the defendant was the only individual in a photo array with a dark complexion, “and this fact was emphasized because [his] . . . photograph was noticeably darker,”⁵⁸ or when the eyewitness claimed she had never before seen the perpetrator, but the lineup contained individuals that the eyewitness recognized.⁵⁹

In determining whether the use of an unnecessarily suggestive pre-trial identification procedure would lead to a substantial likelihood of irreparable misidentification, courts consider the following factors: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the suspect, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.⁶⁰

To determine the admissibility of an in-court identification, the court will use these same factors to establish whether an in-court identification by a witness has a sufficient independent basis for reliability or whether it purely relies on the unnecessarily suggestive pre-trial procedure.⁶¹

⁵⁵ *Id.*

⁵⁶ *Id.* at 196-97; *State v. Thomas*, 780 S.W.2d 379, 382 (Tenn. Crim. App. 1989).

⁵⁷ *Thomas*, 780 S.W.2d at 381-82.

⁵⁸ *State v. Hall*, 976 S.W.2d 121, 153 (Tenn. 1998).

⁵⁹ *State v. Strickland*, 885 S.W.2d 85, 89 (Tenn. Crim. App. 1993).

⁶⁰ *Neil*, 409 U.S. at 199; *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998) (affirming the opinion of the Court of Criminal Appeals).

⁶¹ *See Thomas*, 780 S.W.2d at 382.

II. ANALYSIS

A. Recommendation #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (which has been reproduced below, in relevant part and with slight modifications).

Thirty-five law enforcement agencies in Tennessee have obtained certification by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), an independent accrediting authority.⁶² The CALEA standards, however, do not require the certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. In fact, the standards allow the agencies latitude in determining how they will achieve compliance with each applicable CALEA standard. For example, CALEA Standard 42.2.3 simply requires law enforcement agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects,⁶³ and provides no guidance as to the contents of the directive.

While an individual law enforcement agency could create specific guidelines that mirror the requirements of the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (ABA Best Practices) in order to comply with CALEA Standard 42.2.3, we were unable to obtain these guidelines in order to ascertain whether Tennessee law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices.

Regardless of whether a law enforcement agency has obtained certification, all pre-trial identification procedures are ultimately subject to constitutional due process limitations. In assessing compliance with each ABA Best Practice, we therefore draw upon case law relating to the administration of pre-trial identification procedures.

1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his/her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

Tennessee law does not require, whenever practicable, that the person conducting a lineup or photospread be unaware about which participant is the suspect. Additionally,

⁶² See *supra* note 17.

⁶³ CALEA STANDARDS, *supra* note 20, at 42-3 (Standard 42.2.3).

we were unable to ascertain whether Tennessee law enforcement agencies, certified by CALEA or otherwise, have adopted guidelines consistent with this particular ABA Best Practice.

- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

Tennessee law does not mandate that eyewitnesses be instructed that the perpetrator may or may not be in the lineup. Nor does it mandate that eyewitnesses be told not to assume that the person administering the lineup knows which individual is the suspect and that the eyewitnesses need not identify anyone. Case law indicates that at least one Tennessee law enforcement agency advises eyewitnesses “not to assume that anyone depicted in the array was involved in the offense” and that an identification should only be made when the individual is “positive of such identification.”⁶⁴ Additionally, though we were unable to determine whether law enforcement officers ask witnesses to state a level of certainty in their identifications as a matter of course, case law does illustrate witnesses stating either a percentage or general level of certainty in their identification.⁶⁵

2. Foil Selection, Number, and Presentation Methods

- a. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
- b. The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

Tennessee law does not mandate that lineups and photospreads use a select number of individuals nor that foils be chosen for their similarity to the witness’s description of the perpetrator. Moreover, we were unable to ascertain whether law enforcement agencies across the State of Tennessee, certified by CALEA or otherwise, have adopted guidelines complying with this particular ABA Best Practice.

Tennessee courts, however, have condemned the use of showups—the presentation of “a single person . . . as a suspect to a viewing witness.”⁶⁶ In concert with the United States

⁶⁴ State v. Burke, 2002 WL 1162352, *2 n.2 (Tenn. Crim. App. Nov. 4, 2002) (unpublished opinion) (non-capital case).

⁶⁵ See State v. Griffin, 2003 WL 151196, *9 (Tenn. Crim. App. Jan. 22, 2003) (unpublished opinion); State v. Tarter, 2006 WL 568158, *1 (Tenn. Crim. App. March 8, 2006) (unpublished opinion); State v. Williamson, 2004 WL 3021148, *3 (Tenn. Crim. App. Dec. 30, 2004) (unpublished opinion); State v. Armstrong, 2004 WL 1208871, *8 (Tenn. Crim. App. June 2, 2004) (unpublished opinion).

⁶⁶ *Thomas*, 780 S.W.2d at 381.

Supreme Court, the Tennessee Court of Criminal Appeals has “long recognized that showups are inherently suggestive and unfair to the accused.”⁶⁷ Consequently, the use of showups to identify a suspect are limited to where: “(a) there are imperative circumstances which necessitate a showup; or (b) the showup occurs as an on-the scene investigatory procedure shortly after the commission of the crime.”⁶⁸

Additionally, a review of relevant case law demonstrates that law enforcement officials generally prepare lineups or photospreads with six people and attempt to include a number of foils—participants who match the physical description of the perpetrator—in the lineup or photospread. Still, Tennessee courts have failed to find lineup and photo arrays impermissibly suggestive even where the defendant was the only participant of a certain race,⁶⁹ or the defendant was the only participant wearing a prison suit.⁷⁰

3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness’s confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**

The Tennessee Supreme Court has stated that “there is no authority in Tennessee requiring that interrogations be electronically recorded.”⁷¹ Nonetheless, the Court has recognized that if law enforcement agencies recorded interrogations, it would reduce the amount of time courts expended on resolving issues related to interrogations.⁷² Given “the slight inconvenience and expense associated with electronically recording custodial interrogations,” the Tennessee Supreme Court also has recognized that “sound policy considerations support its adoption as a law enforcement practice.”⁷³ However, the Court concluded that the issue was more suitable for the Tennessee Legislature.⁷⁴

In 2002, the Tennessee legislature passed a joint resolution that directed the Tennessee Law Enforcement Advisory Council to study and evaluate issues concerning the electronic recording of custodial interrogations.⁷⁵ The Council was to report its findings

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See State v. Faight*, 2005 WL 1848496, *3-4 (Tenn. Crim. App. Aug. 5, 2005) (unpublished opinion).

⁷⁰ *See State v. Molina*, 2006 WL 2069429, *5 (Tenn. Crim. App. July 25, 2006) (unpublished opinion).

⁷¹ *State v. Godsey*, 60 S.W.3d 759, 771 (Tenn. 2001).

⁷² *Id.* at 772; *State v. Rollins*, 188 S.W.3d 553, 564-65 (Tenn. 2006).

⁷³ *Godsey*, 60 S.W.3d at 772; *Rollins*, 188 S.W.3d at 564-65.

⁷⁴ *Godsey*, 60 S.W.3d at 772; *Rollins*, 188 S.W.3d at 564-65.

⁷⁵ *See Rollins*, 188 S.W.3d at 564-65.

to the House and Senate Judiciary Committee, but as of date, no report has been issued by the Council. Nearly identical bills were introduced in the 103rd and 104th sessions of the Tennessee General Assembly that would have required either audio or video electronic recording of custodial interrogations, but the General Assembly failed to pass either bill.⁷⁶

It should be noted that the Tennessee Bureau of Investigation (TBI), the State's primary criminal investigative agency, indicates a preference against the audio or videotaping of interrogations.⁷⁷ In fact, under TBI Written Policy 8-304(H), the audio or videotaping of statements "is permissible on a limited basis and only when authorized" by the Special Agent in Charge, the Assistant Special Agent in Charge, the Deputy Director, or the Assistant Director of the Drug Division.⁷⁸

- c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

Tennessee law does not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of confidence in any identification and document that statement accurately. And, we were unable to assess whether law enforcement agencies, certified by CALEA or otherwise, have adopted such guidelines.

A review of Tennessee case law indicates at least one instance of a witness being instructed by an officer that he should make an identification from a computer generated lineup only if he was "a hundred percent sure" of his identification.⁷⁹ Additionally, several cases demonstrate witnesses indicating a percentage or general level of confidence in their identification.⁸⁰

4. Immediate Post-Lineup or Photospread Procedures

- a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.**

⁷⁶ S.B. 0343, 103d Leg. (Tenn. 2003); H.B. 1138, 103d Leg. (Tenn. 2003); S.B. 1679, 104th Leg. (Tenn. 2004); H.B. 204, 104th Leg. (Tenn. 2004)

⁷⁷ TENNESSEE BUREAU OF INVESTIGATION WRITTEN POLICY 8-3-004 (revised June 28, 2004).

⁷⁸ *Id.*

⁷⁹ *State v. Griffin*, 2003 WL 151196, *9 (Tenn. Crim. App. Jan. 22, 2003) (unpublished opinion).

⁸⁰ *State v. Tarter*, 2006 WL 568158, *1 (Tenn. Crim. App. Mar. 8, 2006) (unpublished opinion); *State v. Williamson*, 2004 WL 3021148, *3 (Tenn. Crim. App. Dec. 30, 2004) (unpublished opinion); *State v. Armstrong*, 2004 WL 1208871, *8 (Tenn. Crim. App. June 2, 2004) (unpublished opinion).

The problem with giving a witness feedback on whether s/he selected the “right man” is that it can improperly influence the identification process. Tennessee law does not specifically prohibit police and prosecutors from providing feedback to the witness on whether s/he selected the “right man,” and we were unable to assess whether law enforcement agencies, certified by CALEA or otherwise, have adopted such guidelines.

Conclusion

In sum, although numerous law enforcement agencies may have adopted written directives in compliance with the ABA Best Practices, we were unable to obtain these written directives to determine whether they complied with each particular aspect of Recommendation #1. While Tennessee case law may be demonstrative of certain law enforcement practices related to pre-trial identifications, we were unable to ascertain whether these practices are uniform among all Tennessee law enforcement agencies. We therefore cannot assess whether the State of Tennessee is in compliance with the requirements of Recommendation #1.

B. Recommendation #2

Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.

The Tennessee Peace Officers Standard and Training Commission (POST Commission) mandates law enforcement officers to complete a course consisting of at least 400 hours of training, including instruction in such relevant areas as constitutional law, interpersonal communications (interviewing witnesses and victims), and human relations.⁸¹ The Tennessee Law Enforcement Training Academy (Academy), wherein law enforcement candidates may complete the required POST training, also offers law enforcement officers the courses entitled “Interview and Interrogation” and “Criminal Investigations.”⁸² The extent to which either these courses or the mandatory POST curriculum include training on implementing the guidelines for conducting lineups and photospreads as well as training on non-suggestive techniques for interviewing witnesses, however, is unclear.

Additionally, CALEA Standard 33.5.1 requires the thirty-five accredited law enforcement agencies in Tennessee to establish “a written directive that requires each sworn officer [to] receive annual training on legal updates.”⁸³ A law enforcement agency complying with this CALEA standard could create a training program that complies with this Recommendation. However, we were unable to obtain any relevant law enforcement

⁸¹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N chs. 1110-2-.01(1), 1110-7-.01(1).

⁸² TENNESSEE.GOV, Dep’t of Commerce & Insurance, Tennessee Law Enforcement Training Academy, CALENDAR OF SCHOOLS, at <http://www.state.tn.us/commerce/let/tleta/calendar.html> (last visited Feb. 16, 2007).

⁸³ CALEA STANDARDS, *supra* note 20 (Standard 33.5.1).

agency directives to ascertain whether these CALEA accredited agencies are in compliance with Recommendation #2.

Because we were unable to sufficiently ascertain whether law enforcement agencies, certified by CALEA or otherwise, are complying with this particular Recommendation, we cannot assess whether the State of Tennessee is in compliance with Recommendation #2.

C. Recommendation #3

Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.

We were unable to ascertain whether Tennessee law enforcement agencies periodically update their guidelines, therefore, we are unable to conclude whether the State of Tennessee is in compliance with Recommendation #3.

D. Recommendation #4

Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.

It is unclear how many law enforcement agencies in Tennessee regularly record the entirety of custodial interrogations. The most specific information we received is that, as of February 2006, twelve law enforcement agencies in Tennessee regularly record the entirety of all custodial interrogations.⁸⁴ These agencies use either audio or video recording equipment to record interviews of persons under arrest in an agency facility from the moment *Miranda*⁸⁵ warnings are given until the interview ends.⁸⁶ A November 2002 study of Tennessee law enforcement agencies conducted by the Comptroller's

⁸⁴ E-mail from Thomas P. Sullivan, Esq., Chair of the Illinois Governor's Commission on Capital Punishment, to Deborah T. Fleischaker, Director, ABA Death Penalty Moratorium Implementation Project (Feb. 9, 2006). These law enforcement agencies are the Blount County Sheriff, Bradley County Sheriff, Brentwood Police Department, Chattanooga Police Department, Cleveland Police Department, Goodelettsville Police Department, Hamilton County Sheriff, Hendersonville Police Department, Loudon County Sheriff, Montgomery County Sheriff, Murfreesboro Police Department, and Nashville Police Department. *Id.*; see also Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL CONVICTIONS SPEC. REP., at 5 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (last visited Jan. 17, 2007).

⁸⁵ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

⁸⁶ See Sullivan, *supra* note 84, at 5. This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police station or lockup, such as at crime scenes or in squad cars. *Id.*

Office of Research found a greater incidence of recording.⁸⁷ Of the 400 law enforcement agencies that responded to the survey, 43 percent recorded custodial interrogations at least some of the time and 23.3 percent recorded all custodial interrogations.⁸⁸

While we commend these law enforcement agencies, the number of agencies that actually record custodial interrogations is far outnumbered by those agencies that fail to record them. Indeed, the Tennessee Bureau of Investigation, the State's primary criminal investigative agency, only allows audio and/or video recording of interviews "on a limited basis" and only when authorized by the Special Agent in Charge, the Assistant Special Agent in Charge, the Deputy Director, or the Assistant Director of the Drug Division.⁸⁹

Based on the foregoing, the State of Tennessee is not in compliance with Recommendation #4.

E. Recommendation #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

We were unable to ascertain whether the State of Tennessee provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations. Therefore, we cannot determine whether the State of Tennessee meets the requirements of Recommendation #5.

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.

The Tennessee Supreme Court has prohibited the use of "general and unparticularized" expert testimony, "not specific to the witness whose testimony is in question," on eyewitness accuracy.⁹⁰ The Court reasoned that such testimony "simply offers generalities" and that "the reliability of eyewitness identification is within the common understanding of reasonable persons."⁹¹ The Court also feared that allowing expert

⁸⁷ Lance H. Selva & William L. Shulman, *Legislative Prerogative or Judicial Fiat: Mandating Electronic Recording of Stationhouse Interrogations in Tennessee*, 1 TENN. J.L. & PUB. POL'Y 387, 429-30 (2004). The Tennessee Comptroller's Office of Research posts many of its reports at http://www.comptroller1.state.tn.us/RA_RE/ORreports.asp (last visited Feb. 16, 2007), but the Custodial Interrogation Survey is not posted.

⁸⁸ Selva & Shulman, *supra* note 87, at 429-30.

⁸⁹ TENNESSEE BUREAU OF INVESTIGATION WRITTEN POLICY 8-3-004 (revised June 28, 2004).

⁹⁰ *State v. Coley*, 32 S.W.3d 831, 837-38 (Tenn. 2000).

⁹¹ *Id.*

testimony on eyewitness accuracy could “mislead and confuse” jury members, as well as “encourage the jury to abandon its responsibility as fact-finder.”⁹²

The State of Tennessee, therefore, fails to meet the requirements of Recommendation #6.

Based on this information, and because of the evidence about the unreliability of eyewitness identifications and its role in a number of wrongful convictions around the United States, the Tennessee Death Penalty Assessment Team recommends that the Tennessee General Assembly reverse the prohibition against expert testimony on eyewitness identifications.

G. Recommendation #7

Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.

Whenever identification is a material issue in a case— i.e. the defendant places identity at issue or the eyewitness testimony is uncorroborated by circumstantial evidence— Tennessee trial courts must instruct the jury on the factors to be considered in gauging the accuracy of the identification.⁹³ The exact instruction, which was adopted by the Tennessee Supreme Court in *State v. Dyle*⁹⁴ and later encapsulated as Pattern Jury Instruction 42.05, states:

One of the issues in this case is the identification of the defendant as the person who committed the crime. The [S]tate has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness’ capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness’ own recollection;

⁹² *Id.*

⁹³ *State v. Cribbs*, 967 S.W.2d 773, 779 (Tenn. 1998).

⁹⁴ *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995).

- (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the [S]tate has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which [he] [she] is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.⁹⁵

A court's failure to provide this instruction when (1) the defendant's identification is a material issue and (2) defendant's counsel requests the instruction, constitutes plain error.⁹⁶ If the identification is a material issue, but the defense fails to request the instruction, the error will be reviewed under a harmless error standard.⁹⁷

Because Tennessee courts use a specific instruction explaining the factors to be considered in gauging lineup accuracy, the State of Tennessee is in compliance with Recommendation #7.

⁹⁵ *Id.* at 612; TENN. CRIM. PATTERN JURY INSTRUCTION 42.05.

⁹⁶ *Cribbs*, 967 S.W.2d at 780.

⁹⁷ *Id.*

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.¹ While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing properly to analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to lack of proper training and supervision, the lack of testing procedures or the failure to follow procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

¹ See Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

A. *Crime Laboratories*

1. The Tennessee Bureau of Investigation's System of Crime Laboratories

The Tennessee Bureau of Investigation (TBI) is the State of Tennessee's primary criminal investigative agency, responsible for overseeing the State's three crime laboratories.² The TBI's Forensic Services Unit, comprised of the TBI's three crime laboratories, as well as a Violent Crime Response Team, processes evidence for every law enforcement agency and medical examiner in the State.³

The TBI has three crime laboratories: the State's central laboratory in Nashville serves all ninety-five counties in Tennessee; a regional laboratory in Knoxville serves thirty counties; and a second regional laboratory in Memphis serves twenty-two counties.⁴ Additionally, the Violent Crime Response Team includes three "specially designed crime scene vehicles equipped with the most advanced forensic equipment and materials available," to assist in processing homicide crime scenes.⁵

The TBI's crime laboratories each provide an array of services including: Drug Chemistry; Serology/DNA; Evidence Receiving; Latent Print Examination; Firearms Identification; Microanalysis (including fire debris analysis, analysis of gunshot residue, shoe or tire impression comparisons, paint analysis and comparisons, glass fracture analysis/order of breakage, fiber comparisons, indented impressions, speedometers; composite imagery such as image modification or composite drawings); and Toxicology (blood alcohol, breath alcohol, and toxicological drug screens).⁶

2. Crime Laboratory Accreditation

Since 1994, all three of the TBI's crime laboratories have been accredited by the Legacy Program of the American Society of Crime Laboratory Directors/Laboratory

² Tennessee Bureau of Investigation, at <http://www.tbi.state.tn.us/> (last visited Feb. 16, 2007).

³ Tennessee Bureau of Investigation, Forensic Services Division, available at <http://www.tbi.state.tn.us/divisions/Forensic%20Services%20Division.htm> (last visited Jan. 25, 2007).

⁴ *Id.*; see also Tennessee Bureau of Investigation, Forensic Services Division, Crime Laboratory Locations, available at http://www.tbi.state.tn.us/divisions/lab_locations.htm# (last visited Feb. 16, 2007). There is also a private crime lab in Tennessee, the Orchid Cellmark laboratory in Nashville. Orchid Cellmark is a "world leader in forensic DNA testing providing a variety of services to law enforcement agencies, government crime laboratories, and private clients." Orchid Cellmark, About us, available at <http://www.orchidcellmark.com/about.html> (last visited Feb. 16, 2007). Research revealed that the Tennessee Bureau of Investigation, medical examiner offices, district attorneys general, public defender offices, and private attorneys utilize Orchid Cellmark Laboratory to perform DNA analysis in a variety of circumstances. Interview by Sarah Turberville with Deanna Lunkford, Manager of Forensic Laboratory at Orchid Cellmark in Nashville, Tennessee (Jan. 23, 2007).

⁵ Tennessee Bureau of Investigation, Forensic Services Division, Violent Crime Response Team, available at http://www.tbi.state.tn.us/divisions/lab_vcr.htm (last visited Jan. 25, 2007).

⁶ Tennessee Bureau of Investigation, Forensic Services Division, Crime Laboratory Disciplines, available at http://www.tbi.state.tn.us/divisions/lab_disciplines.htm#evidence (last visited Feb. 16, 2007).

Accreditation Board (ASCLD/LAB).⁷ The ASCLD/LAB is a “voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards.”⁸ The ASCLD/LAB-Legacy Accreditation Program is voluntary and requires crime laboratories to demonstrate compliance with a number of established standards.⁹

a. Application Process for ASCLD/LAB Accreditation

To obtain accreditation by the Legacy Program, a laboratory must submit an “Application for Accreditation,” documenting the qualifications of staff, the existence of laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.¹⁰ In addition to the application, the laboratory must submit a “Grade Computation/Summation of Criteria Ratings,” which is based on the laboratory’s self-evaluation of whether it is in compliance with all of the criteria contained in the 2003 ASCLD/LAB Laboratory Accreditation Board Manual (Manual).¹¹

b. ASCLD/LAB Accreditation Standards and Criteria

The Manual contains various standards and criteria; each of which is assigned a rating of “Essential,” “Important,” or “Desirable.”¹² In order to obtain accreditation, the “laboratory must achieve not less than 100% of the Essential,¹³ 75% of the Important,¹⁴ and 50% of the Desirable¹⁵ criteria.”¹⁶ Some of the Essential criteria contained in the Manual require:

⁷ ASCLD/LAB, Accredited Labs, available at <http://www.asclld-lab.org/legacy/aslablegacylaboratories.html#TN> (last visited Feb. 16, 2007); see also Tennessee Bureau of Investigation, International Accreditation, available at <http://www.tbi.state.tn.us/General/accreditation1.htm> (last visited Jan. 23, 2007). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. See CALEA Online, at <http://www.calea.org/> (last visited Feb. 16, 2007). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD/LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, at <http://www.asclld-lab.org> (last visited Feb. 16, 2007); NFSTC, at <http://www.nfstc.org/> (last visited Feb. 16, 2007).

⁸ ASCLD/LAB, About ASCLD/LAB, at <http://www.asclld-lab.org/dual/aslabdualaboutasclldlab.html> (last visited Feb. 16, 2007).

⁹ *Id.*

¹⁰ ASCLD/LAB LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 (2003) (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

¹¹ *Id.* at 3.

¹² *Id.* at 2.

¹³ The *Manual* defines "Essential" as "[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence. *Id.*

¹⁴ The *Manual* defines "Important" as "[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence. *Id.*

¹⁵ The *Manual* defines "Desirable" as "[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory. *Id.*

- (1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;¹⁷
- (2) A training program to develop the technical skills of employees in each applicable functional area;¹⁸
- (3) A chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;¹⁹
- (4) The proper storage of evidence to protect the integrity of the evidence;²⁰
- (5) A comprehensive quality manual;²¹
- (6) The performance of an annual review of the laboratory's quality system;²²
- (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;²³
- (8) The performance and documentation of administrative reviews of all reports issued;²⁴
- (9) The monitoring of the testimony of each examiner at least annually;²⁵ and
- (10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.²⁶

The Manual also contains Essential criteria on personnel qualifications, requiring examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.²⁷ Additionally, the examiners must successfully complete a competency test prior to assuming casework and, thereafter, annual proficiency exams.²⁸

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.²⁹

c. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

¹⁶ *Id.* (emphasis omitted).

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 19.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 21.

²¹ *Id.* at 23.

²² *Id.* at 27.

²³ *Id.*

²⁴ *Id.* at 31.

²⁵ *Id.* at 32.

²⁶ *Id.* at 33-34.

²⁷ *Id.* at 38-45.

²⁸ *Id.*

²⁹ *Id.* at 5.

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.³⁰ The inspection team will also interview all trainees to evaluate the laboratory's training program.³¹ At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.³²

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the "audit committee," which is comprised of an ASCLD/LAB Board member, the Executive Director, at least three staff inspectors, and the inspection team captain.³³ Decisions on accreditation must be made within twelve months of "the date of the laboratory's first notification of an audit committee's consideration of the draft inspection report."³⁴ During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.³⁵

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years, "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."³⁶ After five years, the laboratory must apply for reaccreditation and undergo another on-site inspection.³⁷

B. *Medical Examiner Offices*

1. Office of the Chief Medical Examiner

The Office of the Chief Medical Examiner was established by the Post-Mortem Examination Act in 1961 to investigate and identify unnatural deaths occurring throughout the State of Tennessee.³⁸ The Chief Medical Examiner is appointed by the Commissioner of the Tennessee Department of Health (Commissioner), with the approval of the Governor.³⁹ The Chief Medical Examiner must be a pathologist certified by the American Board of Pathology and hold a certificate of competency in forensic pathology.⁴⁰ The Chief Medical Examiner also must possess an unrestricted state license to practice medicine and surgery, or be qualified for such license, in which case, s/he must obtain the license within six months of appointment.⁴¹

³⁰ *Id.*

³¹ *Id.* at 6.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.* at 1.

³⁷ *Id.*

³⁸ TENN. CODE ANN. §§ 38-7-101 *et seq.* (2006); *see also* State Medical Examiner's Office, *available at* <http://www2.state.tn.us/health/smep/> (last visited Feb. 16, 2007).

³⁹ TENN. CODE ANN. § 38-7-102 (2006).

⁴⁰ TENN. CODE ANN. § 38-7-103 (2006).

⁴¹ *Id.*

The Chief Medical Examiner provides education, training, and consultation in death investigation and forensic pathology to county medical examiners, law enforcement, and state and local officials, and maintains an archive of medical examiner investigations conducted statewide.⁴² The Chief Medical Examiner also is responsible for supplying copies of autopsy reports and/or investigative reports by county medical examiners to the public.⁴³

In addition, the Chief Medical Examiner is statutorily mandated to:

- (1) Prescribe autopsy protocol, policies, and guidelines for child death investigations;⁴⁴
- (2) Develop and implement program for training of child death pathologists based on nationally recognized standards;⁴⁵
- (3) Direct the disposition of unclaimed dead bodies, except those of honorably discharged veterans;⁴⁶
- (4) Prescribe proper precautions for the handling of dead bodies that have died of contagious or infectious disease in order to prevent the spread of contagions or infections;⁴⁷ and
- (5) Together with organ procurement agencies, develop protocols under the Anatomical Gift Act.⁴⁸

The Chief Medical Examiner is authorized to appoint, with the Commissioner's approval, any deputy and assistant state medical examiners needed for administrative, professional and technical duties as well as certain educational tasks.⁴⁹ The medical examiners appointed must possess identical qualifications as the Chief Medical Examiner.⁵⁰

2. County Medical Examiner Offices

a. Election, Appointment and Qualification Requirements for County Medical Examiners

In 1994, the Post-Mortem Examination Act was amended, in part to establish qualifications, powers, and duties for county medical examiners.⁵¹ County medical examiners are elected by the county legislative body from a list of no more than two candidates who are nominated by a convention of local physicians (medical or

⁴² State Medical Examiner's Office, *available at* <http://www2.state.tn.us/health/smep/> (last visited Feb. 16, 2007).

⁴³ *Id.* The Chief Medical Examiner also is responsible for ensuring payments are made to pathologists for autopsies performed through the medical examiner program.

⁴⁴ TENN. CODE ANN. § 68-1-1101(c)(1) (2006).

⁴⁵ TENN. CODE ANN. § 68-1-1102(b) (2006).

⁴⁶ TENN. CODE ANN. § 68-4-102(a) (2006).

⁴⁷ TENN. CODE ANN. § 68-4-103(f) (2006).

⁴⁸ TENN. CODE ANN. § 38-7-108(4) (2006).

⁴⁹ TENN. CODE ANN. § 38-7-103 (b) (2006).

⁵⁰ *Id.*

⁵¹ TENN. CODE ANN. §§ 38-7-104 *et seq.* (2006).

osteopathic).⁵² If there is no acceptable physician in a county, a physician from another county may be elected.⁵³ However, in those counties having the metropolitan form of government and in those counties with a population of at least eight hundred thousand, the medical examiner is appointed by the county's mayor from a list of no more than two candidates nominated by a convention of local physicians.⁵⁴ The appointment is then subject to confirmation by a majority of the metropolitan council or county legislative body.⁵⁵

To qualify for the office of county medical examiner, an individual must be a physician who is either (1) a graduate of an accredited medical school authorized to confer the Doctor of Medicine degree (M.D.) and is duly licensed in Tennessee, or (2) a graduate of a recognized college authorized to confer a degree of Doctor of Osteopathy (D.O.) and is licensed to practice osteopathic medicine in Tennessee.⁵⁶

b. Powers and Duties of County Medical Examiners

The county medical examiner must be notified of and immediately investigate the circumstances of deaths occurring in the following eight ways: (1) from sudden violence; (2) by casualty; (3) by suicide; (4) suddenly when in apparent health; (5) when found dead; (6) in prison; (7) in any suspicious, unusual, or unnatural manner; (8) where the body is to be cremated.⁵⁷

When a death occurs under one of the above eight circumstances, a body cannot be embalmed without authorization by the county medical examiner,⁵⁸ nor can a body be removed from its position or location without authorization by the county medical examiner, "except to preserve the body from loss or destruction or to maintain the flow of traffic on a highway, railroad, or airport."⁵⁹ If an individual is interred before an autopsy is performed, a county medical examiner also may request that a district attorney general petition the court to order a body disinterred and an autopsy performed.⁶⁰

A copy of the county medical examiner's investigation must be given to the Chief Medical Examiner and the district attorney general if there is evidence of foul play and/or if in the county medical examiner's judgment an autopsy should be performed.⁶¹ When a case involves homicide or suspected homicide, the autopsy must be completed and

⁵² TENN. CODE ANN. § 38-7-104(a) (2006).

⁵³ TENN. CODE ANN. § 38-7-104(b) (2006).

⁵⁴ TENN. CODE ANN. § 38-7-104(b), (e) (2006).

⁵⁵ *Id.*

⁵⁶ TENN. CODE ANN. § 38-7-104(a) (2006).

⁵⁷ TENN. CODE ANN. §§ 38-7-108(a)(1), -109(a) (2006).

⁵⁸ TENN. CODE ANN. § 38-7-108(b) (2006).

⁵⁹ *Id.*

⁶⁰ TENN. CODE ANN. § 38-7-107(a) (2006).

⁶¹ TENN. CODE ANN. § 38-7-109(a) (2006). In a case involving homicide, suspected homicide, suicide, or violent, unnatural or suspicious death, the county medical examiner also may perform or order an autopsy on the body. TENN. CODE ANN. § 38-7-106 (2006). In such an event, the county medical examiner must notify the next of kin if known or readily ascertainable. *Id.*

submitted within sixty days following submission of the body for examination.⁶² If a state medical examiner's facility is not available to perform an autopsy, the county medical examiner may employ a pathologist certified by the American Board of Pathology, or eligible for such certification, to perform the autopsy.⁶³ The Tennessee Attorney General has stated that no Tennessee law prohibits a county medical examiner from employing a non-physician, acting under the county medical examiner's supervision, direction, and control, to carry out specific tasks that assist the county medical examiner.⁶⁴ Additionally, at least one private firm, Forensic Medical, performs medical examiner and forensic pathology services for Nashville/Davidson County and Williamson County, Tennessee.⁶⁵

Only the county medical examiner is explicitly authorized to remove from the body of the deceased a specimen of blood or other body fluids, or bullets or other foreign objects, in lieu of performing an autopsy, so long as in the county medical examiner's judgment these procedures are justified in order to complete his/her investigation.⁶⁶

The county medical examiner also must conduct an examination of a deceased child upon receiving a report that the child died as a result of suspected sexual abuse,⁶⁷ and must report his/her findings, in writing, to the local law enforcement agency, the district attorney general, and the Department of Children's Services.⁶⁸ Additionally, the medical examiner must also investigate the cause, and prepare and file a report, of fetal deaths occurring without medical attendance where the dead fetus is either five hundred grams or more, or twenty-two weeks old or more.⁶⁹

c. County Medical Investigator

The legislative body of any county may establish by resolution the position of medical investigator to assist the county medical examiner.⁷⁰ The medical investigator must be a licensed EMT, paramedic, registered nurse, physician's assistant, or a person registered by or a diplomat of the American Board of Medicolegal Death Investigators and approved by the county medical examiner as qualified to serve as a medical investigator.⁷¹ If the county has an elected coroner, the coroner may serve as the medical investigator provided that the coroner meets the above qualifications.⁷²

⁶² TENN. CODE ANN. § 38-7-109(c) (2006).

⁶³ TENN. CODE ANN. § 38-7-105(a) (2006).

⁶⁴ Tenn. Att'y Gen. Op. 02-064 (2002). Such duties may include drawing bodily fluids, taking temperatures, or manipulating the dead body. *Id.*

⁶⁵ See Forensic Medical, Our Company, available at http://www.forensicmed.com/our_company.htm (last visited Feb. 16, 2007).

⁶⁶ TENN. CODE ANN. § 38-7-109(a) (2006).

⁶⁷ TENN. CODE ANN. § 37-1-605(c) (2006).

⁶⁸ *Id.*

⁶⁹ TENN. CODE ANN. § 68-3-504(a)(1) (2006).

⁷⁰ TENN. CODE ANN. § 38-7-104(g)(1) (2006).

⁷¹ *Id.*

⁷² TENN. CODE ANN. § 38-7-104(g)(2) (2006); see also TENN. CODE ANN. § 38-7-104(g)(1) (2006) (qualification requirements for medical investigator).

A county medical investigator may conduct death investigations, provided it is under the supervision of the county medical examiner.⁷³ Although the county medical examiner may delegate the authority to order an autopsy to the county medical investigator,⁷⁴ the medical investigator is not empowered to sign a death certificate.⁷⁵

⁷³ TENN. CODE ANN. § 38-7-104(g)(3) (2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

II. ANALYSIS

A. Recommendation #1

Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

Crime Laboratories

The State of Tennessee does not require the accreditation of crime laboratories. However, the Tennessee Bureau of Investigation's (TBI) three crime laboratories in Nashville, Knoxville, and Memphis, which process evidence for every law enforcement agency and medical examiner in the State,⁷⁶ are currently accredited by the Legacy Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).⁷⁷

As a prerequisite for accreditation, ASCLD/LAB's Legacy Program requires laboratories to take certain measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the laboratory must have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.⁷⁸ The Legacy Program requires these procedures to be included in the laboratory's quality manual,⁷⁹ although crime laboratories are not explicitly required to publish these procedures.

The Legacy Program also requires laboratory personnel to possess certain qualifications. The 2003 ASCLD/LAB Laboratory Accreditation Board Manual requires examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.⁸⁰ Examiners also must successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.⁸¹

⁷⁶ See Tennessee Bureau of Investigation, Forensic Services Division, *available at* <http://www.tbi.state.tn.us/divisions/Forensic%20Services%20Division.htm> (last visited Jan. 23, 2007).

⁷⁷ ASCLD/LAB, Laboratories Accredited by ASCLD/LAB, at <http://www.asclclab.org/legacy/asclclablaboratories.html#TN> (last visited Feb. 16, 2007); *see also* Tennessee Bureau of Investigation, International Accreditation, at <http://www.tbi.state.tn.us/General/accreditation1.htm> (last visited Jan. 23, 2007).

⁷⁸ ASCLD/LAB 2003 MANUAL *supra* note 10, at 21.

⁷⁹ *See id.* at 78. The ASCLD/LAB program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to, the following: (1) control and maintenance of documentation of case records and procedure manuals, (2) validation of test procedures used, (3) handling evidence, (4) use of standards and controls in the laboratory, (5) calibration and maintenance of equipment, (6) practices for ensuring continued competence of examiners, and (7) taking corrective action whenever analytical discrepancies are detected. *Id.* at 3.

⁸⁰ *Id.* at 37-50.

⁸¹ *Id.*

While it is commendable that all three state crime laboratories are accredited by the ASCLD/LAB, accreditation by the ASCLD/LAB alone cannot ensure the validity, reliability, and timely analysis of forensic evidence. Only 53 percent of the ASCLD/LAB Manual requirements are considered mandatory for accreditation,⁸² while international standards, such as the ISO/IEC 17025 Guide, contain no optional requirements for quality management systems and technical operations of laboratories.⁸³ Furthermore, membership of the ASCLD/LAB delegate assembly consists solely of laboratory directors from ASCLD/LAB accredited laboratories, effectively making any inspection of a Tennessee lab a peer review by other accredited laboratory directors,⁸⁴ which, in turn, can affect the impartiality of the accreditation process.

It is clear that crime laboratories can and do make critical errors. Congress enacted the Paul Coverdell Forensic Sciences Improvement Grant Program (Coverdell Grant Program) to “improve quality, timeliness, and credibility of forensic sciences services for criminal justice purposes.”⁸⁵ Under the authority of the Coverdell Grant Program, the Department of Justice provides funds to state and local governments to assist crime laboratories and medical examiner offices with improving the following areas: Education and Training, Accreditation/Certification, Equipment/Supplies, Facilities/Renovation, and Staffing.⁸⁶ In order to qualify for Coverdell funds, state or local governments had to show they had “developed a program for improving the quality and timeliness of forensic science or medical examiner services.”⁸⁷ In addition, applicants had to use “generally accepted laboratory practices and procedures as established by accrediting organizations or appropriate certifying bodies.”⁸⁸ To further ensure the reliability and credibility of forensic tests conducted by Coverdell grant recipients,⁸⁹ Congress added a further

⁸² *Id.* at 2.

⁸³ *Id.*; see also American Association for Laboratory Accreditation, Laboratory Accreditation Program, New Policy for Accredited Laboratories, available at <http://www.a2la.org/Applications/ApplyTestLab.cfm> (last visited Jan. 24, 2007) (requiring adherence to international standards of ISO/IEC 17025). However, due to a backlog of cases, the TBI has begun to outsource around 2,000 toxicology and DNA tests to private labs. Lauren Gregory, *The Slow Arm of the Law: Time to Process Evidence Drags Out in Criminal Cases*, TIMESFREEPRESS.COM, Oct 21, 2006 (on file with author). At least one of these private firms, Orchid Cellmark in Nashville, has obtained several accreditations, notably one from ISO/IEC 17025 Forensic Quality Services (FSQ-I), as well as ASCLD/LAB. See Orchid Cellmark, Accreditations, available at http://www.orchidcellmark.com/about_accredited.html (last visited Jan. 26, 2007).

⁸⁴ Arvizu, *supra* note 1, at 18, 20-21.

⁸⁵ Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-561, codified at 42 U.S.C. 3797(j), *et seq.*

⁸⁶ National Institute of Justice, Coverdell National Forensic Sciences Improvement Grant Program, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/nfsia/> (last visited Jan. 25, 2007).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Indeed, the legislative history of the Justice for All Act reveals testimony before Congress in which Peter Neufeld of The Innocence Project argued for independent external investigation mechanisms and observed:

One way vigilance can be achieved is by utilizing some of the same quality assurance measures we employ in other institutions where health, safety, and security are at stake. When the Challenger crashed and NASA initially suggested an internal audit, Congress would not allow it. When the Enron scandal broke, the nation would not accept yet

eligibility requirement in 2004 when it passed the Justice for All Act, amending the Coverdell Grant Program and requiring grant applicants to certify that:

[A] government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.⁹⁰

As the State of Tennessee receives Coverdell funding, the State should have in a place an external auditing process that, if needed, investigates TBI's crime laboratories.

Additionally, in order to maintain the integrity of evidence and thereby ensure its valid and reliable analysis, the State must provide standards for the identification, collection and transportation of forensic evidence. Although the TBI has published procedures on gathering and collecting evidence in its *Evidence Guide* (Guide), the TBI does not mandate that Tennessee law enforcement adhere to these procedures. In fact, the Guide specifically states that "this publication is intended solely as a guide" and that "there may be other acceptable methods than those put forth in this manual."⁹¹ As such, the methods employed by local law enforcement to collect and submit evidence that is later submitted to TBI crime laboratories are unknown and may differ from the *Evidence Guide*.

A noteworthy incident of evidence mishandling by the Tennessee Bureau of Investigation was partially responsible for the U.S. Supreme Court reversing a death sentence in

another audit from Arthur Anderson. In fact, whenever there is evidence of serious misconduct affecting the public, an independent external audit is obligatory. One of the few notable exceptions to this fundamental principle, I am afraid, has been the state and local criminal justice system.

Advancing Justice Through Forensic DNA Technology, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, Serial No. 46, 108th Cong. 36 (2003) (statement of Peter Neufeld, Co-Founder and Director of The Innocence Project).

⁹⁰ Justice for All Act of 2004, Pub. L. No. 108-405. A 2005 review conducted by the Department of Justice Office of the Inspector General (OIG) concluded that the National Institute of Justice (NIJ), the DOJ agency tasked with administering the grant program, did not enforce the independent external investigation requirement. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE OFFICE OF JUSTICE PROGRAMS' FORENSIC SCIENCE IMPROVEMENT GRANT PROGRAM, at i. 21, (Dec. 2005), available at <http://www.usdoj.gov/oig/reports/OJP/e0602/final.pdf> (last visited Jan. 25, 2007). So long as grant applicants signed the certification that there was a government entity or process in place to conduct independent external investigations into allegations of misconduct, the NIJ disbursed the funds. *Id.* The OIG criticized the NIJ for failing to instruct the grant applicants on what kinds of agencies or processes would suffice under the requirement. *Id.* at 9, 21.

⁹¹ See TENNESSEE BUREAU OF INVESTIGATION, TENNESSEE BUREAU OF INVESTIGATION EVIDENCE GUIDE [hereinafter TBI EVIDENCE GUIDE], available at <http://www.tbi.state.tn.us/Lab/TBIEvidenceGuide.pdf> (last visited Feb. 16, 2007).

2006.⁹² In *House v. Bell*, the prosecution presented evidence at trial that the defendant's clothing contained blood from the victim.⁹³ However, subsequent investigation and testimony at the defendant's *habeas corpus* hearing revealed that a vial and a quarter of autopsy blood from the victim was unaccounted for; the blood on the jeans may have come from the autopsy samples; the blood was transported by TBI officers to the FBI together with the pants in conditions that could have caused the vials to spill; some blood did spill at least once during the blood's journey from Tennessee authorities through FBI hands to a defense expert; the pants were stored in a plastic bag bearing a large bloodstain and a label from a TBI agent; and the box containing the blood samples may have been opened before arriving at the FBI lab.⁹⁴ The failure to introduce any of this evidence at trial led the U.S. Supreme Court to find, that "[w]hereas the bloodstains seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin."⁹⁵

Medical Examiners

Under Tennessee law, the Chief Medical Examiner for the State must be a pathologist certified by the American Board of Pathology and must hold a certificate of competency in forensic pathology.⁹⁶ All deputies and assistant medical examiners appointed to assist the Chief Medical Examiner must also possess these same qualifications.⁹⁷ Additionally, each medical examiner, including all county medical examiners, must be licensed by the State as a doctor of medicine or a doctor of osteopathy.⁹⁸ Apart from this, however, there are no certification requirements for individual county medical examiners.

The State of Tennessee imposes no mandatory accreditation requirement for medical examiner offices, either at the state or county level.⁹⁹ We note that at least two Tennessee county medical examiner offices, Shelby and Davidson Counties, have voluntarily obtained accreditation through the National Association of Medical Examiners (NAME).¹⁰⁰ NAME requires medical examiner offices to adopt and implement minimum standardized procedures to ensure the validity, reliability, and timely analysis of forensic evidence.¹⁰¹

⁹² *House v. Bell*, 126 S.Ct. 2064 (2006).

⁹³ *Id.* at 2072.

⁹⁴ *Id.* at 2083.

⁹⁵ *Id.*

⁹⁶ TENN. CODE ANN. § 38-7-103(a) (2006).

⁹⁷ TENN. CODE ANN. § 38-7-103(b) (2006).

⁹⁸ See Tennessee Board of Medical Examiners, available at <http://www2.state.tn.us/health/Boards/ME/index.htm> (last viewed Jan. 24, 2007).

⁹⁹ Research did not uncover a state-wide certification requirement for county medical examiners like that required of the chief medical examiner in TENN. CODE ANN. § 38-7-103(a), however, individual counties may elect/appoint medical examiners who are certified and/or require certification of the county medical examiner.

¹⁰⁰ National Association of Medical Examiners (NAME), Accredited Offices, available at http://www.thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Jan. 24, 2007).

¹⁰¹ See NAME, INSPECTION AND ACCREDITATION POLICES AND PROCEDURES MANUAL (2003) [hereinafter NAME MANUAL], available at

A review of medical examiner practices in the State revealed that on April 21, 2005, the State Board of Medical Examiners permanently revoked the license of Dr. Charles Harlan, who had served as the State's Chief Medical Examiner in the 1990s.¹⁰² *The Tennessean* reported that the Board of Medical Examiners voted to revoke Dr. Harlan's license after finding a pattern of repeated negligence or incompetence in cases handled by him.¹⁰³ As Dr. Harlan served as an expert witness in several murder cases, the revocation of his license casts doubt on his competence, as well as the reliability of his testimony that was introduced in these cases.

In another instance, Shelby County Medical Examiner O.C. Smith was indicted on charges of illegal possession of a bomb and making false statements to federal Alcohol, Tobacco, and Firearms agents related to allegations that Smith faked his own abduction in 2003.¹⁰⁴ The Shelby County District Attorney stated that the federal indictment of Smith would have "no bearing on the validity of his expert testimony in trials," including the medical examiner's prior testimony against a death-row inmate at a clemency hearing.¹⁰⁵ The charges ultimately resulted in a mistrial.¹⁰⁶

Conclusion

Although the State of Tennessee does not require crime laboratories and county medical examiner offices to obtain accreditation, all three of the State's crime laboratories and at least two county medical examiners offices have voluntarily obtained accreditation. Accordingly, the State is in partial compliance with Recommendation #1.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding is needed to ensure that crime laboratories and medical examiners offices maintain the state-of-art equipment needed to develop accurate and reliable results and to hire and retain a sufficient number of competent forensic scientists and staff to timely analyze forensic evidence.

http://thename.org/index.php?option=com_docman&task=doc_download&gid=25&Itemid=26&mode=view (last viewed Jan. 24, 2007).

¹⁰² Leon Alligood & Rob Johnson, *State Strips Dr. Harlan of his License Permanently*, TENNESSEAN.COM, Apr. 22, 2005, available at <http://www.tennessean.com/local/archives/05/03/68558470.shtml> (last visited Jan. 25, 2007).

¹⁰³ *Id.*

¹⁰⁴ *48 Hours: Terror at the Morgue* (CBS News Television Broadcast, Apr. 23, 2005), available at <http://www.cbsnews.com/stories/2005/04/18/48hours/main688910.shtml> (last visited Jan. 24, 2007).

¹⁰⁵ Press Release, 30th Judicial District of Tennessee Shelby County Attorney General's Office, Statement by the District Attorney General Bill Gibbons Regarding the Federal Indictment of Shelby County Medical Examiner, O.C. Smith (Feb. 10, 2004), available at <http://www.scdag.com/archive/204.htm#smith> (last viewed Jan. 24, 2007).

¹⁰⁶ *48 Hours: Terror at the Morgue* (CBS News Television Broadcast, Apr. 23, 2005), available at <http://www.cbsnews.com/stories/2005/04/18/48hours/main688910.shtml> (last visited Jan. 24, 2007).

In FY 2005, the Tennessee Bureau of Investigation's Forensic Services Unit received \$9,409,918 in funding and in FY 2006, the Forensic Services Unit received \$11,783,729 in funding.¹⁰⁷ Additionally, the Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively,¹⁰⁸ awarded \$445,803 to the TBI in FY 2005.¹⁰⁹ The Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases,¹¹⁰ awarded \$470,033 to the TBI in FY 2005.¹¹¹ The TBI also received federal Coverdell Program grants to improve the quality, timeliness, and credibility of forensic science services totaling \$191,389 in FY 2005 and \$203,375 in FY 2006.¹¹² It is unclear whether these grants are included within the Forensic Services Unit's funding for FY 2005 and 2006.

Even with funding provided to the TBI crime laboratories from state and federal sources, the State's three crime laboratories are over-burdened with an increasing caseload and continual backlog of cases. Due to budget constraints in 2003, the State of Tennessee consolidated the TBI's five crime laboratories into three.¹¹³ However, the number of forensic tests performed by the TBI is expected to increase by almost 10,000 between FY 2005 and FY 2007.¹¹⁴ In 2006, each of the TBI's crime laboratories had significant waiting periods for results from samples submitted to the labs for testing: the Knoxville lab had a 28-week backlog, the Nashville lab had a 21-week backlog,¹¹⁵ and the Memphis lab had a 12-week backlog.¹¹⁶

¹⁰⁷ TENNESSEE BUREAU OF INVESTIGATION, ANNUAL REPORT FISCAL YEAR 2004-2005, at 13; TENNESSEE BUREAU OF INVESTIGATION, ANNUAL REPORT FISCAL YEAR 2005-2006, at 13 [hereinafter 2005-2006 ANNUAL REPORT], available at <http://www.tbi.state.tn.us/Info%20Systems%20Div/Color%20-%20TBI%2004-05%20Annual%20Report.pdf> (last visited on Jan. 24, 2007).

¹⁰⁸ See President's DNA Initiative, Capacity Enhancement Funding Chart, available at <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Jan. 25, 2007).

¹⁰⁹ *Id.*

¹¹⁰ See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, available at <http://www.dna.gov/funding/casework/fcfunding/> (last visited Jan. 25, 2007).

¹¹¹ *Id.*

¹¹² See National Institute of Justice, NIJ Awards in FY 2005, available at http://www.ojp.usdoj.gov/nij/awards/2005_topic.htm#paul_coverdell (last visited Jan. 25, 2007); National Institute of Justice, NIJ Awards in FY 2006, available at http://www.ojp.usdoj.gov/nij/awards/2006_topic.htm#paul_coverdell (last visited Jan. 25, 2007).

¹¹³ See Department of Justice Oversight: Funding Forensics Sciences – DNA and Beyond, Before the Subcomm. on Admin. Oversight and the Courts, Senate Comm. on the Judiciary, July 23, 2003 (statement of Susan Johns, President, American Society of Crime Laboratory Directors), available at http://judiciary.senate.gov/print_testimony.cfm?id=886&wit_id=2492 (last visited on Jan. 24, 2007).

¹¹⁴ 2005-2006 ANNUAL REPORT, *supra* note 107; STATE OF TENNESSEE, THE BUDGET FISCAL YEAR 2006-2007, vol. 2, at 273, available at <http://www.state.tn.us/finance/bud/bud0607/0607Volume2.pdf> (last visited Feb. 16, 2007).

¹¹⁵ By some reports, the Nashville lab backlog reached 40 weeks in 2006. See Gregory, *supra* note 83.

¹¹⁶ Andy Wise, *TBI Will Get Help With DNA Backlog*, NEWS CHANNEL 3, May 19, 2006, available at <http://www.wreg.com/Global/story.asp?S=4927198> (last visited Jan. 24, 2007).

In order to provide some short-term relief for these backlogs, the TBI has begun to outsource approximately 2,000 toxicology and DNA tests to private labs, at a cost of \$500,000 to the State, with additional assistance being provided by the federal government.¹¹⁷ Additionally, state and federal funds were approved in the 104th legislative session of the Tennessee General Assembly, enabling the TBI to hire seventeen new forensic scientists and a new forensic technician.¹¹⁸

Medical Examiner Offices

The Tennessee Code Annotated provides that a county medical examiner must be paid, from county funds, no less than twenty-five dollars, and no more than seventy-five dollars, for each death that the county medical examiner investigates.¹¹⁹ The county government may elect to compensate the medical examiner on a salaried basis as well.¹²⁰ We were unable to determine any state allocations specifically appropriated to the Chief Medical Examiner of the State or the county medical examiner offices.

Conclusion

While the state and federal governments will likely allocate over \$10 million to the TBI's crime laboratories in 2007, reports indicate that this money will not diminish the backlog of cases currently existing in the crime labs, suggesting that additional funding is needed. We were, however, unable to obtain sufficient information to appropriately assess the adequacy of funding provided to both crime laboratories and medical examiner offices and therefore cannot assess whether the State of Tennessee is in compliance with Recommendation #2.

¹¹⁷ *Id.*; Gregory, *supra* note 83.

¹¹⁸ Wise, *supra* note 116.

¹¹⁹ TENN. CODE ANN. § 38-7-104(c) (2006).

¹²⁰ *Id.*

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.¹

Prosecutorial misconduct can encompass various actions, including but not limited to failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.² The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the

¹ See Steve Weinberg Center for Public Integrity, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?* (2003), available at <http://www.publicintegrity.org/pm/default.aspx?act=main> (last visited on Feb. 20, 2007).

² *Id.*; see also Innocence Project, *Government Misconduct*, available at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited on Feb. 20, 2007).

police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

I. FACTUAL DISCUSSION

A. *Prosecution Offices*

1. District Attorneys General Offices

The State of Tennessee is divided into ninety-five counties³ which are arranged into thirty-one judicial districts.⁴ Each judicial district has its own elected district attorney general.⁵ To assist with his/her responsibilities, the district attorney general may appoint assistant district attorneys general.⁶ The district attorney general may also hire additional support staff, such as investigators.⁷

a. Responsibilities of District Attorneys General and Assistant District Attorneys General

The responsibilities of district attorneys general include:

- (1) Prosecuting in the courts of the district all violations of the state criminal statutes and performing all prosecutorial functions attendant thereto, including prosecuting cases in a municipal court where the municipality provides sufficient personnel to the district attorney general for that purpose;
- (2) Prosecuting in the federal court all criminal cases removed from a state court in the district to an inferior court;
- (3) Cooperating and assisting, upon the request or direction of the Attorney General and Reporter, in the initiation, preparation, and prosecution of all cases in the circuit and chancery courts in which the Attorney General is required to appear for the protection of the State or the public interest;
- (4) Providing advice, without charge, whenever called upon by any county officer in the district, to a question of criminal law relating to the duties of the county officer's office;
- (5) Submitting to the Office of Executive Director for the District Attorneys General Conference within ninety (90) days after the end of each fiscal year, a written report specifying:
 - a. Each source from which funds were received by the office of the district attorney general during the fiscal year;
 - b. The amount of funds received from each source;
 - c. The disposition of such funds; and

³ TENN. CODE ANN. § 5-1-101 (2006).

⁴ TENN. CODE ANN. § 16-2-506 (2006).

⁵ *See id.*; TENN. CODE ANN. § 8-7-102 (2006).

⁶ TENN. CODE ANN. § 16-2-508(d) (2006); *see also* State v. Taylor, 653 S.W.2d 757, 760-61 (Tenn. Crim. App. 1983) (stating that the Tennessee statutes “carry the connotation that an Assistant District Attorney General may act in the stead of the Attorney General in whatever capacity [s]/he is called upon to serve.”).

⁷ TENN. CODE ANN. § 8-7-231 (2006).

- (6) Allocating the resources available to such district attorney general, any other provision of law notwithstanding;⁸

The district attorney general also may delegate the foregoing duties and responsibilities to an assistant district attorney general.⁹

The district attorney general or assistant district attorney general may also assist the grand jury in its inquiry, which may include examining witnesses and providing legal advice to the grand jury.¹⁰ District attorneys general and assistant district attorneys general have the authority to prosecute criminal cases at the trial level.¹¹

b. Funding of District Attorneys General Offices

Tennessee district attorneys general offices are funded through lump sum payments awarded by the General Assembly.¹² This lump sum payment is distributed by the Executive Director of the District Attorneys General Conference to each district attorney general's office based upon budget requests submitted by the offices.¹³ The district attorneys general offices then are responsible for administering the funding within their individual offices.

According to a report released by the Comptroller of the Treasury of Tennessee,¹⁴ the average cost for the prosecution of a capital trial between 1993 and 2003 was \$11,427.¹⁵ The total cost of a capital trial was \$46,791.¹⁶

2. Office of the Attorney General and Reporter

The Attorney General and Reporter (Attorney General) for the State of Tennessee is appointed by the Justices of the Tennessee Supreme Court to serve an eight-year term.¹⁷

The Tennessee courts have noted that the duties of the Attorney General are “so numerous that the legislature does not attempt to identify each by statute.”¹⁸ The Tennessee Code Annotated (T.C.A.) provides that: “[t]he attorney general and reporter has and shall exercise all duties vested in the office by the Constitution of Tennessee and all duties and authority pertaining to the office of the attorney general and reporter under

⁸ TENN. CODE ANN. § 8-7-103(1)-(6) (2006).

⁹ TENN. CODE ANN. § 8-7-103(7) (2006).

¹⁰ See *Taylor*, 653 S.W.2d at 761; TENN. CODE ANN. § 8-7-501 (2006).

¹¹ See *State v. Simmons*, 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980).

¹² TENN. CODE ANN. § 8-26-101(2) (2006).

¹³ TENN. CODE ANN. § 8-26-101(2)(B)-(C) (2006).

¹⁴ In July 2004, the Comptroller of the Treasury, Office of Research published a report examining the cost of first-degree murder cases in the State of Tennessee. John G. Morgan, *Tennessee's Death Penalty: Costs and Consequence*, Comptroller of the Treasury Office of Research (2004, available at <http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf> (last visited Feb. 20, 2007).

¹⁵ *Id.* at 16.

¹⁶ *Id.*

¹⁷ TENN. CONST. art. 6, § 5; TENN. CODE ANN. § 8-6-101 (2006).

¹⁸ *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990).

the statutory law. The attorney general and reporter is authorized to utilize and refer to the common law in cases in which the [S]tate of Tennessee is a party.”¹⁹ Some additional responsibilities of the Attorney General which are provided by statute include, but are not limited to:

- (1) The trial and direction of all civil litigated matters and administrative proceedings in which the State of Tennessee or any officer, department, agency, board, commission or instrumentality of the State may be interested;
- (2) To attend to all business of the State, both civil and criminal in the Court of Appeals and the Supreme Court;
- (3) To give the Governor, Secretary of State, State Treasurer, Comptroller of the Treasury, members of the General Assembly and other state officials, when called upon, any legal advice required in the discharge of their official duties and written legal opinions on all matters submitted by them in the discharge of their official duties. Written opinions issued pursuant hereto shall be made available for public inspection. It is the legislative intent that when a request for a written legal opinion is from a member of the General Assembly and concerns pending legislation, such request shall be replied to as expeditiously as possible;
- (4) To report the decisions of the Court of Appeals, the Court of Criminal Appeals and the Supreme Court of Tennessee in the manner prescribed by law; and
- (5) To defend the constitutionality and validity of all legislation of statewide applicability, except as provided in subdivision (b)(10), enacted by the General Assembly, except in those instances where the Attorney General is of the opinion that such legislation is not constitutional, in which event the Attorney General shall so certify to the speaker of each house of the General Assembly.²⁰

The Tennessee courts have indicated that the Attorney General’s duties include those exercised “as the public interest may require,” including filing lawsuits “necessary for the enforcement of state laws and public protection.”²¹ The Attorney General also represents the State in criminal cases, including capital cases, on appeal to the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court.²²

B. The Tennessee District Attorneys General Conference

The State of Tennessee established the Tennessee District Attorneys General Conference (the Conference), which is composed of all district attorneys general from the State’s

¹⁹ TENN. CODE ANN. § 8-6-109(a) (2006).

²⁰ TENN. CODE ANN. § 8-6-109(b)(1)-(15) (2006).

²¹ *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990).

²² *State v. Simmons*, 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980).

thirty-one judicial districts.²³ The Conference also is responsible for drafting laws and rules of procedure which are “necessary to suppress crime more effectively.”²⁴

Additionally, to “assist in improving the administration of justice,” Tennessee law provides for the selection of an executive director to the Conference.²⁵ The Executive Director may improve the administration of justice by “coordinating the prospective efforts of the various district attorneys general.”²⁶ For example, the Executive Director may organize meetings of the Conference, which require the attendance of all the members, “unless otherwise officially engaged, or for other good and sufficient reasons.”²⁷ During his/her tenure, the Executive Director of the Conference is prohibited from engaging in the practice of law.²⁸

Meetings can be organized at any time by the President of the Conference, as long as written notice is provided to the members of the Conference at least ten days prior to the meeting.²⁹

C. The Tennessee Rules of Professional Conduct

²³ Tennessee District Attorneys General Conference, About Us, *available at* <http://www.tndagc.org/about.htm> (last visited on Feb. 20, 2007).

²⁴ TENN. CODE ANN. § 8-7-303 (2006).

²⁵ TENN. CODE ANN. § 8-7-307 (2006).

²⁶ TENN. CODE ANN. § 8-7-307 (2006).

²⁷ TENN. CODE ANN. § 8-7-305 (2006). The Executive Director is statutorily charged with:

- (1) Working under the supervision of the executive committee of the District Attorneys General Conference;
- (2) Assisting the district attorneys general in coordinating the efforts of the district attorneys general against criminal activity in the State;
- (3) Initiating conference calls between district attorneys general and coordinate efforts of district attorneys general investigating cases and crimes crossing district lines;
- (4) Serving in a liaison capacity between the various branches of state government and the offices of the district attorneys general;
- (5) Administering the accounts of the judicial branch of government which relate to the offices of the district attorneys general, and preparing, approving and submitting budget estimates and appropriations necessary for the maintenance and operation of the offices of district attorneys general and make recommendations with respect to such offices; and
- (6) Drawing and approving all requisitions for the payment of public moneys appropriated for the maintenance and operation of the state judicial branch of government which relate to the offices of the district attorneys general, and auditing claims and preparing vouchers for presentation to the Department of Finance and Administration, including payroll warrants, expense warrants, and warrants covering necessary costs of supplies, materials and other obligations by the various offices with respect to which the executive director shall exercise fiscal responsibility.

TENN. CODE ANN. § 8-7-309(a)(1)-(6) (2006). The Executive Director also has the “authority, within budgetary limitations, to provide the district attorneys general with minimum law libraries, the nature and extent of which shall be determined in every instance by the executive director on the basis of need.”

TENN. CODE ANN. § 8-7-309(b) (2006).

²⁸ TENN. CODE ANN. § 8-7-311(c)(1) (2006).

²⁹ TENN. CODE ANN. § 8-7-304 (2006). The Conference, however, must have one annual meeting that occurs at the same time as the Judicial Conference’s annual meeting. *Id.*

The Tennessee Rules of Professional Conduct address the professional and ethical responsibilities of all attorneys, including prosecutors.³⁰

1. Professional and Ethical Responsibilities of Prosecutors

The Tennessee Rules of Professional Conduct state that “prosecutors are expected to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals.”³¹ Prosecutors also “are expected to prosecute criminal cases with zeal and vigor within the bounds of the law and professional conduct.”³² To ensure that these obligations are satisfied, Rule 3.8 of the Tennessee Rules of Professional Conduct requires that a prosecutor in a criminal case comply with a number of rules, including:

- (1) Refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) Making reasonable efforts to assure that the accused has been advised of the right to counsel, the procedure for obtaining counsel, and that s/he has been given reasonable opportunity to obtain counsel;
- (3) Not advising an unrepresented accused to waive important pretrial rights;
- (4) Making timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclosing to the defense and/or tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (5) Exercising reasonable care to prevent employees of the prosecutor’s office from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;³³
- (6) Discouraging investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6; and
- (7) Not subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.³⁴

³⁰ See TENN. SUP. CT. R. 8 PREAMBLE, TENN. RULES OF PROF’L CONDUCT R. 3.8.

³¹ See TENN. SUP. CT. R. 8, TENN. RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (citing *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994)).

³² *Id.*, (citing *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000)).

³³ Rule 3.6 prohibits lawyers from making extrajudicial statements that the lawyer knows or reasonably should know will be “disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT § 3.6(a).

³⁴ TENN. SUP. CT. R. 8, TENN. RULES OF PROF’L CONDUCT R. 3.8(a)-(f).

The Tennessee Rules of Professional Conduct require all attorneys, including prosecutors, to report certain professional misconduct.³⁵ Rule 8.3 of the Tennessee Rules of Professional Conduct states: “[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.”³⁶

2. Investigating District Attorneys General and Disciplining Members of the Bar

Members of the Tennessee Bar, including district attorneys general, can be subjected to professional investigation and discipline. Formal disciplinary proceedings can be initiated by filing a written complaint with the Board of Professional Responsibility of the Supreme Court of Tennessee (Board). After a written complaint has been filed with the Board of Professional Responsibility of the Tennessee Supreme Court,³⁷ formal

³⁵ TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT R. 8.3(a).

³⁶ *Id.*; see also TENN. SUP. CT. R. 9, § 7.2. The Tennessee Supreme Court appoints a lawyer admitted to practice in Tennessee to serve as the Chief Disciplinary Counsel. TENN. SUP. CT. R. 9, § 7.1. The Chief Disciplinary Counsel reports to the Tennessee Board of Professional Responsibility. *Id.* The Chief Disciplinary Counsel has the power and responsibility to:

- (1) Employ and supervise staff, with the approval of the Board, who are needed for the performance of the Counsel’s duties;
- (2) Investigate all matters involving possible misconduct;
- (3) Dispose of all matters involving alleged misconduct by either dismissal, informal admonition, or the prosecution of formal charges before a hearing panel, except if the claim is frivolous, clearly unfounded, or outside the jurisdiction of the Board;
- (4) Prosecute in a timely manner all disciplinary proceedings to determine incapacity of attorneys before hearing panels, trial courts, and the Supreme Court;
- (5) Investigate, file pleadings, and appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, or with respect to petitions for voluntary surrenders of law licenses, and to cross-examine witnesses testifying in support of any such petitions, and to marshal and present available evidence, if any, in opposition thereto;
- (6) File with the Supreme Court certificates of conviction of attorneys for crimes;
- (7) Maintain permanent records of all matters processed and the disposition thereof;
- (8) Give advisory ethics opinions to members of the bar pursuant to Section 26; and
- (9) Implement the written guidelines adopted by the Board and approved by the Court pursuant to Section 5.5(b), and to file reports with the Board on a monthly basis demonstrating Disciplinary Counsel’s substantial compliance with the guidelines.

TENN. SUP. CT. R. 9, § 7.2(a)-(i).

³⁷ The Board of Professional Responsibility consists of twelve members appointed by the Tennessee Supreme Court. TENN. SUP. CT. R. 9, § 5.1. Members of the Board serve three-year terms, but not more than two consecutive terms. *Id.* Vacancies on the Board are filled by the Tennessee Supreme Court. *Id.* The Board can only act with the approval of seven or more members. TENN. SUP. CT. R. 9, § 5.3. The Board has the power to:

- (1) Consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as appropriate to effectuate the purpose of the disciplinary rules;

disciplinary proceedings are initiated.³⁸ The power to investigate grievances and discipline members of the State Bar, including prosecutors, is vested in the Board of Professional Responsibility³⁹ and the Disciplinary Counsel.⁴⁰ However, investigations of complaints are conducted by the Disciplinary Counsel.⁴¹

Upon concluding an investigation, the Disciplinary Counsel can recommend dismissal, informal admonition, private reprimand, public censure or prosecution of formal charges before a hearing panel.⁴² Grounds for discipline include:

- (1) Violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or to do so through the acts of another;
- (2) Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (3) Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (4) Engaging in conduct that is prejudicial to the administration of justice;
- (5) Attempting to, or stating or implying an ability to influence a tribunal or a government agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;
- (6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (7) Knowingly failing to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.⁴³

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- (2) Adopt written guidelines to ensue the efficient and timely resolution of complaints, investigations, and formal proceedings, which must be approved by the Tennessee Supreme Court, and to monitor Disciplinary Counsel's and the hearing panels' continued compliance with such guidelines;
 - (3) Assign members of the district committees appointed within each disciplinary district to conduct disciplinary hearings and to review and approve or modify recommendations by Disciplinary Counsel for dismissals or informal admonitions;
 - (4) Review, upon application by Disciplinary Counsel, a determination by the reviewing member of a district committee that a matter should be concluded by dismissal or by private informal admonition without the institution of formal charges;
 - (5) Privately reprimand attorneys for misconduct;
 - (6) Adopt rules of procedure that are not inconsistent with the disciplinary rules; and
 - (7) To the extent that the Board deems feasible, consult with officers of local bar associations concerning any appointment it is authorized to make under the rules.

TENN. SUP. CT. R. 9, § 5.5(a)-(g).

³⁸ TENN. SUP. CT. R. 9, § 8.1.

³⁹ TENN. SUP. CT. R. 9, § 5.5.

⁴⁰ TENN. SUP. CT. R. 9, § 7.2.

⁴¹ TENN. SUP. CT. R. 9, § 8.1.

⁴² *Id.*

⁴³ TENN. SUP. CT. R. 8, RULES OF PROF'L CONDUCT § 8.4; *see also* TENN. SUP. CT. R. 9, RULES OF PROF'L CONDUCT § 4.1.

If the Disciplinary Counsel recommends the dismissal of a complaint or informal admonition, the recommendation will be reviewed by a district committee member⁴⁴ who may approve or modify the action.⁴⁵ A district committee member's decision can be appealed by the Disciplinary Counsel to the Board of Professional Responsibility.⁴⁶ If the Disciplinary Counsel recommends a private reprimand, public censure, or prosecution of formal charges before a hearing panel,⁴⁷ the Board of Professional Responsibility must approve or modify the action.⁴⁸

In cases in which the Board approves prosecution of formal charges before a hearing panel, the panel will have a hearing in which the Disciplinary Counsel may submit evidence of prior discipline against the respondent if it is admissible under the Tennessee Rules of Evidence.⁴⁹ At the hearing, the respondent is entitled to be represented by counsel, to cross-examine witnesses, and present evidence on his/her own behalf.⁵⁰ The panel, which consists of three district committee members designated by the Board of Professional Responsibility,⁵¹ must act in accordance with a majority of its members,⁵² and its findings and judgment are submitted to the Board of Professional Responsibility and forwarded to the respondent and the respondent's counsel.⁵³ If the panel recommends that the lawyer should be disbarred or suspended for at least three months, the Board of Professional Responsibility will forward the decision to the Tennessee Supreme Court to review for uniformity of punishment and appropriateness of the punishment in accordance with the circumstances.⁵⁴

D. Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

⁴⁴ The State of Tennessee is divided into nine disciplinary districts. TENN. SUP. CT. R. 9, § 2. Within each disciplinary district, the Tennessee Supreme Court appoints one district committee. TENN. SUP. CT. R. 9, § 6.1. A district committee is composed of no less than five district committee members, and not more than thirty district committee members appointed by the Tennessee Supreme Court, who each serve for a term of three years. *Id.*; TENN. SUP. CT. R. 9, § 6.2.

⁴⁵ TENN. SUP. CT. R. 9, § 8.1.

⁴⁶ *Id.*

⁴⁷ The hearing panel consists of three district committee members assigned by the Chair of the Board of Professional Responsibility. TENN. SUP. CT. R. 9, § 6.4; TENN. SUP. CT. R. 9, § 8.2. The members of the panel are selected on a rotating basis from the members of the district committee in the district in which the respondent practices law. TENN. SUP. CT. R. 9, § 8.2. If there are not enough members in that district to serve on the panel, the Chair can select members from the district committee of an adjoining district to serve on the panel. *Id.*

⁴⁸ TENN. SUP. CT. R. 9, § 8.1.

⁴⁹ TENN. SUP. CT. R. 9, § 8.2.

⁵⁰ *Id.*

⁵¹ TENN. SUP. CT. R. 9, § 6.4.

⁵² *Id.*

⁵³ TENN. SUP. CT. R. 9, § 8.3.

⁵⁴ TENN. SUP. CT. R. 9, § 8.4. If such a settlement is reached, the Board also will forward the decision to the Tennessee Supreme Court. *Id.*

The State of Tennessee gives the district attorney general's office in the county where the murder occurred unlimited discretion to seek the death penalty in first-degree murder cases.⁵⁵ If the decision is made to seek a death sentence, the prosecutor must file a notice of intent to seek the death penalty.⁵⁶ The notice must specify that the State intends to seek the death penalty and the aggravating circumstances that the State intends to rely on at the sentencing hearing.⁵⁷ The notice must be filed not less than thirty days prior to trial.⁵⁸ A prosecutor has the discretion to withdraw a notice of intent to seek the death penalty.⁵⁹ If the notice is filed after the filing deadline, then the judge must grant the defendant, if requested by motion, a "reasonable continuance of the trial."⁶⁰ If the State does not file a notice of intent to seek the death penalty and the defendant is found guilty of first-degree murder, the defendant must be sentenced to life imprisonment.⁶¹

2. Plea Agreements

A defendant has no constitutional right to a plea negotiation.⁶² However, Tennessee law permits a district attorney general to enter into plea negotiations with a defendant.⁶³ It is within the discretion of the district attorney general to decide "if and when a prosecution is to be instituted, the precise character of the offense to be charged, and, once instituted, whether the prosecution should go forward, enter into a plea bargain agreement, or dismiss the prosecution."⁶⁴ However, the "ultimate decision whether to accept or reject a particular plea bargain agreement rests entirely with the trial court."⁶⁵ Prior to accepting a plea agreement, the court must make an inquiry that sufficiently ensures that the defendant entered the plea knowingly and voluntarily.⁶⁶

⁵⁵ See *State v. Brimmer*, 876 S.W.2d 75, 86 (Tenn. 1994); see also *State v. McKinney*, 74 S.W.3d 291, 320 (Tenn. 2002) (rejecting defendant's contention that unlimited discretion in District Attorneys General decision of whether to seek the death penalty violates the Constitution).

⁵⁶ TENN. R. CRIM. P. 12.3(b).

⁵⁷ TENN. R. CRIM. P. 12.3(b)(2). In *State v. Berry*, the Tennessee Supreme Court ruled that "a defendant in a capital case is not entitled to any form of notice as to the nature of the aggravating circumstances to be presented to the jury at the sentencing hearing." *State v. Berry*, 592 S.W.2d 553, 562 (Tenn. 1980). But the *Berry* Court did recognize it as a "prudent" practice by the State. *Id.* For example, seeking the death penalty affects jury selection procedures, the number of jury challenges, and the number of appointed counsel. TENN. R. CRIM. P. 12.3 cmt.

⁵⁸ TENN. R. CRIM. P. 12.3(b)(1).

⁵⁹ See *State v. Hines*, 919 S.W.2d 573, 578 n.2 (Tenn. 1995).

⁶⁰ *Id.*; TENN. R. CRIM. P. 12.3(b).

⁶¹ TENN. CODE ANN. § 39-13-208(c) (2006).

⁶² See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *State v. Head*, 971 S.W.2d 49, 50 (Tenn. Crim. App. 1997).

⁶³ TENN. R. CRIM. P. 11(c).

⁶⁴ *Head*, 971 S.W.2d at 51; see also *State v. Turner*, 713 S.W.2d 327, 330 (Tenn. Crim. App. 1986) ("Plea bargaining is a matter which lies entirely within the prosecutor's discretion.").

⁶⁵ *Harris v. State*, 875 S.W.2d 662, 666 (Tenn. 1994).

⁶⁶ See *State v. Howell*, 185 S.W.3d 319, 331 (Tenn. 2006). The court must question the defendant on the record to ensure that the defendant understands:

- (1) The nature of the charge for which the plea is offered and the mandatory minimum and maximum penalties provided by law;

3. Discovery

a. Discovery Requirements

There is no constitutional right to discovery in criminal cases.⁶⁷ However, state and federal law entitles a defendant to receive all exculpatory information or evidence.⁶⁸ The prosecutor “is not required to deliver his[/her] entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”⁶⁹ In capital cases, this means that the prosecution must turn over evidence that supports mitigating circumstances at the penalty phase of the trial,⁷⁰ in addition to evidence that would be exculpatory during the guilt phase, including the disclosure of impeachment evidence that could be used to show bias or interest on the part of a key State witness.⁷¹ Accordingly, the State is under a duty to reveal any deal or agreement, even an informal one, where leniency has been promised to a state witness, who has criminal charges pending against him/her, in exchange for testimony against the defendant.⁷² A prosecutor also must disclose “favorable evidence known to the others acting on the government’s behalf in the case,” such as the police.⁷³

Additionally, Rule 16 of the Tennessee Rules of Criminal Procedure requires the prosecutor to make the following material and information available to the defendant upon his/her request:

- (1) The substance of any of the defendant’s oral statements made before or after arrest in response to interrogation by any person the defendant knew
-
- (2) The right of the defendant to be represented by counsel at every stage of the proceeding and have counsel appointed;
 - (3) The right of the defendant to plead not guilty and persist in that plea, the right to a jury trial, the right to assistance of counsel, the right to confront and cross-examine witnesses against him/her, and the right against compelled self-incrimination;
 - (4) That by pleading guilty or *nolo contendere*, the defendant waives the right to a trial; and
 - (5) That if the defendant enters a guilty or *nolo contendere* plea, the trial court may question the defendant regarding the offenses and that any of the defendant’s answers made under oath, on the record, and in the presence of counsel may later be used against the defendant in a subsequent prosecution for perjury or false statement.

Id., (citing TENN. R. CRIM P. 11(c)(1)-(5)).

⁶⁷ See *Weatherford*, 429 U.S. at 559; *State v. Dowell*, 705 S.W.2d 138, 142 (Tenn. Crim. App. 1985) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.”).

⁶⁸ See *Brady v. Maryland*, 373 U.S. 83 (1963). See also, *State v. Ferguson*, 2 S.W.3d 912, 915 (Tenn. 1999) (noting that *Brady* has been interpreted as providing a defendant with “a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment.”); see also *Wade v. State*, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995).

⁶⁹ *United States v. Bagley*, 473 U.S. 667, 675 (1985); see also *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995).

⁷⁰ See *Johnson v. State*, 38 S.W.3d 52, 56 n. 3 (Tenn. 2001).

⁷¹ See *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Ferguson*, 2 S.W.3d at 915.

⁷² See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *State v. Williams*, 690 S.W.2d 517, 525 (Tenn. 1985); *State v. Benson*, 645 S.W.2d 423, 426 (Tenn. Crim. App. 1983).

⁷³ *Johnson*, 38 S.W.3d at 56.

- was a law enforcement officer if the State intends to offer the statement in evidence at the trial;
- (2) Defendant's written or recorded statements, including: (a) the defendant's relevant written or recorded statements, or copies thereof, if (i) the statement is within the State's possession, custody, or control; and (ii) the district attorney generally knows— or through due diligence could know— that the statement exists; and (b) the defendant's grand jury testimony which relates to the offense charged;
 - (3) When the State decides to place codefendants on trial jointly, all information discoverable, including any oral statements made by a defendant before or after their arrest and any relevant written or recorded statements made by a defendant, as to each codefendant;
 - (4) A copy of the defendant's prior criminal record, if any, that is within the State's possession, custody, or control if the district attorney general knows— or through due diligence could know— that the record exists;
 - (5) Books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the State's possession, custody, or control and (a) the item is material to preparing the defense; (b) the government intends to use the item in its case-in-chief at trial; or (c) the item was obtained from or belongs to the defendant; and
 - (6) The results or reports of physical or mental examinations, and of scientific tests or experiments if (a) the item is within the State's possession, custody, or control; (b) the district attorney general knows— or through due diligence could know— that the item exists; and (c) the item is material to preparing the defense or the State intends to use the item in its case-in-chief at trial.⁷⁴

However, the State does not have to disclose any reports, memoranda, or other internal state documents made by the district attorney general, other state agents, or law enforcement officers in connection with investigating or prosecuting the case.⁷⁵ Additionally, the State does not have to disclose statements made by State witnesses or prospective State witnesses, or recorded proceedings of the grand jury.⁷⁶

The State has a reciprocal right to request discovery which is “always triggered by the defendant.”⁷⁷ For example, if the defendant requests reports of examinations and tests from the prosecution, then the prosecution has a reciprocal right to request these documents from the defendant.⁷⁸ Yet, the State is limited to discovery of items that are within the defendant's possession, custody, or control, and those items the defendant

⁷⁴ TENN. R. CRIM. P. 16(a)(1).

⁷⁵ TENN. R. CRIM. P. 16(a)(2).

⁷⁶ TENN. R. CRIM. P. 16(a)(2)-(3). A court can require a grand jury to reveal the testimony of a grand jury witness to determine if the grand jury testimony is consistent with the testimony provided by a witness before the court, or to disclose the grand jury testimony of any witness charged with perjury. TENN. R. CRIM. P. 6(k)(2).

⁷⁷ TENN. R. CRIM. P. 16 cmt. (“The rule is always triggered by the defendant; where the defendant requests disclosure, the reciprocal rights of the [S]tate come into play.”).

⁷⁸ TENN. R. CRIM. P. 16(b)(1)(B).

“intends to introduce” at the trial or is intending to call the preparer of the report as a witness at the trial.⁷⁹ However, the “State must first comply with the discovery requests of the defendant,” before the State can obtain discovery from the defendant.⁸⁰

Additionally, the parties have a “continuing duty to disclose” evidence up to the time of trial and during the course of the trial if the evidence is subject to discovery or inspection under Rule 16, and the other party previously requested, or the court ordered, production of the evidence.⁸¹

b. Challenges to Discovery Violations

Rule 16 of the Tennessee Rules of Criminal Procedure may provide relief when either the prosecution or the defense fails to make a required disclosure.⁸² Upon a party’s failure to make a required disclosure of evidence, “the court has great discretion in fashioning a remedy”⁸³ and when fashioning a remedy, the court must account for the particular circumstances of the case.⁸⁴ Such remedies can include the inspection of the discoverable evidence, a continuance so that the party can inspect the discoverable evidence or meet with the previously undisclosed witness, or exclusion of the discoverable evidence.⁸⁵

A defendant may also obtain relief for the prosecution’s failure to disclose evidence which is exculpatory as to guilt or punishment, known as *Brady*⁸⁶ material, by proving that:

- (1) S/he requested the discoverable information, unless the evidence is obviously exculpatory, in which case such a request is unnecessary, as the State is bound to release the information whether it is requested or not;
- (2) The State suppressed the information;
- (3) The information was favorable to the defendant; and
- (4) The information was material.⁸⁷

The prosecution’s failure to disclose *Brady* evidence that is material to guilt will result in a new trial⁸⁸ and failure to disclose *Brady* evidence that is material to punishment will result in a new sentencing proceeding.⁸⁹

⁷⁹ *Id.*

⁸⁰ W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE, § 13:12 (2006).

⁸¹ TENN. R. CRIM. P. 16(c)(1)-(2).

⁸² *See* TENN. R. CRIM. P. 16(d)(2).

⁸³ *State v. James*, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984).

⁸⁴ *See State v. Cadle*, 634 S.W.2d 623, 625 (Tenn. Crim. App. 1982).

⁸⁵ *Id.*

⁸⁶ *Brady v. Maryland* held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁸⁷ *United States v. Agurs*, 427 U.S. 97, 106-107 (1976); *see also Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001).

⁸⁸ *Agurs*, 427 U.S. at 112-13; *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995).

⁸⁹ *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

4. Limitations on Arguments

a. Substantive Limitations

The Tennessee courts have stated that closing arguments must be “temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts of law.”⁹⁰ In fact, the courts have determined that the *American Bar Association Standards Relating to the Prosecutorial Function and the Defense Function* have been relied upon so frequently by the Tennessee Supreme Court that these standards are now mostly obligatory.⁹¹ The ABA standards have identified five types of conduct that rise to the level of prosecutorial misconduct:

- (1) The prosecutor intentionally misstates the evidence or misleads the jury as to the inferences it may draw;
- (2) The prosecutor expresses his/her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant;
- (3) The prosecutor uses arguments calculated to inflame the passions or prejudices of the jury;
- (4) The prosecutor uses an argument that diverts the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict; and
- (5) The prosecutor intentionally refers to or argues facts outside the record unless the facts are matters of common public knowledge.⁹²

Additionally, courts have determined that a prosecutor may not reference his/her personal opinions during opening and closing statements,⁹³ discuss the jury’s lack of responsibility in making the ultimate decision,⁹⁴ mention the jury’s duty to impose death,⁹⁵ or reference Biblical and scriptural references.⁹⁶

b. Challenges to Prosecutorial Arguments

⁹⁰ *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003).

⁹¹ *Id.* at 6.

⁹² *Id.*

⁹³ *See United States v. Young*, 470 U.S. 1, 9 (1989); *State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *State v. Thomas*, 2006 WL 1446842, *17 (Tenn. Crim. App. 2006) (slip copy).

⁹⁴ *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *see also Sledge v. State*, 1997 WL 730245, *26-27 (Tenn. Crim. App. 1997) (In assessing a *Caldwell v. Mississippi* violation, the court considers: “whether the trial court endorsed the proper remarks; the extent and the specificity of the statements given the context of the arguments as a whole; whether other portions of the prosecutor’s argument properly set forth the jury’s role; and whether the court properly instructed the jury as to its role under the law.”).

⁹⁵ *Young*, 470 U.S. at 8-9.

⁹⁶ *See State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999); *State v. Cribbs*, 967, S.W.2d 773, 783-84 (Tenn. 1998); *State v. Richardson*, 992 S.W.2d 119, 127 (Tenn. Crim. App. 1998).

A prosecutor's statement is improper when the conduct of the prosecutor could have affected the verdict to the prejudice of the defendant.⁹⁷ If the prosecutor makes improper statements during his/her opening statement, defense counsel can object and the court can admonish the jury to disregard the statement, and/or defense counsel can move for a mistrial.⁹⁸ When determining the prejudicial effect of a prosecutor's statements, the court considers:

- (1) The facts and circumstances of the particular case;
- (2) Any curative measures undertaken by the court and the prosecutor;
- (3) The intent of the prosecution;
- (4) The cumulative effect of the improper conduct and any other errors in the record; and
- (5) The relative strength or weakness of the case.⁹⁹

If the court determines that the prosecutor's closing remarks could have affected the jury's verdict to the prejudice of the defendant, the defendant is entitled to a new trial.¹⁰⁰

⁹⁷ See *State v. Reid*, 164 S.W.3d 286, 344 (Tenn. 2005); *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965).

⁹⁸ See *W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE*, § 21:7 (2006).

⁹⁹ See *Goltz*, 111 S.W.3d at 5-6.

¹⁰⁰ See *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965).

II. ANALYSIS

A. Recommendation #1

Each prosecutor’s office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

The State of Tennessee does not require district attorneys general offices to have written policies governing the exercise of prosecutorial discretion. The Tennessee Supreme Court, however, has established the Tennessee Rules of Professional Conduct (the Rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.¹⁰¹

The Rules describe the prosecutor as “a minister of justice.”¹⁰² Accordingly, prosecutors “are expected to be impartial in the sense that they must seek the truth and not merely obtain convictions” and their charging decisions “should be based upon the evidence.”¹⁰³ The Rules also require prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”¹⁰⁴

In terms of seeking the death penalty, Tennessee law provides prosecutors with discretion to do so in any first-degree murder case.¹⁰⁵ Although filing a notice of intent to seek the death penalty is not constitutionally required, the Tennessee Supreme Court has recognized that filing such notice “is the better practice.”¹⁰⁶ Indeed, the Tennessee Supreme Court has recognized that the “purpose of [Rule 12.3 of the Tennessee Rules of Criminal Procedure] is to ensure that the defense receives timely notice to enable adequate trial preparation.”¹⁰⁷ Therefore, the State’s failure to file a timely notice of intent to seek the death penalty enables the defendant to file a motion requesting a “reasonable” continuance of the trial.¹⁰⁸

Notwithstanding these standard procedural limitations on prosecutors’ ability to seek the death penalty, a recent report released by the State Comptroller of the Treasury found that “[p]rosecutors are not consistent in their pursuit of the death penalty.”¹⁰⁹ The report specifically found that:

Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme cases, or the “worst of the worst.”

¹⁰¹ TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT R. 3.8.

¹⁰² TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT R. 3.8 cmt 1.

¹⁰³ *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000).

¹⁰⁴ TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT R. 3.8(a).

¹⁰⁵ *See State v. McKinney*, 74 S.W.3d 291, 320 (Tenn. 2002); *see also State v. Reid*, 164 S.W.3d 286, 316 (Tenn. 2005) (declining to review prosecutorial discretion in seeking the death penalty.); *State v. Thomas*, 158 S.W.3d 361, 381 (Tenn. 2005).

¹⁰⁶ *State v. Harris*, 919 S.W.2d 323, 331 (Tenn. 1996).

¹⁰⁷ *Id.*

¹⁰⁸ TENN. R. CRIM. P. 12.3(b)(1).

¹⁰⁹ Wilson, et. al., *Tennessee’s Death Penalty: Costs and Consequences* at 13 (2004).

However, prosecutors in other jurisdictions make it a standard practice in every first-degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a “bargaining chip” to secure plea bargains for lesser sentences. Many prosecutors also indicated that they consider the wishes of the victim’s family when making decisions about the death penalty.¹¹⁰

The only consistency found by the report was that “[a]ll prosecutors indicated that some first-degree murder cases are clearly capital cases, such as cases with multiple victims or situations in which the act was particularly brutal and cruel.”¹¹¹

The Comptroller’s report also conducted a survey of 240 first-degree murder cases from 1993 to 2003 and found that: 44.7 percent of the death penalty cases originated in Shelby County, 6.4 percent in Davidson County, 2.1 percent in Hamilton County, and 2.1 percent in Knox County.¹¹² This sort of geographic disparity is a strong indicator of inconsistent prosecutorial decision-making.

Based on this information, it is questionable whether prosecutors in the State of Tennessee are exercising their discretion in a way that ensures fair, efficient, and effective enforcement of criminal law. We are unable to ascertain whether any of the district attorneys general offices have adopted written policies addressing prosecutorial discretion in seeking the death penalty. Consequently, we are unable to ascertain whether the State of Tennessee is in compliance with Recommendation #1.

Furthermore, in an effort to standardize the charging decision, the Tennessee Death Penalty Assessment Team recommends that the State of Tennessee develop statewide protocols for determining who may be charged with a capital crime. In standardizing the charging decision, defense attorneys should always be provided the opportunity to meet with the prosecutor to explain why s/he believes that the defendant should not be charged with a capital offense.

B. Recommendation #2

Each prosecutor’s office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

The State of Tennessee does not require each district attorneys general office to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or testimony of jailhouse snitches, informants and other witnesses who receive benefit. Each district attorneys general office may have such procedures and polices, but we were unable to obtain copies of any of these policies and procedures.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 13-14.

Tennessee courts have adopted a framework for juries to consider when assessing the reliability of confessions and testimony from snitches, informants and other witnesses that receive a benefit. The *Tennessee Criminal Pattern Jury Instructions* provide the jury with factors to use when considering the reliability of the testimony.¹¹³ The general instruction pertaining to witness reliability, which must be given in each case, states:

In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his or her general character, the evidence, if any, of the witness' reputation for truth and veracity, the intelligence and respectability of the witness, his or her interest or lack of interest in the outcome of the trial, his or her feelings, his or her apparent fairness or bias, his or her appearance and demeanor while testifying, his or her contradictory statements as to material matters, if any are shown, and all the evidence in the case tending to corroborate or to contradict him or her.¹¹⁴

The *Tennessee Criminal Pattern Jury Instructions* also have an "alternative" instruction addressing the credibility of witnesses that can be given to the jury which states:

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

- (1) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?
- (2) Did the witness seem to have a good memory?
- (3) How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions?
- (4) Has there been any evidence presented regarding the witness' intelligence, respectability or reputation for truthfulness?
- (5) Does the witness have any bias, prejudice, or personal interest in how the case is decided?
- (6) Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?
- (7) In general, does the witness have any special reason to tell the truth, or any special reason to lie?
- (8) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?¹¹⁵

¹¹³ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS §§ 42.04, 42.04(a).

¹¹⁴ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 42.04.

¹¹⁵ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 42.04(a).

In determining the reliability of the witness, this instruction specifically allows the jury to consider whether the witness has a stake in the case and whether s/he has received any benefits in exchange for testifying.¹¹⁶

Additionally, the *Tennessee Criminal Pattern Jury Instructions* provide the jury with factors to consider when determining the voluntariness of a defendant's confession.¹¹⁷ The instruction states:

Evidence of a confession has been introduced in this case.

A confession is a statement by the defendant that [s/he] engaged in conduct which constitutes the crime charged and is an acknowledgement of guilt itself.

The court has ruled that the confession is admissible in evidence, but it is your duty to judge its truth. In so judging, you should consider the circumstances under which the confession was obtained as well as any evidence which contradicts all or part of the statements made. You must consider all the statements made by the defendant, whether favorable or unfavorable to [him/her], and you must not disregard any of them without good reason. If the evidence in the case leads you to believe that the confession or any part of it is untrue or was never made, you should disregard it or that portion which you do not believe.¹¹⁸

Despite these jury instructions which allow the jury to consider the reliability of witness testimony, we are unable to obtain any statewide or local policies for evaluating cases which rely upon eyewitness identification, informants, snitches, or other witnesses receiving a benefit from the State. Therefore, it is unclear if the State of Tennessee is in compliance with Recommendation #2.

C. Recommendation #3

Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

State and federal law requires prosecutors to disclose evidence that is favorable to the defendant when such evidence is material to either the defendant's guilt or punishment. This includes all exculpatory information or evidence.¹¹⁹ Additionally, the prosecutor

¹¹⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 42.04(a).

¹¹⁷ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 42.12.

¹¹⁸ *Id.*

¹¹⁹ *See Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Ferguson*, 2 S.W.3d 912, 915 (Tenn. 1999).

must disclose “favorable evidence known to the others acting on the government’s behalf in the case.”¹²⁰

When disclosing evidence, the Tennessee Rules of Criminal Procedure require prosecutors to permit defendants to inspect, copy, or photograph discoverable evidence that is within the State’s “possession, custody, or control.”¹²¹ Such evidence that is subject to this requirement includes, but is not limited to: the defendant’s relevant written or recorded statements; documents or other tangible objects that were obtained from or belong to the defendant, are material to preparing the defense, or that State intends to use in the trial; and “reports of physical or mental examinations, and of scientific tests or experiments.”¹²²

Prosecutors also have an ethical obligation to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, shall disclose to the defense and, if the defendant is proceeding *pro se*, to the tribunal[,] all unprivileged mitigating information known to the prosecutor.”¹²³

Based upon this information, it appears that the State of Tennessee has the necessary framework in place to permit prosecutors to fully and timely disclose all information, documents, and tangible objects to the defense. It also appears that this framework permits reasonable inspection, copying, testing, and photographing of the disclosed documents and tangible objects. However, some prosecutors still fail to comply with discovery requirements despite this framework.

For example, one assistant district attorney general, John C. Zimmerman, received a public censure in 2002 for violating a “defendant’s constitutional rights by withholding material evidence that the defendant’s attorney was entitled to receive.”¹²⁴ Specifically, Mr. Zimmerman failed to turn over exculpatory evidence in an arson case in which the defendant received life imprisonment.¹²⁵ The State’s case relied upon demonstrating that the defendant “locked” the victim in a utility room of the house and set fire to the house.¹²⁶ However, the evidence suppressed by the assistant district attorney general demonstrated that the room was not locked.¹²⁷

¹²⁰ Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001).

¹²¹ TENN. R. CRIM. P. 16(a)(1).

¹²² *Id.*

¹²³ TENN. SUP. CT. R. 8, RULES OF PROF’L CONDUCT R. 3.8(d).

¹²⁴ TENN. SUP. CT., BOARD OF PROF’L RESPONSIBILITY, *Nashville Lawyer Censured* (2002), available at <http://www.tbpr.org/NewsAndPublications/Releases/Pdfs/009723-20020529.pdf> (last visited on Feb. 20, 1979). Assistant district attorney general Zimmerman has had a history of misconduct, including a similar failure to comply with discovery rules. *See In re Zimmerman*, 1986 WL 8586 (Tenn. Crim. App. 1986).

¹²⁵ *See* Garrett v. Tennessee, 2001 WL 280145 (Tenn. Crim. App. March 22, 2001).

¹²⁶ *Id.* at *15.

¹²⁷ *Id.* at *13-14. The Tennessee Court of Criminal Appeals found that the report suppressed by the State indicating that the door was unlocked was both exculpatory and material. *Id.* at *14. The Court assessed the evidence suppression in light of *Brady* and found that the “State withheld exculpatory information which was material to the showing of guilt, and because the withholding of that information undermines

Prior to the public censure, this same assistant district attorney general also prosecuted a death penalty case in which the defendant, on appeal, claimed that the prosecutor withheld various forms of exculpatory evidence, such as:

- (1) Evidence supporting that an accomplice, rather than the defendant, stabbed the victim;
- (2) Evidence demonstrating that a prior murder conviction in 1972 was in fact committed by the defendant to protect himself from being raped while he was in prison, instead of, as the prosecutor told the jury during the sentencing phase of the trial, committed in “a turf war in the prison between the two gangs as to who would control the drug trade in the prison.” This prior murder conviction was used by the prosecutor as an aggravating circumstance to support a death sentence; and
- (3) Evidence demonstrating that the defendant had a well-documented history of mental illness.¹²⁸

Six former Tennessee prosecutors filed an Amicus Brief in the United States Supreme Court on behalf of the defendant, Abu-Ali Abdur’Rahman.¹²⁹ The Amicus Brief recounted Abdur’Rahman’s claims of prosecutorial misconduct and concluded that “the record of this case shows that the prosecutor [Zimmerman] engaged in a pattern of deception that deprived petitioner [Abdur’Rahman], and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner’s trial.”¹³⁰ The United States Supreme Court, however, declined to review the prosecutorial misconduct claims.¹³¹

Additionally, the Center for Public Integrity’s study of Tennessee criminal appeals, including both death and non-death cases, from 1970 to June 2003, revealed 200 cases in which the defendant alleged prosecutorial error or misconduct.¹³² In eighteen of these cases, judges reversed or remanded a defendant’s conviction, sentence or indictment due to a prosecutor’s conduct.¹³³ Of the cases in which judges ruled that the prosecutor’s conduct prejudiced the defendant, six involved the prosecution withholding evidence from the defense.¹³⁴

our confidence in the outcome of the trial, we hold that the State committed such a *Brady* violation as to require a new trial.” *Id.* at *18.

¹²⁸ See Brief for Former Prosecutors James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels, United States Supreme Court Amicus Brief In Support of Petitioner (2002), Abdur’Rahman v. Bell, No. 01-9094.

¹²⁹ *Id.*

¹³⁰ *Id.* at *24.

¹³¹ See 537 U.S. 88, 89 (2002) (dismissing writ of certiorari as improvidently granted) (Stevens, J. dissenting).

¹³² Center for Pubic Integrity, *Harmful Error*, available at <http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y> (last visited on Feb. 20, 2007).

¹³³ *Id.*

¹³⁴ Center for Pubic Integrity, *Harmful Error*, available at <http://www.publicintegrity.org/pm/states.aspx?st=TN> (last visited on February 20, 2007).

Although Tennessee has the necessary framework in place to permit prosecutors to fully and timely disclose evidence and many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, they do not always do so. We, therefore, conclude that the State of Tennessee is only in partial compliance with Recommendation #3.

D. Recommendation #4

Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.

The State of Tennessee has entrusted the Board of Professional Responsibility of the Tennessee Supreme Court and the Disciplinary Counsel with investigating grievances and disciplining practicing attorneys.¹³⁵ Initially, a written complaint or grievance is filed with the Board of Professional Responsibility.¹³⁶ All attorneys, including prosecutors, are required to report professional misconduct of other attorneys to the Board of Professional Responsibility.¹³⁷

The merits of the complaint are investigated by the Disciplinary Counsel.¹³⁸ Upon concluding the investigation, the Disciplinary Counsel can recommend several different types of discipline, including dismissal, informal admonition, private reprimand, public censure, or prosecution of formal charges before a hearing panel.¹³⁹ If the Disciplinary Counsel recommends the dismissal of the complaint or informal admonition, then the recommendation is reviewed by the district committee member in the appropriate disciplinary district for approval or modification.¹⁴⁰ A decision by the district committee member can be appealed by the Disciplinary Counsel to the Board of Professional Responsibility.¹⁴¹

If the Disciplinary Counsel recommends a private reprimand, public censure, or prosecution of formal charges before a hearing panel, then the Board of Professional Responsibility will approve the action or make a modification.¹⁴² In cases in which the Board of Professional Responsibility approves prosecution of formal charges before a hearing panel, the panel will conduct the hearing and forward its findings and judgment to the Board of Professional Responsibility.¹⁴³ If the hearing panel recommends that the

¹³⁵ TENN. SUP. CT. R. 9, § 8.1 (2006).

¹³⁶ TENN. SUP. CT. R. 9, §§ 8.1, 8.2 (2006).

¹³⁷ TENN. SUP. CT. R. 8, RULES OF PROF'L CONDUCT R. 8.3 (2006).

¹³⁸ TENN. SUP. CT. R. 9, § 8.1 (2006).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ TENN. SUP. CT. R. 9, § 8.3 (2006).

lawyer should be disbarred for any length of time, the Board of Professional Responsibility will forward the decision to the Tennessee Supreme Court to review addressing the uniformity of the punishment and the appropriateness of the punishment in the particular case.¹⁴⁴

According to the American Bar Association Center for Professional Responsibility, the State Bar of Tennessee received 1,247 complaints about alleged attorney misconduct in 2004.¹⁴⁵ Of these cases, 321 were summarily dismissed for lack of jurisdiction, 926 were investigated, 1,110 were dismissed after investigation, forty-eight complaints warranted the filing of formal charges, and forty-eight attorneys were formally charged.¹⁴⁶ Furthermore, forty-six lawyers were publicly sanctioned in 2004.¹⁴⁷ Of the forty-six lawyers who were publicly sanctioned, seven of them were disbarred, fourteen were suspended, two were suspended on an interim basis (for risk of harm or criminal conviction), twenty-five were publicly reprimanded and/or censured, and six were transferred to disability/inactive status.¹⁴⁸ Because there was a “gag order” on the attorney discipline and complaint process, we were unable to determine how many, if any, of these attorneys were or are prosecutors.

The organization HALT,¹⁴⁹ which evaluates lawyer discipline systems across the country, assigned a grade of “C+” to Tennessee’s lawyer discipline system, based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of disciplinary procedures, the amount of public participation, and promptness of follow-up on complaints.¹⁵⁰ One of the reasons for Tennessee’s low grade is the inadequacy of the lawyer discipline agency’s investigation and imposition of sanctions and discipline.¹⁵¹ Specifically, fewer than six percent of investigated lawyer discipline cases result in public sanctions.¹⁵² Despite Tennessee’s C+ grade, HALT ranks Tennessee as having the fourth best attorney disciplinary process in the country.¹⁵³ This high relative ranking is due “primarily

¹⁴⁴ TENN. SUP. CT. R. 9, § 8.4 (2006).

¹⁴⁵ ABA Center for Professional Responsibility, Survey on Lawyer Discipline Systems, 2004, *available at* http://www.abanet.org/cpr/discipline/sold/toc_2004.html (last visited on Feb. 20, 2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ According to its website, HALT – *An Organization of Americans for Legal Reform*, is a nonprofit, nonpartisan public interest group of more than 50,000 members and is the nation’s largest and oldest legal reform organization. “Dedicated to the principle that all Americans should be able to handle their legal affairs simply, affordably and equitably, HALT’s Reform Projects challenge the legal establishment to improve access and reduce costs in our civil justice system at both the state and federal levels.” HALT, About HALT, *at* http://www.halt.org/about_halt/ (last visited Jan. 8, 2007).

¹⁵⁰ HALT, Lawyer Discipline 2006 Report Card, Tennessee, *available at* http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/TN_LDRC_06.pdf (last visited on November 2, 2006).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

because the state supreme court struck down Tennessee’s longstanding gag rule in 2004.”¹⁵⁴

Moreover, the Center for Public Integrity’s study of Tennessee’s criminal appeals, including both capital and non-capital cases, from 1970 to June 2003, revealed 200 cases in which the defendant alleged prosecutorial error or misconduct.¹⁵⁵ In eighteen of these cases, judges reversed or remanded a defendant’s conviction, sentence or indictment due to a prosecutor’s conduct.¹⁵⁶ In an additional two cases, a dissenting judge or judges thought the prosecutor’s conduct prejudiced the defendant.¹⁵⁷ Of the cases in which judges ruled the prosecutor’s conduct prejudiced the defendant, eight involved improper trial behavior such as arguments and witness examination, six involved the prosecution withholding evidence from the defense, two involved conflict of interest with special prosecutors and private prosecutors, and two involved “various improper tactics.”¹⁵⁸ In the majority of cases in which the defendant alleged prosecutorial misconduct (172 out of 200), however, the prosecutor’s conduct or error was found to be harmless.¹⁵⁹ We were unable to determine how many of the prosecutors in these cases were referred to the State Bar for discipline.

Although the State of Tennessee has established a procedure by which grievances are investigated and members of the State Bar are disciplined, the “gag order” previously in place in Tennessee makes it difficult to know whether or not the state lawyer discipline agency—the Tennessee Board of Professional Responsibility—has adequately investigated and imposed discipline on lawyers. Consequently, we are unable to assess whether the State of Tennessee is in compliance with Recommendation #4.

E. Recommendation #5

Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.

The Tennessee Supreme Court has stated that a prosecutor is responsible for disclosing “any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”¹⁶⁰ However, the Court recognized that there is no constitutional requirement that the State make available a “complete and detailed

¹⁵⁴ *Id.* A “gag” rule holds an individual in contempt of court if they do not keep secret the fact that they have filed grievances against their attorneys. *Id.*

¹⁵⁵ Center for Public Integrity, *Harmful Error*, available at <http://www.publicintegrity.org/pm/states.aspx?st=TN> (last visited on February 20, 2007).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Center for Public Integrity, *Nationwide Numbers*, available at <http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y> (last visited on February 20, 2007).

¹⁶⁰ *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 275 n. 12 (1999)).

accounting” of the entire police investigation to the defendant.¹⁶¹ If the State has failed to disclose exculpatory or mitigating evidence, then the defendant must satisfy the *Brady* requirements, which include:

- (1) That the defendant requested the information, unless the evidence is obviously exculpatory, in which case the State is required to disclose the evidence whether requested or not;
- (2) That the State suppressed the information;
- (3) That the information was favorable to the accused; and
- (4) That the information was material.¹⁶²

If the State fails to disclose evidence material to guilt, then the defendant could receive a new trial¹⁶³ and if the State fails to disclose evidence material to punishment, then the defendant could receive a new sentencing trial.¹⁶⁴ These potential outcomes encourage all law enforcement agencies, laboratories, and other experts under the control of the prosecutor to comply with their obligation to inform the prosecutor of any potentially exculpatory or mitigating evidence.

We were unable to obtain any information addressing whether the law enforcement agencies, laboratories, and other experts have failed to provide prosecutors with exculpatory or mitigating evidence. Despite the fact that disclosing evidence is in the best interest of prosecutors, we do not have sufficient information to draw any conclusions as to whether all prosecutors are in compliance with Recommendation #5.

F. Recommendation #6

The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

The Tennessee District Attorneys General's Conference offers some training programs, including a New Prosecutors Academy.¹⁶⁵ Additional training programs have been sponsored by the Tennessee District Attorneys General's Association. These programs have been conducted by the National District Attorneys Association and the National Advocacy Center at the University of South Carolina. There are, however, no mandatory training programs. Capital prosecutors in Tennessee can acquire training with national training organizations – the National District Attorneys Association and its research and

¹⁶¹ *Johnson*, 38 S.W.3d at 56; *see also* *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (“We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.”); *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995).

¹⁶² *Johnson*, 38 S.W.3d at 56.

¹⁶³ *United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995).

¹⁶⁴ *See generally* *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁶⁵ *See* Tennessee District Attorneys General Conference, Training, available at <http://www.tndagc.org/departments.htm> (last visited Jan. 8, 2007).

training affiliate, the American Prosecutor's Research Institute, and the National College of District Attorneys.

Based on this information, the State of Tennessee is in compliance with Recommendation #6.

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel’s errors, the result of the proceeding would have been different.¹ The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.² In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

¹ Strickland v. Washington, 466 U.S. 668 (1984).

² James S. Liebman *et al.*, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html> (last visited Feb. 19, 2007).

I. FACTUAL DISCUSSION

Tennessee's indigent legal representation system for capital defendants consists primarily of the District Public Defenders Conference and the Office of the Post-Conviction Defender.³ In 1989, the Tennessee legislature created the District Public Defenders Conference, a statewide system of public defenders, who today carry the chief responsibility of representing indigent capital defendants at trial and on appeal.⁴ In 1995, the Tennessee legislature created the Office of the Post-Conviction Defender to provide representation to indigent death-row inmates in state post-conviction proceedings.⁵

In addition to these two entities, the State of Tennessee maintains an indigent defense fund to compensate private attorneys who represent indigent defendants.⁶

A. *The District Public Defenders Conference*

The District Public Defenders Conference (Conference) is comprised of thirty-one public defenders; each of whom represents one of the State's thirty-one judicial districts.⁷ As members of the Conference, all district public defenders are statutorily mandated to meet at least once a year to consider any matter related to their duties so as to ensure the "more prompt and efficient administration of justice."⁸ They also must meet annually to elect a President, Vice-President, Secretary, and any other necessary officers for the Conference.⁹ The State Attorney General and Reporter also serves as an *ex officio* member and legal advisor to the Conference.¹⁰

The Office of the Executive Director (OED) serves as the central administrative office for the Conference.¹¹ The Tennessee Legislature created the OED to coordinate the defense efforts of the various public defenders in an effort to improve the "administration of justice."¹² The Executive Director is elected by Conference members to a four year-term, but is subject to removal upon a majority vote of the Conference.¹³

³ See TENN. CODE ANN. §§ 8-14-202, 40-30-205 (2006).

⁴ See 1989 Public Act Ch. 588, § 11; see generally TENN. CODE ANN. §§ 8-14-202 *et seq.*; 8-14-301 *et seq.*

⁵ 1995 Tenn. Pub. Acts 510; see also JOHN G. MORGAN, COMPTROLLER OF THE TREASURY OFFICE OF RESEARCH, TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES 25-26 (July 2004); see generally TENN. CODE ANN. § 40-30-202 *et seq.* (2006).

⁶ See STATE OF TENNESSEE, THE BUDGET FISCAL YEAR 2006-2007, VOL. 1, at B-190 [hereinafter TENNESSEE BUDGET FY 2006-2007], available at <http://www.state.tn.us/finance/bud/0607/0607Document.pdf> (last visited Feb. 16, 2007).

⁷ TENN. DEP'T OF STATE, TENNESSEE BLUE BOOK 2005-2006, at 309-10 [hereinafter BLUE BOOK 2005-2006], available at <http://www.tennessee.gov/sos/bluebook/> (last visited Feb. 19, 2007).

⁸ TENN. CODE ANN. § 8-14-302 (2006). Additionally, a committee must be appointed to draft legislation and make recommendations to the Tennessee General Assembly. TENN. CODE ANN. § 8-14-303 (2006).

⁹ TENN. CODE ANN. § 8-14-304 (2006).

¹⁰ TENN. CODE ANN. § 8-14-301(a) (2006).

¹¹ BLUE BOOK 2005-2006, *supra* note 7, at 309.

¹² TENN. CODE ANN. § 8-14-401 (2006).

¹³ TENN. CODE ANN. § 8-14-402(b) (2006).

In addition to coordinating defense efforts, the Executive Director must develop training materials and liaise with various state governmental agencies.¹⁴ The Executive Director also is responsible for budgeting, payroll, purchasing, personnel, and administration of all fiscal matters pertaining to the operation of the individual public defender offices.¹⁵

1. District Public Defender Offices

With the exception of the public defenders in Davidson County (Judicial District 20) and Shelby County (Judicial District 30), all district public defenders are elected to an eight-year term at the August general election by the voters in the judicial district in which they serve.¹⁶ These public defenders must be members of the Tennessee Bar, have resided in the State for at least five years, and have resided in the judicial district in which they are elected for at least one year.¹⁷ Unlike other members of the Conference, the public defender in Davidson County is elected to a four-year term, and the public defender in Shelby County is appointed to a four-year term by the mayor with the approval of the County's Board of Commissioners.¹⁸

In accordance with Tennessee Supreme Court Rule 13, the court must appoint the district public defender to represent any indigent defendant, unless a conflict of interest exists or the defender is not qualified.¹⁹ The public defender must not only counsel and represent the defendant in the trial court, but also must handle any appeals filed by the defendant.²⁰ Additionally, the district public defender may be obligated to advise the defendant of appellate review upon the dismissal of a state post-conviction or federal *habeas corpus* petition.²¹ To assist in these duties, the district public defender must appoint assistant district public defenders and district investigators, who serve at the "pleasure of the

¹⁴ TENN. CODE ANN. § 8-14-403(2), (4) (2006).

¹⁵ TENN. CODE ANN. § 8-14-403(5), (6) (2006). S/he also will serve as a member of the Judicial Council and the State Law Enforcement Planning Commission. TENN. CODE ANN. § 8-14-404 (2006). To assist in any of these duties, the Executive Director, upon the approval of the Conference's officers, must appoint an assistant executive director, a budget officer, a director, and any other necessary personnel. TENN. CODE ANN. § 8-14-405(a) (2006).

¹⁶ TENN. CODE ANN. § 8-14-202(b)(1)(A) (2006).

¹⁷ *Id.*

¹⁸ *See* Government in Shelby County, Public Defender, available at http://www.shelbycountyttn.gov/FirstPortal/dotShowDoc/Government/OfficeoftheMayor/pd_index.htm (last visited Feb. 17, 2007); *see* Public Defender of Davidson County, Nashville, A Short History of the Metropolitan Pubic Defender's Office, available at <http://publicdefender.nashville.gov/portal/page/portal/publicdefender/pdHistory> (last visited Feb. 17, 2007). Although Shelby and Davidson Counties joined the Conference in 1990, the two counties are served by local public defender offices that existed prior to the Conference's creation. *See* THE SPANGENBERG GROUP, TENNESSEE PUBLIC DEFENDER CASE-WEIGHTING STUDY, FINAL DRAFT REPORT 1 (April 1999) [hereinafter SPANGENBERG GROUP REPORT].

¹⁹ TENN. SUP. CT. R. 13, § 1(e)(4)(A), (B) (noting also that the court in its "sound discretion" can appoint other counsel when necessary); *see also* TENN. CODE ANN. § 8-14-204(a) (2006).

²⁰ TENN. CODE ANN. § 8-14-204(a)-(c) (2006).

²¹ TENN. CODE ANN. § 8-14-204(a) (2006).

public defender.”²² Assistant public defenders must be attorneys admitted to the Tennessee Bar.²³

2. Funding for the District Public Defender Conference

The State of Tennessee provides primary funding for the District Public Defenders Conference. For Fiscal Year 2004-2005, the State allocated a total of \$28,761,400 to the Conference, including \$751,000 for the Executive Director, \$2,840,000 for the Shelby County Public Defender, \$1,482,000 for the Davidson County Public Defender, and \$23,688,000 for the remaining district public defenders.²⁴ Other non-state sources provided an additional sum of \$1,676,900 in funding for the District Public Defenders Conference.²⁵ While both the Shelby County and Davidson County Public Defender Offices are members of the Conference, the counties and not the State provide for the majority of their funding.²⁶ For example, in Fiscal Year 2005-2006, the State provided the Davidson County Public Defender Office with \$1,516,200, but its primary funding of \$3,585,200 was derived from the county.²⁷

For Fiscal Year 2006-2007, the Governor recommended allocating \$33,298,400 for the District Public Defenders Conference.²⁸ As part of this sum, the Governor specifically recommended allocating \$1,222,600 for the Executive Director, \$2,906,100 for the Shelby County Public Defender, and \$1,516,200 for the Davidson County Public Defender.²⁹ The Governor recommended allocating the remainder of the funding, \$27,653,500, among the twenty-nine other public defender offices.³⁰

In addition to its financial backing, the State is statutorily mandated to provide each district public defender with office space, necessary equipment and supplies, and secretarial assistance.³¹

B. The Office of the Post-Conviction Defender

The Tennessee Legislature created the Office of the Post-Conviction Defender (Office) to provide representation exclusively to indigent inmates convicted of a capital offense.³²

²² TENN. CODE ANN. § 8-14-202(2), (3) (2006).

²³ *Id.*

²⁴ TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-199 to B-200.

²⁵ *Id.* at B-200.

²⁶ See SPANGENBERG GROUP REPORT, *supra* note 18, at 2.

²⁷ See METRO PUBLIC DEFENDER’S OFFICE, ANNUAL REPORT FISCAL YEAR 2005-2006, at 19, *available at* <http://publicdefender.nashville.gov/portal/page/portal/publicdefender/pdDownloadsMain/downloads/PublicDefenderAnnualReport-FY2006.pdf> (last visited Feb. 15, 2007). The Metro Public Defender’s Office also received \$165,500 from the Criminal Courts and another \$16,600 of funding for the Fiscal Year 2005-2006. *Id.*

²⁸ See 2006 Tenn. Pub. Acts 963 § 1; *see also* TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-199 to B-200.

²⁹ See 2006 Tenn. Pub. Acts 963 § 1; TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-200.

³⁰ See TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-199.

³¹ TENN. CODE ANN. § 8-14-203 (2006).

³² TENN. CODE ANN. § 40-30-205(g) (2006).

The Post-Conviction Defender is appointed to serve a term of four years by the Post-Conviction Defender Commission.³³ S/he must be an attorney in good standing with the Tennessee Supreme Court and possess “a demonstrated experience” in capital litigation.³⁴ The principal and only office of the Post-Conviction Defender is located in Nashville, but the Post-Conviction Defender is authorized to establish branch offices as needed.³⁵

The primary responsibility of the Post-Conviction Defender is to represent indigent death-row inmates in state post-conviction proceedings.³⁶ The Post-Conviction Defender also is allowed to represent any indigent capital defendant in federal *habeas corpus* proceedings, but “only to the extent that compensation for representation and reimbursement for expenses is provided by title 18 U.S.C. section 3006A or any other non-state funded source.”³⁷ Additionally, the Post-Conviction Defender must:

- (1) Maintain a clearinghouse of materials and repository of briefs prepared by the Post-Conviction Defender and made available to public defenders and private counsel who represent indigents charged with or convicted of capital crimes;
- (2) Provide continuing legal education training to public defenders, assistant post-conviction defenders and to private counsel representing indigents in capital cases, as resources are available;
- (3) Provide consulting services to all attorneys representing defendants in capital cases on a non-case-specific basis; and
- (4) Recruit qualified members of the private bar who are willing to provide representation in state death penalty proceedings.³⁸

In the interest of justice and where competent counsel is unavailable, the Post-Conviction Defender may represent an indigent capital defendant on direct appeal.³⁹ In case of such an event, the Office of the Post-Conviction Defender will be barred from representing the individual in any collateral proceedings.⁴⁰ Similarly, in the interest of justice, the Post-Conviction Defender may choose to represent a death-row inmate⁴¹ during clemency proceedings and in proceedings challenging the inmate’s competency to be executed.⁴²

³³ TENN. CODE ANN. § 40-30-205(b), (d) (2006). For a discussion on the Post-Conviction Defender Commission, see *infra* note 49 and accompanying text.

³⁴ TENN. CODE ANN. § 40-30-205(c) (2006).

³⁵ TENN. CODE ANN. § 40-30-205(f) (2006).

³⁶ TENN. CODE ANN. § 40-30-206(a) (2006).

³⁷ TENN. CODE ANN. § 40-30-206(c) (2006).

³⁸ TENN. CODE ANN. § 40-30-206(d)(1)-(4) (2006).

³⁹ TENN. CODE ANN. § 40-30-206(b) (2006).

⁴⁰ TENN. CODE ANN. § 40-30-205(h) (2006).

⁴¹ The Post-Conviction Defender may represent such an individual only if s/he “is presently represented by the post-conviction defender or if such individual is not currently represented by the post-conviction defender but is unable to secure counsel due to indigency.” TENN. CODE ANN. § 40-30-206(e) (2006).

⁴² TENN. CODE ANN. § 40-30-206(e) (2006).

The Office of the Post-Conviction Defender is prohibited from lobbying any entity, organization, or legislative body for the abolition or retention of the death penalty.⁴³ However, the Office may reply to inquiries of the General Assembly, the judiciary and the executive branch.”⁴⁴

In fulfilling any of these duties, the Post-Conviction Defender may employ assistant post-conviction defenders, investigators, and support staff.⁴⁵

1. Funding for the Office of the Post-Conviction Defender

The State provides all funding for the Office of the Post-Conviction Defender.⁴⁶ In Fiscal Year 2004-2005, the State allocated \$1,176,600 for the Office,⁴⁷ and for Fiscal Year 2006-2007, the Governor recommended allocating \$1,268,800 in funding.⁴⁸

The Post-Conviction Defender Commission, a separate state entity, is responsible for the appointment of the Post-Conviction Defender and oversight of the Office, including preparation of its annual budget.⁴⁹

C. Indigent Defense Fund

In addition to district public defender offices and the Office of the Post-Conviction Defender, the State of Tennessee maintains an indigent defense fund to compensate private attorneys who represent indigent defendants.⁵⁰ If a conflict of interest arises with a district public defender office or the Office of the Post-Conviction Defender, or if neither is qualified to represent the defendant, the court must designate a private attorney to represent the defendant.⁵¹ The court also retains discretion to appoint a private attorney when “necessary.”⁵²

Under Tennessee Supreme Court Rule 13, all trial courts are required to maintain a roster of attorneys from which appointments are to be made.⁵³ However, “if necessary to

⁴³ TENN. CODE ANN. § 40-30-205(g) (2006).

⁴⁴ *Id.*

⁴⁵ TENN. CODE ANN. § 40-30-208 (2006).

⁴⁶ TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-201.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ TENN. CODE ANN. § 40-30-202; 40-30-204(c), (d) (2006). The Commission is comprised of nine members: two appointed by the Governor, two appointed by the Lieutenant Governor, two appointed by the Speaker of the House of Representatives, and three appointed by the Supreme Court of Tennessee. TENN. CODE ANN. § 40-30-203(a)(1)-(4) (2006). Members serve a term of four years and are responsible for selecting a Chair to head the Commission. TENN. CODE ANN. §§ 40-30-203(a)(1)-(4), 40-30-204(a), (b) (2006). The Commission, upon notice by the Chair, may hold meetings in which periodic reports from the Post-Conviction Defender concerning caseload, funding, staffing, and salaries may be considered. TENN. CODE ANN. §§ 40-30-204(a), (b), 40-30-210 (2006).

⁵⁰ *See* TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-190.

⁵¹ TENN. SUP. CT. R. 13, § 1(e)(4)(B).

⁵² TENN. SUP. CT. R. 13, § 1(e)(4)(A).

⁵³ TENN. SUP. CT. R. 13, § 1(b).

obtain competent counsel,” the court may appoint an attorney who is not listed on the roster.⁵⁴ The Administrative Office of the Court also maintains a roster of attorneys who qualify for appointment in capital cases.

1. Funding for the Indigent Defense Fund

The State of Tennessee provides primary funding for the Indigent Defense Fund (Fund).⁵⁵ In Fiscal Year 2004-2005, the State allocated \$17,412,200 to the Fund.⁵⁶ An additional \$22,300 of funding was provided by non-state sources.⁵⁷ For Fiscal Year 2006-2007, the Governor recommended that the State allocate \$18,343,300 to the Fund.⁵⁸

D. Appointment, Qualifications, and Compensation of and Resources Available to Defense Counsel at Trial, on Appeal, and in Post-Conviction Proceedings

1. Appointment of Counsel

The court must appoint counsel for an indigent individual accused or convicted of a capital offense before trial through post-conviction proceedings.⁵⁹ Appointed counsel is required to represent the indigent party through the entirety of the proceedings, including any appeals.⁶⁰ However, on direct appeal, the court will appoint new counsel if it is “necessary to provide the defendant with effective assistance of counsel” or if “the best interest of the defendant” mandates the appointment.⁶¹

In all cases, the court must first advise the defendant of his/her right to counsel and that an attorney will be appointed if the defendant is indigent and requests counsel.⁶² After the party requests counsel, s/he must submit to the court an Affidavit of Indigency Form,⁶³ and the court is obligated to “conduct a full and complete hearing” to determine if the defendant is indigent.⁶⁴ An “indigent person” is “any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.”⁶⁵ To determine whether an individual is indigent, the court may consider a

⁵⁴ *Id.*

⁵⁵ *See* TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-190.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ TENN. SUP. CT. R. 13, § 1(d)(A), (C), (D). Under Tennessee law, the court is not obligated to appoint post-conviction counsel until the death-row inmate files a petition and the court finds the petitioner has asserted a colorable claim. *See* TENN. CODE ANN. §§ 40-30-107(b)(1); *see also* Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002).

⁶⁰ TENN. SUP. CT. R. 13, § 1(e)(5). Counsel may be permitted to withdraw under limited circumstances. *See* TENN. RULES OF PROF'L CONDUCT R. 1.16 (specifying the circumstances under which counsel may seek to withdraw); TENN. SUP. CT. R. 14.

⁶¹ TENN. SUP. CT. R. 13, § 3(e).

⁶² TENN. SUP. CT. R. 13, § 1(e)(2).

⁶³ TENN. SUP. CT. R. 13, § 1(e)(1), (2).

⁶⁴ TENN. CODE ANN. § 40-14-202(b) (2006); *see also* TENN. SUP. CT. R. 13, § 1(e)(2).

⁶⁵ TENN. CODE ANN. § 40-14-201(1) (2006).

number of factors, including the services to be rendered, the customary cost of the service in the community, the defendant's income and property interests, the U.S. Department of Labor's poverty level income guidelines, whether the defendant has been able to make bond and the amount and source of the money used to make bond, as well as any other circumstances "relevant to the issue of indigency."⁶⁶

If the court finds the defendant indigent, it must appoint counsel.⁶⁷ The court will generally appoint a district public defender office to represent a defendant at trial and through direct appeal, and the Office of the Post-Conviction Defender to represent a death-row inmate in post-conviction proceedings.⁶⁸ However, if a conflict of interest exists, if the State defender is not qualified to represent a capital defendant, or if the court in its discretion finds it necessary, the court may appoint a private attorney.⁶⁹ Significantly, the court cannot appoint counsel (including a district public defender office or the Office of the Post-Conviction Defender) when counsel "makes a clear and convincing showing that adding the appointment to [his/her] current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."⁷⁰ If the defendant declines the appointment of counsel, s/he must do so in a signed writing in court.⁷¹

In all cases in which the defendant has been charged with first-degree murder and a notice of intent to seek the death penalty has been filed, the court must appoint two attorneys to represent the defendant at trial.⁷² If the accused is eligible for appointed counsel, s/he is entitled to two attorneys at trial and on direct appeal: one to serve as lead counsel and the other to serve as co-counsel.⁷³ The State does not mandate the appointment of two attorneys in post-conviction proceedings.⁷⁴

2. Qualifications of Counsel

a. Trial Counsel

Lead counsel and co-counsel at trial must be attorneys in good standing with the Tennessee Bar or be admitted *pro hac vice* following a motion to the court.⁷⁵ Before

⁶⁶ TENN. CODE ANN. § 40-14-202(c)(1)-(7) (2006).

⁶⁷ TENN. SUP. CT. R. 13, § 1(e)(3). If the court appoints counsel, yet finds the accused can defray a segment or all of the cost of the representation, the court must enter an order directing him/her to do so. TENN. CODE ANN. § 40-14-202(e) (2006). The defendant has no right to select his/her counsel. TENN. SUP. CT. R. 13, § 1(f)(1).

⁶⁸ TENN. SUP. CT. R. 13, § 1(e)(4)(A).

⁶⁹ TENN. SUP. CT. R. 13, § 1(e)(4)(A), (B); *see also* TENN. CODE ANN. § 40-30-207(a) (2006).

⁷⁰ TENN. SUP. CT. R. 13, § 1(e)(4)(D).

⁷¹ TENN. SUP. CT. R. 13, § 1(f)(1).

⁷² TENN. SUP. CT. R. 13, § 3(a), (b)(1).

⁷³ TENN. SUP. CT. R. 13, § 3(b)(1). When possible, a public defender must be designated lead counsel.

Id.

⁷⁴ *See* TENN. SUP. CT. R. 13, § 3 (appointing two attorneys only at trial).

⁷⁵ TENN. SUP. CT. R. 13, § 3(b)(1). Only one of the two attorneys may not be licensed to practice law in the State of Tennessee and be admitted *pro hac vice* to appear in the court on behalf of the defendant. TENN. SUP. CT. R. 13, § 3(b)(1).

being appointed, counsel also must have completed at least six hours of capital defense training and an additional six hours every two years thereafter.⁷⁶ Specifically, lead counsel in a death penalty case must possess the following credentials:

- (1) Five years of experience in criminal jury trials; and
- (2) Experience as one of the following:
 - (a) Lead counsel in the jury trial of one capital case;
 - (b) Co-counsel in the trial of two capital cases;
 - (c) Co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of one murder case;
 - (d) Lead or sole counsel in three murder jury trials or one murder jury trial and three felony jury trials; or
 - (e) Judge in the jury trial of one capital case.⁷⁷

Co-counsel must either qualify as lead counsel or have relevant experience as sole, lead, or co-counsel in a murder jury trial.⁷⁸

b. Appellate Counsel

During the direct appeal process, a defendant may retain his/her previously court-appointed counsel, so long as one attorney meets the appellate counsel qualifications requirements, or s/he may be appointed new counsel.⁷⁹ To qualify as appellate counsel, an attorney must possess three years of experience in criminal trials and appeals, and either (1) capital appellate experience; or (2) criminal appellate experience in three felony convictions within the past three years and six hours of training in the trial and appeal of capital cases.⁸⁰

c. Post-Conviction Counsel

Post-conviction counsel must differ from defendant's counsel at trial and on direct appeal, unless both the defendant and counsel consent to the continued representation.⁸¹ To be appointed counsel in post-conviction proceedings, an attorney must either:

- (1) Possess three years of experience in criminal trials and appeals, and (a) capital appellate experience; or (b) criminal appellate experience in three felony convictions within the past three years and six hours of training in the trial and appeal of capital cases;⁸² or
- (2) Possess trial and appellate experience in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case.⁸³

⁷⁶ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

⁷⁷ TENN. SUP. CT. R. 13, § 3(c)(2), (c)(4)(A)-(E).

⁷⁸ TENN. SUP. CT. R. 13, § 3(d)(3)(A), (B).

⁷⁹ TENN. SUP. CT. R. 13, § 3(g).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² TENN. SUP. CT. R. 13, § 3(h).

⁸³ *Id.*

Counsel also must possess knowledge of federal *habeas corpus* practice, “which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts.”⁸⁴

3. Compensation and Resources Available to Defense Counsel in Capital Cases

a. Compensation of Defense Counsel

District public defenders and the Post-Conviction Defender receive an annual salary of \$124,900.⁸⁵ In 1994, the Tennessee legislature set compensation for entry-level assistant public defenders and assistant post-conviction defenders at \$40,440, increasing over twenty-five years to \$106,000 and subject to any annual salary increases approved by the State Legislature.⁸⁶

Private court-appointed attorneys in capital cases are entitled to “reasonable compensation as determined by the court in which such services are rendered.”⁸⁷ The Tennessee Supreme Court has set forth the following rates of compensation for appointed counsel in capital cases:

- (1) Lead counsel at \$75 per hour for out-of-court work and \$100 per hour for in-court work;
- (2) Co-counsel at \$60 per hour for out-of-court work and \$80 per hour for in-court work; and
- (3) Post-conviction counsel at \$60 per hour for out-of-court work and \$80 per hour for in-court work.⁸⁸

The amount requested by each attorney for fees must be “reviewed and approved by the judge who presided over final disposition of the case” and is then subject to review by the Administrative Office of the Courts (AOC).⁸⁹ Upon review of the claim, the AOC has the authority to contest the billing.⁹⁰ If the AOC rejects an attorney’s fee claim “in whole or in substantial part,” the Chief Justice of the Tennessee Supreme Court must review the denial and render a final decision.⁹¹

⁸⁴ *Id.*

⁸⁵ See TENN. CODE ANN. §§ 8-7-105(a), 8-14-207(a), 40-30-209(a) (2006).

⁸⁶ See TENN. CODE ANN. §§ 8-14-207(b)(1), (2), 40-30-209(b) (2006).

⁸⁷ TENN. SUP. CT. R. 13, § 3(j).

⁸⁸ TENN. SUP. CT. R. 13, § 3(k)(1)-(8). The Tennessee Supreme Court Rules define “out-of-court” as “time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party” and define “in-court” as “time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.” TENN. SUP. CT. R. 13, § 3(l). If an attorney is appointed to represent a death-row inmate in proceedings to determine whether s/he is competent to be executed, the attorney is entitled to \$60 for out-of-court work and \$80 for in-court work. TENN. SUP. CT. R. 13, § 3(i), (k)(7)-(8).

⁸⁹ TENN. SUP. CT. R. 13, § 6(b)(1), (2), (5).

⁹⁰ TENN. SUP. CT. R. 13, § 6(b)(1), (2), (5).

⁹¹ TENN. SUP. CT. R. 13, § 6(b)(5).

b. Resources Available to Defense Counsel

District public defenders are statutorily mandated to appoint assistant district public defenders and district investigators to assist in their duties.⁹² Each district public defender is statutorily authorized to hire at least one criminal investigator position, but may be authorized to hire an additional investigator for every five assistant district public defenders.⁹³ The district public defender offices also have secretarial assistance,⁹⁴ but only one judicial district, the Sixth, is authorized a paralegal position by law.⁹⁵ Similarly, the Post-Conviction Defender is authorized to appoint assistant post-conviction defenders, investigators, and other clerical and support personnel.⁹⁶

The court may, in its discretion, pre-authorize funds for expert and investigative services for trial, appellate, and/or post-conviction proceedings if such services are “necessary to ensure that the constitutional rights of the defendant are properly protected.”⁹⁷ In any motion seeking funding for an expert or an investigator, the defense must itemize:

- (1) The nature of the expert services requested and/or type of investigation to be conducted;
- (2) The name, address, qualifications, and licensure status of the person or entity proposed to provide the expert and/or investigative services;
- (3) A statement of the itemized costs of the expert services, including the hourly rate and the amount of any expected additional or incidental costs related to the services, or an itemized list of anticipated expenses for the investigation;
- (4) If applicable, the means, date, time, and location at which any expert services are to be provided; and
- (5) If applicable, the specific facts that suggest an investigation likely will result in admissible evidence.⁹⁸

If these threshold requirements are met, the court will grant an *ex parte* hearing to determine whether the “requested services are necessary to ensure the protection of the defendant’s constitutional rights.”⁹⁹ The defendant must demonstrate a “particularized need” for the requested services and the hourly rate charged for the services must be reasonable.¹⁰⁰

At trial and on appeal, a particularized need is established “when a defendant shows, by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the

⁹² TENN. CODE ANN. § 8-14-202(b)(2), (3) (2006).

⁹³ TENN. CODE ANN. § 8-14-202(e) (2006).

⁹⁴ TENN. CODE ANN. § 8-14-203 (2006).

⁹⁵ TENN. CODE ANN. § 8-14-202(h) (2006).

⁹⁶ TENN. CODE ANN. § 40-30-208 (2006).

⁹⁷ TENN. SUP. CT. R. 13, § 5(a)(1).

⁹⁸ TENN. SUP. CT. R. 13, § 5(b)(2), (3).

⁹⁹ TENN. SUP. CT. R. 13, § 5(b)(4).

¹⁰⁰ TENN. SUP. CT. R. 13, § 5(c)(1).

defense at trial and the requested services are necessary to protect the defendant's right to a fair trial."¹⁰¹ During post-conviction proceedings, a particularized need is established "when a petitioner shows, by reference to the particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence."¹⁰²

If a capital defendant demonstrates a particularized need and that the rate of services is reasonable, the court may, in its discretion, grant prior authorization for expert and/or investigative services.¹⁰³ However, the Tennessee Supreme Court Rules do not permit payment for hourly expert services over a maximum amount, including:

- (1) \$115 per hour for Accident Reconstruction;
- (2) \$250 per hour for Medical Services/Doctors & Psychiatrists;
- (3) \$150 per hour for Psychologists;
- (4) \$50 per hour for Investigators (Guilt/Sentencing);
- (5) \$65 per hour for Mitigation Specialists;
- (6) \$200 per hour for DNA Experts;
- (7) \$125 per hour for Forensic Anthropologists; and
- (8) \$75 per hour for Ballistics Experts, Fingerprint Experts, or Handwriting Experts.¹⁰⁴

In post-conviction proceedings, the court may not authorize more than a total of \$20,000 for all investigative services or a total of \$25,000 for all expert services, unless the court finds that extraordinary circumstances exist to permit funding in excess of these amounts.¹⁰⁵ Furthermore, the Director of the Administrative Office of the Courts (AOC) must approve the court's order pre-authorizing funding for expert and/or investigative services.¹⁰⁶ If the AOC denies the court's order, the Chief Justice of the Tennessee Supreme Court will review the claim and make a final determination as to whether prior approval for investigative and/or expert services will be granted.¹⁰⁷

Private court-appointed attorneys also may be entitled to compensation without prior court approval for "certain necessary expenses directly related to the representation of indigent parties."¹⁰⁸ For example, the court will reimburse for long distance telephone charges, travel mileage, lodging and meals if an overnight stay is required, parking,

¹⁰¹ TENN. SUP. CT. R. 13, § 5(c)(2).

¹⁰² TENN. SUP. CT. R. 13, § 5(c)(3).

¹⁰³ TENN. SUP. CT. R. 13, § 5(a)(1), (c)(1).

¹⁰⁴ TENN. SUP. CT. R. 13, § 5(d)(1).

¹⁰⁵ TENN. SUP. CT. R. 13, § 5(d)(4), (5). The extraordinary circumstances must be proven by clear and convincing evidence. *Id.*

¹⁰⁶ TENN. SUP. CT. R. 13, § 5(e)(4).

¹⁰⁷ *Id.* These provisions of Tennessee Supreme Court Rule 13 appear to be in conflict with section 40-14-207(b), which provides that the trial court will authorize the funds. *Id.*

¹⁰⁸ TENN. SUP. CT. R. 13, § 3(a)(1).

photocopying costs not to exceed \$500, computerized research, miscellaneous expenses such as postage, and expenses related to improving the indigent party's appearance.¹⁰⁹

Additionally, the court may reimburse counsel for foreign language interpreters and translators if it finds that the indigent party has limited English proficiency.¹¹⁰

E. Appointment, Qualifications, Training and Resources Available to Attorneys Handling Capital Federal Habeas Corpus Petitions

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal *habeas corpus* in one of Tennessee's three federal judicial districts—the East, Middle, or West—is entitled to appointed counsel and other resources if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”¹¹¹ In Tennessee, staff attorneys from the Federal Public Defender's Office in the Middle and Eastern Districts, which both have Capital Habeas Units, are generally appointed to handle these cases.¹¹² Under the Tennessee Code Annotated, the Office of the Post-Conviction Defender also is allowed to represent an indigent capital defendant in federal *habeas corpus* proceedings, but “only to the extent that compensation for representation and reimbursement for expenses is provided by section 18 U.S.C. section 3006A or any other non-state funded source.”¹¹³

According to section 3599 of Title 18 of the United States Code, inmates entitled to an appointed attorney must be appointed “one or more” qualified attorneys prior to the filing of a formal, legally sufficient federal *habeas* petition.¹¹⁴ To be qualified for appointment, at least one attorney must have been admitted to practice in the United States Court of Appeals for the Sixth Circuit for at least five years, and have had at least three years of experience in handling felony appeals in the Sixth Circuit.¹¹⁵ For “good cause,” the court may appoint another attorney “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”¹¹⁶ Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than \$125 per hour for both in-court and out-of-court work.¹¹⁷

In addition to counsel, the court also may authorize a defendant's attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.¹¹⁸

¹⁰⁹ TENN. SUP. CT. R. 13, § 4(a)(3)(A)-(J).

¹¹⁰ TENN. SUP. CT. R. 13, § 4(d)(1).

¹¹¹ 18 U.S.C. § 3599(a)(2) (2006).

¹¹² See MORGAN, *supra* note 5, at 28.

¹¹³ TENN. CODE ANN. § 40-30-206(c) (2006). 18 U.S.C. § 3006A explains how each federal district court shall provide for representation for criminal defendants financially unable to obtain representation.

¹¹⁴ 18 U.S.C. § 3599(a)(2) (2006); see also *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹¹⁵ 18 U.S.C. § 3599(c) (2006).

¹¹⁶ 18 U.S.C. § 3599(d) (2006).

¹¹⁷ 18 U.S.C. § 3599(g)(1) (2006).

¹¹⁸ 18 U.S.C. § 3599(f) (2006).

The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.¹¹⁹

F. Appointment and Qualifications of Attorneys Representing Death-Sentenced Clemency Petitioners

The State of Tennessee does not require that the court appoint counsel to death-row inmates petitioning for clemency. However, in the interest of justice, the Office of the Post-Conviction Defender may elect to represent a death-row inmate in clemency proceedings if (1) the Office already represents the inmate, or (2) the inmate is unable to obtain counsel due to indigency.¹²⁰

Attorneys who represent death-row inmates in clemency proceedings are not subject to additional qualification standards nor are they required to participate in any training.

¹¹⁹ 21 U.S.C. § 3599(g)(2) (2006).

¹²⁰ TENN. CODE ANN. § 40-30-206(e) (2006).

II. ANALYSIS

A. Recommendation #1

In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal *habeas corpus*, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):

Under state and federal law, indigent defendants charged with or sentenced to death in the State of Tennessee are guaranteed counsel at every stage of the legal proceedings, except clemency.¹²¹ However, in the interest of justice, the Office of the Post-Conviction Defender may elect to represent a death-row inmate in clemency proceedings.¹²²

Although counsel must be appointed prior to trial,¹²³ counsel must not be appointed in post-conviction proceedings until after the death-row inmate files a post-conviction petition, if the petition is not summarily dismissed by the court.¹²⁴ Under federal law, if new counsel is appointed for *habeas corpus* proceedings, s/he must be appointed prior to the filing of a formal, legally sufficient *habeas* petition.¹²⁵

The adequacy of compensation provided to defense counsel in capital cases will be discussed in Recommendation #4.

- a. **At least two attorneys at every stage of the proceedings qualified in accordance with *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

State and federal law does not guarantee the appointment of two attorneys at all stages of the legal proceeding, nor does it guarantee access to investigators and mitigation specialists. The qualification requirements for attorneys appointed in all legal proceedings will be discussed below in Recommendation #2.

¹²¹ TENN. SUP. CT. R. 13, § 1(d)(1)(A), (C), (D); TENN. SUP. CT. R. 13, § 1(e)(5); *see also* *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974) (guaranteeing an indigent criminal defendant's right to counsel at preliminary hearings).

¹²² TENN. CODE ANN. § 40-30-206(e) (2006). The Office may elect to represent the death-row inmate in clemency proceedings if (1) the Office already represents the inmate, or (2) the inmate is unable to obtain counsel due to indigency. *Id.*

¹²³ *See* *McKeldin*, 516 S.W.2d at 82.

¹²⁴ *See* TENN. CODE ANN. § 40-30-107(b)(1) (2006).

¹²⁵ *See* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

Appointment of Counsel

For all capital cases in Tennessee, the court must appoint two attorneys to represent the defendant at trial: one to serve as lead counsel and the other as co-counsel.¹²⁶ On direct appeal, a capital defendant also is entitled to two attorneys to assist in his/her defense,¹²⁷ but the State does not mandate the appointment of two attorneys for post-conviction proceedings.¹²⁸ Similarly, indigent death-row inmates seeking federal *habeas corpus* relief are not entitled to two attorneys; federal law only mandates an indigent defendant be represented by “one or more attorneys.”¹²⁹ While the State of Tennessee does not guarantee counsel in clemency proceedings, the Office of the Post-Conviction Defender may elect to represent a death-row inmate petitioning for clemency.¹³⁰ Two attorneys, however, are not required in this circumstance.

Access to Investigators and Mitigation Specialists

Attorneys appointed to represent an indigent capital defendant or a death-row inmate may have, but are not guaranteed, access to investigators and mitigation specialists at trial, on appeal, during state post-conviction proceedings, and during federal *habeas corpus* proceedings.¹³¹ If the Office of the Post-Conviction Defender elects to represent a death-row inmate in clemency proceedings,¹³² such individual should have access to the Office’s investigators.¹³³

The procedures for obtaining such experts and their compensation will be discussed below under Subsection c.

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the State.**

The State of Tennessee does not require any member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. However, the Tennessee Supreme Court Rules

¹²⁶ TENN. SUP. CT. R. 13, § 3(a), (b)(1). When possible, a public defender must be designated lead counsel. *Id.*

¹²⁷ TENN. SUP. CT. R. 13, § 3(b)(1). When possible, a public defender must be designated lead counsel. *Id.*

¹²⁸ See TENN. SUP. CT. R. 13, § 3 (noting only the appointment of two attorneys at trial).

¹²⁹ 18 U.S.C. § 3599(a)(2) (2006); see also *McFarland*, 512 U.S. at 856-57.

¹³⁰ TENN. CODE ANN. § 40-30-206(e) (2006). The Office may elect to represent the death-row inmate in clemency proceedings if (1) the Office already represents the inmate, or (2) the inmate is unable to obtain counsel due to indigency. *Id.*

¹³¹ See TENN. SUP. CT. R. 13, § 5(a)(1); TENN. CODE ANN. §§ 8-14-202(e), 40-30-208 (2006); 18 U.S.C. 3599(f), (g) (2006).

¹³² TENN. CODE ANN. § 40-30-206(e) (2006).

¹³³ See TENN. CODE ANN. § 40-30-208 (2006) (authorizing the Post-Conviction Defender to employ investigators).

do require trial counsel to undergo training on defending a capital case.¹³⁴ In fulfilling this requirement, an attorney could—but is not mandated to—receive training on screening individuals for the presence of mental or psychological disorders or impairments.

Additionally, the Tennessee Department of Mental Health and Developmental Disabilities has issued a procedural manual for defense attorneys that encompasses a wide range of topics regarding mental illness issues, including its symptoms.¹³⁵

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
 - i. Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.**
 - ii. Counsel should have the right to have such services provided by persons independent of the government.**
 - iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

The court may, in its discretion, pre-authorize funds for expert and investigative services for trial, appellate, and/or post-conviction proceedings if such services are “necessary to ensure that the constitutional rights of the defendant are properly protected.”¹³⁶ Defense counsel may seek these services through *ex parte* proceedings and may be appointed experts and investigators who are independent of the State or federal government.¹³⁷ As these experts and/or investigators are appointed to serve the defense, communications between counsel and the expert and/or investigator should remain confidential.

In order to obtain investigative and/or expert services, however, defense counsel must meet strict pleading requirements. First, in any motion seeking funding for an expert or an investigator, the defendant must itemize:

- (1) The nature of the expert services requested and/or type of investigation to be conducted;

¹³⁴ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

¹³⁵ MENTAL HEALTH IN TENNESSEE COURTS: A PROCEDURAL MANUAL FOR JUDGES, DEFENSE ATTORNEYS AND DISTRICT ATTORNEYS (July 2006) (on file with author).

¹³⁶ TENN. SUP. CT. R. 13, § 5(a)(1).

¹³⁷ Under Tennessee Supreme Court Rule 13, “every effort” must be made to obtain the expert and/or investigative services “of a person or entity whose primary office of business within 150 miles of the court where the case is pending. If the entity or person proposed to provide the service is not located within the 150-mile radius, the motion shall explain the efforts made to obtain the service of a provider within the 150-mile radius.” TENN. SUP. CT. R. 13, § 5(b)(1).

- (2) The name, address, qualifications, and licensure status of the person or entity proposed to provide the expert and/or investigative services;
- (3) A statement of the itemized costs of the expert services, including the hourly rate and the amount of any expected additional or incidental costs related to the services; or an itemized list of anticipated expenses for the investigation;
- (4) If applicable, the means, date, time, and location at which any expert services are to be provided; and
- (5) If applicable, the specific facts that suggest an investigation likely will result in admissible evidence.¹³⁸

Only if these threshold requirements are met will the court grant an *ex parte* hearing.¹³⁹ At the hearing, the defense still must prove that the “requested services are necessary to ensure the protection of the defendant’s constitutional rights.”¹⁴⁰ To satisfy this requirement, under the Tennessee Supreme Court Rules, the hourly rate charged for the services must be reasonable and there must be a “particularized need” for the requested services.¹⁴¹

At trial and on appeal, a particularized need is established “when a defendant shows, by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and the requested services are necessary to protect the defendant’s right to a fair trial.”¹⁴² During post-conviction proceedings, a particularized need is established “when a petitioner shows, by reference to the particular facts and circumstances of the petitioner’s case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence.”¹⁴³

If a capital defendant demonstrates (1) a particularized need; and (2) that the rate of services is reasonable, the court may, in its discretion, grant prior authorization for expert and/or investigative services.¹⁴⁴ Significantly, the Tennessee Supreme Court Rules do not permit payment for hourly expert and/or investigative services over a maximum amount, including:

- (1) \$115 per hour for Accident Reconstruction;
- (2) \$250 per hour for Medical Services/Doctors & Psychiatrists;
- (3) \$150 per hour for Psychologists;
- (4) \$50 per hour for Investigators (Guilt/Sentencing);
- (5) \$65 per hour for Mitigation Specialists;
- (6) \$200 per hour for DNA Experts;

¹³⁸ TENN. SUP. CT. R. 13, § 5(b)(2), (3).

¹³⁹ TENN. SUP. CT. R. 13, § 5(b)(4).

¹⁴⁰ *Id.*

¹⁴¹ TENN. SUP. CT. R. 13, § 5(c)(1).

¹⁴² TENN. SUP. CT. R. 13, § 5(c)(2).

¹⁴³ TENN. SUP. CT. R. 13, § 5(c)(3).

¹⁴⁴ TENN. SUP. CT. R. 13, § 5(a)(1), (c)(1) (emphasis added).

- (7) \$125 per hour for Forensic Anthropologists; and
- (8) \$75 per hour for Ballistics Experts, Fingerprint Experts, or Handwriting Experts.¹⁴⁵

In post-conviction proceedings, the court may not authorize more than a total of \$20,000 for all investigative services or a total of \$25,000 for all expert services, unless the court finds that extraordinary circumstances exist to permit funding in excess of these amounts.¹⁴⁶

Even if the court pre-authorizes funding for investigative and/or expert services, the defense still is not guaranteed this funding. The Director of the Administrative Office of the Courts (AOC) must approve the court's order granting pre-authorization.¹⁴⁷ If the AOC denies the court's order, the Chief Justice of the Tennessee Supreme Court will review the claim and make a final determination as to whether prior approval for investigative and/or expert services will be granted.¹⁴⁸ The defense is afforded neither notice nor review of the AOC and/or Chief Justice's decision to reduce or deny funds. In practice, the AOC and the Chief Justice appear to have been using this authority to reduce or refuse funds authorized by the trial courts.¹⁴⁹

It is important to note that because district public defender offices and the Office of the Post-Conviction Defender should have access to investigators within their respective offices, they will generally not seek authorization for investigative services.¹⁵⁰ However, due to a shortage of assistant public defenders and an ever-increasing workload, at least twelve district public defender offices have used their investigator positions to hire assistant public defenders (see Recommendation #4 for a discussion on the inadequacy of indigent defense funding).¹⁵¹ As a result, district public defender offices are not only short of assistant defenders, but also of investigators. In fact, in three of these twelve offices, there were "no investigator positions other than those occupied by attorneys acting as defenders."¹⁵²

Accordingly, both the Office of the Post-Conviction Defender and the District Public Defender Office must generally seek prior authorization in order to hire any necessary experts.

¹⁴⁵ TENN. SUP. CT. R. 13, § 5(d)(1).

¹⁴⁶ TENN. SUP. CT. R. 13, § 5(d)(4), (5). The extraordinary circumstances must be proven by clear and convincing evidence. *Id.*

¹⁴⁷ TENN. SUP. CT. R. 13, § 5(e)(4).

¹⁴⁸ *Id.* These provisions of Tennessee Supreme Court Rule 13 appear to be in conflict with section 40-14-207(b), which provides that the trial court with authorize funding. TENN. CODE ANN. § 40-14-207(b) (2006).

¹⁴⁹ Indigent Defense Representation in Tennessee Death Penalty Cases, at 10; *see also* Email Interview by Banafsheh Amirzadeh, with Don Dawson, Post-Conviction Defender, Office of the Post-Conviction Defender (Jan. 23, 2007).

¹⁵⁰ TENN. CODE ANN. §§ 8-14-202(e), 40-30-208 (2006).

¹⁵¹ *See* JOHN G. MORGAN, COMPTROLLER OF THE TREASURY OFFICE OF RESEARCH, FY 2005-2006 TENNESSEE WEIGHTED CASELOAD STUDY UPDATE: DISTRICT PUBLIC DEFENDERS 6 (February 2006) [hereinafter TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2005-2006] (on file with author).

¹⁵² *See id.* at 6.

An indigent death-row inmate petitioning for federal *habeas corpus* relief may request and the court may authorize the inmate's attorney(s) to obtain investigative, expert, or other necessary services on behalf of the inmate.¹⁵³ The fees for these services may not exceed \$7,500 in any case, unless the court certifies payment in excess of this limit.¹⁵⁴

Conclusion

Under state and federal law, individuals charged with a capital felony or sentenced to death must be appointed two attorneys at trial and on appeal, but only are guaranteed one attorney in state post-conviction and federal *habeas corpus* proceedings. Furthermore, the State of Tennessee does not guarantee counsel to indigent defendants in clemency proceedings. No member of the defense team is required to be qualified by experience or training to screen for mental or psychological disorders or conditions in a capital defendant, and many public defenders and private court-appointed attorneys in capital cases may not be provided with the resources to retain the investigators and experts necessary to provide high quality legal representation.

The State of Tennessee, therefore, is only in partial compliance with Recommendation #1.

Accordingly, the Tennessee Death Penalty Assessment Team recommends that:

- (1) The State of Tennessee adopt increased attorney qualification and monitoring procedures for capital attorneys at trial, on appeal, in state post-conviction proceedings, and clemency proceedings so that they are consistent with the *ABA Guidelines*; and
- (2) Tennessee Supreme Court Rule 13 be amended to allow a defendant to obtain expert and/or investigative services at any time after s/he has been charged with a potentially death-eligible criminal offense, so that the defense has the opportunity to demonstrate to the prosecutor considering filing capital charges why such charges may be inappropriate.

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):

- a. **The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- b. **In formulating qualification standards, the jurisdiction should ensure:**
 - i. **That every attorney representing a capital defendant has:**

¹⁵³ 18 U.S.C. §3599(f) (2006).

¹⁵⁴ 18 U.S.C. §3599(g)(2) (2006).

- (a) Obtained a license or permission to practice in the jurisdiction;
 - (b) Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - (c) Satisfied the training requirements set forth in Guideline 8.1.
- ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation.

Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

- a. Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- b. Skill in the management and conduct of complex negotiations and litigation;
- c. Skill in legal research, analysis, and the drafting of litigation documents;
- d. Skill in oral advocacy;
- e. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- f. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- g. Skill in the investigation, preparation, and presentation of mitigating evidence; and
- h. Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Tennessee Supreme Court Rule 13 provides minimum qualification standards for attorneys handling death penalty cases at trial, on appeal, and during state post-conviction proceedings.

Under Supreme Court Rule 13, lead counsel and co-counsel at trial must be attorneys in good standing with the Tennessee Bar or be admitted *pro hac vice* following a motion to the court.¹⁵⁵ Before being appointed, counsel also must have completed at least six hours of capital defense training and an additional six hours every two years thereafter.¹⁵⁶ Specifically, lead counsel in a death penalty case must possess the following credentials:

- (1) Five years of experience in criminal jury trials; and
- (2) Experience as one of the following:
 - (a) Lead counsel in the jury trial of one capital case;
 - (b) Co-counsel in the trial of two capital cases;
 - (c) Co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of one murder case;

¹⁵⁵ TENN. SUP. CT. R. 13, § 3(b)(1). Only one of the two attorneys may not be licensed to practice law in the State of Tennessee and be admitted *pro hac vice* to appear in the court on behalf of the defendant. TENN. SUP. CT. R. 13, § 3(b)(1), (f).

¹⁵⁶ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

- (d) Lead or sole counsel in three murder jury trials or one murder jury trial and three felony jury trials; or
- (e) Judge in the jury trial of one capital case.¹⁵⁷

Co-counsel must either qualify as lead counsel or have relevant experience as sole, lead, or co-counsel in a murder jury trial.¹⁵⁸

The requirements, in accord with ABA Guideline 5.1, mandate that counsel in capital cases be a member of the Tennessee Bar or be admitted *pro hac vice*, but they do not mandate that attorneys handling death penalty cases demonstrate a specific commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases. Additionally, while the State mandates six hours of initial training in capital defense and six hours every two years thereafter, the content of this training is not mandated.

Of the two attorneys representing a capital defendant on direct appeal, at least one must qualify as appellate counsel.¹⁵⁹ To qualify as appellate counsel, an attorney must possess three years of experience in criminal trials and appeals, and either (1) capital appellate experience; or (2) criminal appellate experience in three felony convictions within the past three years and six hours of training in the trial and appeal of capital cases.¹⁶⁰

Similarly, to qualify as counsel in state post-conviction proceedings, an attorney must either qualify as appellate counsel,¹⁶¹ or possess trial and appellate experience in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case.¹⁶² Post-conviction counsel also must possess knowledge of federal *habeas corpus* practice, “which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts.”¹⁶³

The qualifications for defense attorneys representing death-sentenced inmates on appeal and during post-conviction proceedings are less stringent than those for trial attorneys. These qualifications do not require appellate and post-conviction counsel to demonstrate a commitment to providing zealous advocacy and high quality legal representation, specifically in the defense of capital cases, nor do they mandate capital defense training.

At all levels—at trial, on appeal, and during post-conviction proceedings in Tennessee—the main criteria for qualification of counsel in death penalty cases is experience. Experience, however, does not automatically translate into high quality legal representation. For example, in 2001, *The Tennessean* newspaper reported at least thirty-nine lawyers who had represented defendants in capital cases also had been disciplined by the State, including one “cocaine-sniffing Oak Ridge lawyer who was getting drunk in

¹⁵⁷ TENN. SUP. CT. R. 13, § 3(c)(2), (c)(4)(A)-(E).

¹⁵⁸ TENN. SUP. CT. R. 13, § 3(d)(3)(A), (B).

¹⁵⁹ TENN. SUP. CT. R. 13, § 3(e).

¹⁶⁰ TENN. SUP. CT. R. 13, § 3(g).

¹⁶¹ *Id.*

¹⁶² TENN. SUP. CT. R. 13, § 3(h).

¹⁶³ *Id.*

a bar when the jury returned his client's death sentence.”¹⁶⁴ According to *The Tennessean*, eleven of the thirty-nine disciplined attorneys appeared on a list of attorneys “who me[t] Tennessee Supreme Court standards for future appointment in death penalty cases. This list of eligible defense attorneys, circulated to trial judges by the [S]tate Supreme Court as a guide, include[d] a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man linger in jail for four years on a rape charge.”¹⁶⁵

As highlighted by the Tennessee Bar Association's Study Committee on Effective Assistance of Counsel in Capital Cases in its December 2004 report:

Rule 13 has no mechanism to determine whether counsel will be zealous advocates, no mechanism to determine whether counsel did anything other than attend the training or to evaluate the quality or content of the training, no mechanism to determine counsel's knowledge of the requisite case law, or any means to measure or monitor the quality of the representation being provided.¹⁶⁶

The Tennessee Bar Association's Study Committee concluded that the State “perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation.”¹⁶⁷

Conclusion

Although the State of Tennessee has established qualification standards for attorneys handling death penalty cases at trial, on appeal, and in state post-conviction proceedings, these standards fall well below those required by Guideline 5.1. The State standards do not mandate that attorneys provide zealous advocacy in capital cases nor do they mandate training for attorneys representing capital defendants on direct appeal, in post-conviction proceedings, or during federal *habeas* or clemency proceedings. Furthermore, the State of Tennessee fails to provide counsel to indigent death-row inmates in clemency proceedings.

Thus, the State of Tennessee is only in partial compliance with Recommendation #2.

C. Recommendation #3

The selection and evaluation process should include:

¹⁶⁴ John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, TENNESSEAN, July 25, 2001, at 1A.

¹⁶⁵ *Id.*

¹⁶⁶ TENNESSEE BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE STUDY COMMITTEE ON EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES, app. E, at 7 (Dec. 31, 2004) [hereinafter TBA EFFECTIVE ASSISTANCE OF COUNSEL REPORT], available at http://www.tba.org/sections/TB_Crime/capitalcases_study.html (last visited Feb. 15, 2007).

¹⁶⁷ TBA EFFECTIVE ASSISTANCE OF COUNSEL REPORT, *supra* note 166, at 47.

- a. **A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:**
 - i. **A defender organization that is either:**
 - (a) **A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - (b) **A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - ii. **An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.**

The State of Tennessee does not have a statewide independent appointing authority responsible for training, selecting, and monitoring attorneys who represent indigent capital defendants and death-row inmates and instead vests the judiciary with the authority to appoint counsel in all capital cases.¹⁶⁸

In the past, the State of Tennessee did have a statewide organization responsible for all capital cases. From 1988 to the 1995, the Capital Case Resource Center of Tennessee (CCRC) operated as a statewide entity providing representation to defendants in capital proceedings, including federal *habeas corpus* proceedings.¹⁶⁹ The CCRC also provided “resource assistance” to both State and private attorneys representing capital defendants, and established standards for effective representation in capital cases.¹⁷⁰ In 1995, then-Governor Sundquist withdrew state funding, effectively dismantling the CCRC.¹⁷¹

In response, the Tennessee legislature created the Office of the Post-Conviction Defender, which is statutorily mandated to represent death-row inmates on post-conviction review, so long as there is no conflict of interest.¹⁷² The Office of the Post-Conviction Defender, however, is not wholly independent of the judicial or executive branches, as the Post-Conviction Defender is appointed by the Post-Conviction Defender Commission, a separate state entity, which is comprised of nine members; four of whom are appointed by the Governor and Lieutenant Governor, and three of whom are

¹⁶⁸ See generally TENN. SUP. CT. R. 13.

¹⁶⁹ See John North, *New Defender’s Office Expected to Streamline Post-Conviction Death Penalty Cases*, KNOXVILLE-NEWS SENTINEL, Oct. 1, 1995, at B4 (on file with author).

¹⁷⁰ *Id.*

¹⁷¹ See *id.*; Michael Loftin, *Don’t Abolish the CCRC*, CHATTANOOGA TIMES, April 1, 1995, at A6 (on file with author).

¹⁷² TENN. CODE ANN. § 40-30-206(a); see also North, *supra* note 169, at B4.

appointed by the Tennessee Supreme Court.¹⁷³ The Commission also is responsible for oversight of the Office, including preparation of its annual budget.¹⁷⁴

Although the State of Tennessee does have a statewide public defender system, this system is not specifically limited to handling capital cases, but instead is open to all indigent defendants.¹⁷⁵ Additionally, as elected officials, district public defenders are subject to the electors they serve.¹⁷⁶ As such, the district public defender system in Tennessee does not meet the criteria set forth in this Recommendation.

The training, selection, and monitoring of counsel will be discussed in detail in Subparts b and c.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

As indicated above, the State of Tennessee does not have a statewide independent appointing authority responsible for developing and maintaining a registry of attorneys. The Administrative Office of the Courts, however, maintains a roster of attorneys who qualify for appointment in a capital case. This roster differentiates among the qualifications for trial, appellate, and post-conviction counsel.

c. The statewide independent appointing authority should perform the following duties:

Because the State of Tennessee has no statewide independent appointing authority responsible for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony, this portion of the recommendation will address the extent (if any) to which state agencies are performing the following duties.

i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

The Office of the Post-Conviction Defender is statutorily mandated to recruit qualified members of the Tennessee Bar to provide representation in all state death penalty cases.¹⁷⁷ In practice, the Office's efforts in recruiting qualified counsel are "very limited."¹⁷⁸

¹⁷³ TENN. CODE ANN. § 40-30-203(a)(1)-(4) (2006).

¹⁷⁴ TENN. CODE ANN. §§ 40-30-202, 40-30-204(c), (d) (2006).

¹⁷⁵ TENN. CODE ANN. § 8-14-204(a) (2006).

¹⁷⁶ See *supra* note 16 and accompanying text.

¹⁷⁷ TENN. CODE ANN. § 40-30-206(d)(1)-(4) (2006).

¹⁷⁸ See Email Interview by Banafsheh Amirzadeh, with Don Dawson, Post-Conviction Defender, Office of the Post-Conviction Defender (Jan. 23, 2007).

No state entity appears to certify attorneys as qualified to be appointed in a capital case. Rather, in order to appear on the AOC's roster of qualified attorneys, the attorney must fill out a form, attesting that s/he meets the qualifications delineated in Rule 13.¹⁷⁹

ii. Draft and periodically publish rosters of certified attorneys;

As indicated above, the Administrative Office of the Courts maintains a roster of attorneys qualified to handle death penalty cases,¹⁸⁰ but we were unable to determine whether this roster is periodically published or made available to the public.

iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

The Tennessee Supreme Court—rather than a statewide independent appointing authority—has adopted qualification standards for attorneys handling death penalty cases at trial, on appeal, and on post-conviction review. Specifically, the Tennessee Supreme Court promulgated Rule 13, which delineates qualification standards for lead counsel and co-counsel at trial, appellate counsel, and post-conviction counsel in death penalty cases.¹⁸¹

iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The responsibility for assigning attorneys to represent indigent defendants in death penalty cases is vested solely in the judiciary. Under Tennessee Supreme Court Rule 13, the court must appoint a district public defender office to represent a defendant at trial and through direct appeal, and the Office of the Post-Conviction Defender to represent a death-row inmate in post-conviction proceedings.¹⁸² However, if a conflict of interest exists or the State defender is not qualified to represent a capital defendant, the court must appoint counsel from the roster of private attorneys.¹⁸³ The court also retains discretion to appoint a private attorney when necessary.¹⁸⁴ Significantly, the court cannot appoint counsel (including a district public defender office or the Office of the Post-Conviction Defender) when counsel “makes a clear and convincing showing that adding the appointment to [his/her] current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.”¹⁸⁵

¹⁷⁹ See Email Interview by Banafsheh Amirzadeh, with Don Dawson, Post-Conviction Defender, Office of the Post-Conviction Defender (Jan. 24, 2007).

¹⁸⁰ See *supra* note 54 and accompanying text.

¹⁸¹ See TENN. SUP. CT. R. 13, § 3.

¹⁸² See TENN. SUP. CT. R. 13, § 1(e)(4)(A).

¹⁸³ TENN. SUP. CT. R. 13, § 1(e)(4)(B); see also TENN. CODE ANN. § 40-30-207 (2006).

¹⁸⁴ See TENN. SUP. CT. R. 13, § 1(e)(4)(A).

¹⁸⁵ TENN. SUP. CT. R. 13, § 1(e)(4)(D).

In accordance with Tennessee Supreme Court Rule 13, Tennessee courts are now primarily appointing public defenders to handle capital cases. By appointing public defenders in place of private court-appointed attorneys, the courts appear to have prioritized cost-saving over the efficacy of counsel; unlike private attorneys, public defenders are salaried state employees who, regardless of their caseload, will be compensated at the same rate. This trend is particularly disturbing in light of the excessive caseloads of district public defenders offices and the Office of the Post-Conviction Defender. Attorneys working within the district public defender offices boast some of the highest caseloads in the country.¹⁸⁶ In fact, in fiscal year 2006, the court appointed over 183,000 criminal cases to the district public defender offices,¹⁸⁷ which, at the time, employed 309 full-time attorneys.¹⁸⁸ During this same period, the Tennessee Comptroller concluded that there was a statewide shortage of 123 public defenders.¹⁸⁹ Similarly, the Office of the Post-Conviction Defender has been said to be “on the verge of collapse because of its excessive caseload.”¹⁹⁰

v. Monitor the performance of all attorneys providing representation in capital proceedings;

No state agency has the responsibility of monitoring the performance of counsel in capital proceedings.¹⁹¹

vi. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

We were unable to determine whether any state agency is charged with periodically reviewing the roster of qualified attorneys and removing attorneys who fail to provide high quality legal representation consistent with the *ABA Guidelines*. In 2001, *The Tennessean* newspaper reported that eleven of thirty-nine lawyers who had been disciplined by the State still appeared on a list of attorneys “who me[t] Tennessee

¹⁸⁶ See Bill Redick, *For Indigent Defendants, Equal Justice Requires Competent Attorneys*, TENNESSEAN (op-ed), April 24, 2006, available at <http://www.thejusticeproject.org/press/articles/for-indigent-defendants.html> (last visited Feb. 16, 2007); JOHN G. MORGAN, COMPTROLLER OF THE TREASURY OFFICE OF RESEARCH, FY 2004-2005 TENNESSEE WEIGHTED CASELOAD STUDY UPDATE: DISTRICT PUBLIC DEFENDERS, at ii (February 2006) [hereinafter TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2004-2005], available at <http://www.comptroller1.state.tn.us/repository/RE/final%20pd%20report%202005.pdf> (last visited Feb. 17, 2007) (noting that “Tennessee’s public defenders carry caseloads in excess of nationally recognized standards”).

¹⁸⁷ TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE, 2006 ANNUAL REPORT 5 (on file with author).

¹⁸⁸ See TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2005-2006, *supra* note 151, at 3. Notably, the 309 full-time attorney positions include public defenders, as well as locally and federally-funded attorneys and attorneys in investigator positions. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Problems with the State Criminal Indigent Defense System for Consideration by the Tennessee Judicial Selection Commission and the New Appointees to the Tennessee Supreme Court, at 3 (on file with author).

¹⁹¹ TBA EFFECTIVE ASSISTANCE OF COUNSEL REPORT, *supra* note 166, app. E., at 10.

Supreme Court standards for future appointment in death penalty cases.”¹⁹² It is unclear whether the remaining twenty-eight lawyers were removed from the roster of qualified attorneys, were appointed without being on the roster (assuming the AOC’s roster existed at the time of their appointment), or had been privately retained.

vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

The Office of the Post-Conviction Defender is charged with providing continuing legal education training to public defenders, assistant post-conviction defenders and to private counsel representing indigents in capital cases, to the extent resources are available.¹⁹³

Each year, the Office of the Post-Conviction Defender assists the Tennessee Association of Criminal Defense Attorneys in producing a capital defense seminar, which provides attorneys with twelve hours of continuing legal education.¹⁹⁴

viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

The State of Tennessee has entrusted the Board of Professional Responsibility of the Tennessee Supreme Court with investigating grievances and disciplining practicing attorneys, including attorneys defending a capital defendant.¹⁹⁵

Trial and appellate courts also are responsible for receiving complaints about the performance of attorneys and taking corrective action. When judges receive information indicating a “substantial likelihood” that any attorney has committed a violation of the Tennessee Rules of Professional Conduct, the Tennessee Code of Judicial Conduct specifically advises judges to “take appropriate action.”¹⁹⁶ Appropriate action includes: “direct communication with the . . . [attorney] who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency.”¹⁹⁷ If an attorney’s violation of the Tennessee Rules of Professional Conduct raises a “substantial question as to the [attorney’s] honesty or fitness as a[n] [attorney],” the judge must report the violation to the “appropriate authority.”¹⁹⁸

Conclusion

¹⁹² Shiffman, *supra* note 164, at 1A.

¹⁹³ TENN. CODE ANN. § 40-30-206(d)(2) (2006).

¹⁹⁴ Email interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender, (Jan. 23, 2007).

¹⁹⁵ TENN. SUP. CT. R. 9, § 8.3 (2006).

¹⁹⁶ TENN. CODE OF JUD. CONDUCT, CANON 3(D)(1).

¹⁹⁷ TENN. CODE OF JUD. CONDUCT, CANON 3(D) cmt.

¹⁹⁸ TENN. CODE OF JUD. CONDUCT, CANON 3(D)(2).

As the State of Tennessee has not vested one or more independent entities all of the responsibilities contained in Recommendation #3 and has failed to remove the judiciary from the attorney appointment and monitoring process, the State fails to comply with Recommendation #3.

The Tennessee Death Penalty Assessment Team therefore recommends that the State of Tennessee create and vest in one statewide independent appointing authority the responsibility for appointing, training, and monitoring attorneys who represent indigent individuals charged with a capital felony or sentenced to death. The statewide independent appointing authority, comprised solely of defense attorneys, also should be responsible for monitoring attorney caseloads, providing resources for expert and investigative services, and recruiting qualified attorneys to represent such individuals. In addition, this independent appointing authority should create and oversee a statewide capital trial unit and a statewide capital case appellate unit, consisting of attorneys and staff with specialized knowledge and experience in handling death penalty cases.

D. Recommendation # 4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by ABA Guideline 9.1, by the defense team and outside experts selected by counsel.¹⁹⁹**

The State of Tennessee has fallen dramatically short of ensuring funding for the full cost of high quality legal representation in capital cases.

The District Public Defender Offices

The State of Tennessee provides primary funding for all district public defender offices, with the exception of public defender offices in Shelby and Davidson Counties; each of which receive primary funding from the county.²⁰⁰ In Fiscal Year 2004-2005, the State allocated \$2,840,000 for the Shelby County Public Defender Office, \$1,482,000 for the Davidson County Public Defender Office, and \$23,688,000 for the remaining twenty-nine district public defenders offices.²⁰¹

¹⁹⁹ In order for a state to ensure funding for the “full cost of high quality legal representation,” it must be responsible for “paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g., Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5]).” See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

²⁰⁰ See SPANGENBERG GROUP REPORT, *supra* note 18, at 1; see also METRO PUBLIC DEFENDER’S 2005-2006 ANNUAL REPORT, *supra* note 27, at 19.

²⁰¹ See TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-190.

The funding provided by the State, however, has proven inadequate. Attorneys within the Offices of the District Public Defender are burdened by some of the highest caseloads in the country.²⁰² These attorneys are appointed on average over 600 cases, both capital and non-capital, a year, in addition to their pre-existing caseloads.²⁰³ In its Tennessee Weighted Caseload Study Update of February 2006, the Tennessee Comptroller concluded that district public defender offices across the State were short 123 attorneys.²⁰⁴ Indeed, the offices are in such dire need of attorneys that investigator positions have been filled with attorneys.²⁰⁵

For Fiscal Year 2006-2007, the Governor recommended allocating \$2,906,100 for the Shelby County Public Defender, \$1,516,200 for the Davidson County Public Defender,²⁰⁶ and \$27,653,500 among the twenty-nine other public defender offices.²⁰⁷ These proposed allocations, if approved, are still not likely to be sufficient to ensure high quality representation for all indigent capital defendants.

The Office of the Post-Conviction Defender

The State provides all funding for the Office of the Post-Conviction Defender.²⁰⁸ In Fiscal Year 2004-2005, the State allocated \$1,176,600 for the Office.²⁰⁹ Due to an excessive caseload, the Office of the Post-Conviction Defender has been said to be “on the verge of collapse.”²¹⁰ The Office of the Post-Conviction Defender presently has five assistant post-conviction defenders, who on average each carry a caseload of twelve to fourteen capital post-conviction cases.²¹¹

For Fiscal Year 2006-2007, the Governor recommended allocating \$1,268,800 in funding.²¹² Again, this proposed allocation, if approved, is not sufficient to ensure high quality representation to all indigent death-row inmates.

²⁰² See Redick, *supra* note 186; TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2004-2005, *supra* note 186, at ii (noting that “Tennessee’s public defenders carry caseloads in excess of nationally recognized standards”).

²⁰³ 2006 ANNUAL REPORT, *supra* note 187, at 5 (noting that Tennessee District Public Defenders opened 186,429 cases in fiscal year 2006); TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2005-2006, *supra* note 151, at 2-3 (noting that there were 309 public defenders or full-time equivalents handling criminal cases in fiscal year 2006). Notably, the 309 public defenders also include locally and federally-funded attorneys and attorneys in investigative positions. *Id.*

²⁰⁴ TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2005-2006, *supra* note 151, at 3.

²⁰⁵ *Id.* at 6.

²⁰⁶ See 2006 Tenn. Pub. Acts 963 § 1; TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-200.

²⁰⁷ TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-199.

²⁰⁸ *Id.* at B-201.

²⁰⁹ *Id.*

²¹⁰ See Problems with the State Criminal Indigent Defense System for Consideration by the Tennessee Judicial Selection Commission and the New Appointees to the Tennessee Supreme Court, at 3.

²¹¹ Telephone Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender (Jan. 16, 2007); Email Interview with Don Dawson, Office of the Post-Conviction Defender (Jan. 22, 2007).

²¹² See TENNESSEE BUDGET FY 2006-2007, *supra* note 6, at B-201.

Private Court-Appointed Attorneys

The State of Tennessee provides primary funding for the Indigent Defense Fund (Fund), which provides compensation to private court-appointed attorneys in all criminal cases, including capital cases.²¹³ In Fiscal Year 2004-2005, the State allocated \$17,412,200 to the Fund.²¹⁴ An additional \$22,300 of funding was provided by non-state sources.²¹⁵ For Fiscal Year 2006-2007, the Governor recommended that the State allocate \$18,343,300 to the Fund.²¹⁶

We were unable to determine if this amount is sufficient to provide effective representation in capital cases.

- b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
 - i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
 - ii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
 - iii. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The amount of compensation provided for representing a capital defendant or a death-row inmate depends on whether the attorney is employed by a district public defender office or the Office of the Post-Conviction Defender, or is a private attorney appointed by the court.

District Public Defender Offices and the Office of the Post-Conviction Defender

District Public Defenders and the Post-Conviction Defender receive an annual salary of \$124,900.²¹⁷ In 1994, the Tennessee legislature set compensation for entry-level assistant public defenders and assistant post-conviction defenders at \$40,440, increasing gradually over twenty-five years to \$106,000, subject to any annual salary increases

²¹³ *Id.* at B-190.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See* TENN. CODE ANN. §§ 8-7-105(a), 8-14-207(a), 40-30-209(a) (2006).

approved by the State Legislature.²¹⁸ In 2006, however, the starting salary for an assistant post-conviction defender remained approximately \$41,000.²¹⁹

Moreover, due to a striking shortage of assistant public defenders and ever-increasing workloads, some district public defender offices have designated their investigator positions to serve as assistant public defenders.²²⁰ Only upon recommendation of the appointing district public defender and the approval of the Executive Committee of the District Public Defenders Conference may such an attorney be compensated at the level of an assistant district public defender.²²¹ Unfortunately, we were unable to determine the actual compensation of attorneys whose positions had been created by the reapportionment of investigator positions.

Under the T.C.A, the salaries of attorneys working within the district public defender offices and the Office of Post-Conviction Defender are commensurate with those of district attorneys and assistant district attorneys.²²²

Private Court-Appointed Attorneys

In contrast, private court-appointed attorneys in capital cases are entitled to “reasonable compensation as determined by the court in which such services are rendered.”²²³ The Tennessee Supreme Court has set forth the following rates of compensation for appointed counsel in capital cases:

- (1) Lead counsel at \$75 per hour for out-of-court work and \$100 per hour for in-court work.
- (2) Co-counsel at \$60 per hour for out-of-court work and \$80 per hour for in-court work.
- (3) Post-conviction counsel at \$60 per hour for out-of-court work and \$80 per hour for in-court work.²²⁴

Although the Tennessee Supreme Court Rules do not specify a limit on attorney fees, the amount requested by each attorney for fees must be approved by the court and is subject to review by the Administrative Office of the Courts (AOC).²²⁵ Upon review of the

²¹⁸ See TENN. CODE ANN. §§ 8-14-207(b)(1), (2), 40-30-209(b) (2006).

²¹⁹ Email Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender, (Jan. 23, 2007).

²²⁰ See TENNESSEE COMPTROLLER WEIGHTED CASELOAD STUDY FY 2005-2006, *supra* note 151, at 6.

²²¹ TENN. CODE ANN. § 8-14-207(c)(4) (2006).

²²² TENN. CODE ANN. §§ 8-14-207(a), 40-30-209(a) (2006).

²²³ TENN. SUP. CT. R. 13, § 3(j).

²²⁴ TENN. SUP. CT. R. 13, § 3(k)(1)-(8). The Tennessee Supreme Court Rules define “out-of-court” as “time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party” and define “in-court” as “time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.” TENN. SUP. CT. R. 13, § 3(l). If an attorney is appointed to represent a death-row inmate in proceedings to determine whether s/he is competent to be executed, the attorney is entitled to \$60 for out-of-court work and \$80 for in-court work. TENN. SUP. CT. R. 13, § 3(i), (k).

²²⁵ TENN. SUP. CT. R. 13, § 6(b)(1), (2), (5).

claim, the AOC has the authority to decrease the amount awarded or deny the claim in full.²²⁶ In making this determination, the AOC is to give “due consideration to state revenues.”²²⁷ If the AOC rejects an attorney’s fee claim “in whole or in substantial part,” the Chief Justice of the Tennessee Supreme Court must review the denial and render a final decision.²²⁸ The attorney has no recourse to appeal the Chief Justice’s determination.

Additionally, under Tennessee Supreme Court Rule 13, counsel in capital cases must file interim claims for fees “at least every 180 days but no more frequently than every thirty days.”²²⁹ If the claim requests payment “for services rendered more than 180 days prior to the date on which the claim is approved by the court,” the claim is deemed waived.²³⁰

In its December 2004 Report, the Tennessee Bar Association’s Study Committee on Effective Assistance of Counsel in Capital Cases concluded that the State “[r]egrettably . . . has resolved conflicts between the Treasury and the fundamental rights of the accused in favor of the State’s Treasury.”²³¹ As echoed by the TBA Study Committee, it is clear that the State’s “focus must shift [from] budgetary concerns [] to creating a system for defense services that makes the imposition of death reliable and avoids the arbitrary imposition of the ultimate punishment.”²³²

Federal Habeas Corpus Counsel

Attorneys appointed for federal *habeas corpus* proceedings are entitled to compensation at a rate of not more than \$125 per hour for in-court and out-of-court work.²³³

- c. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - i. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - ii. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - iii. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction**

²²⁶ *Id.*

²²⁷ TENN. SUP. CT. R. 13, § 6(b)(2).

²²⁸ TENN. SUP. CT. R. 13, § 6(b)(5).

²²⁹ TENN. SUP. CT. R. 13, § 6(b)(4).

²³⁰ TENN. SUP. CT. R. 13, § 6(a)(4).

²³¹ TBA EFFECTIVE ASSISTANCE OF COUNSEL REPORT, *supra note* 166, at 47.

²³² *Id.*

²³³ 18 U.S.C. § 3599(g)(1) (2006).

between rates for services performed in or out of court. Periodic billing and payment should be available.

State Proceedings

The Tennessee Supreme Court Rules do not permit payment for hourly expert and/or investigative services over a maximum amount, including:

- (1) \$115 per hour for Accident Reconstruction;
- (2) \$250 per hour for Medical Services/Doctors & Psychiatrists;
- (3) \$150 per hour for Psychologists;
- (4) \$50 per hour for Investigators (Guilt/Sentencing);
- (5) \$65 per hour for Mitigation Specialists;
- (6) \$200 per hour for DNA Experts;
- (7) \$125 per hour for Forensic Anthropologists; and
- (8) \$75 per hour for Ballistics Experts, Fingerprint Experts, or Handwriting Experts.²³⁴

In post-conviction proceedings, the court may not authorize more than a total of \$20,000 for all investigative services or a total of \$25,000 for all expert services, unless the court finds by clear and convincing evidence that extraordinary circumstances exist to permit funding in excess of these amounts.²³⁵

Even if the court pre-authorizes funding for investigative and/or expert services, the defense still is not guaranteed this funding. The Director of the Administrative Office of the Courts (AOC) must approve the court's order granting pre-authorization.²³⁶ If the AOC denies the court's order, the Chief Justice of the Tennessee Supreme Court will review the claim and make a final determination as to whether prior approval for investigative and/or expert services will be granted.²³⁷

It is important to note that because district public defender offices and the Office of the Post-Conviction Defender have access to investigators within their respective offices, they do not seek authorization for investigative services.²³⁸ The starting salary of an investigator employed by a district public defender office is \$22,000, while the starting salary of an investigator in the Office of the Post-Conviction Defender ranges between \$30,000 to \$36,000 depending on the investigator's prior experience and education.²³⁹

It does not appear that periodic billing is available for experts and investigators.

Federal Habeas Corpus Proceedings

²³⁴ TENN. SUP. CT. R. 13, § 5(d)(1).

²³⁵ TENN. SUP. CT. R. 13, § 5(d)(4), (5).

²³⁶ TENN. SUP. CT. R. 13, § 5(e)(4).

²³⁷ *Id.*

²³⁸ TENN. CODE ANN. §§ 8-14-202(e), 40-30-208 (2006).

²³⁹ TENN. CODE ANN. § 8-14-207(b)(1) (2006); Email Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender (Jan. 23, 2007).

In federal *habeas corpus* proceedings, the court may authorize the appointed attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.²⁴⁰ The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.²⁴¹

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

Additional compensation for attorneys is not provided in cases in which a district public defender office or the Office of the Post-Conviction Defender is providing representation as these attorneys are salaried employees. In cases where a court-appointed attorney is providing representation, Tennessee Supreme Court Rule 13 stipulates no specific limitations on the total amount of attorney fees that may be awarded.

Tennessee Supreme Court Rule 13 does, however, stipulate specific limitations on the amount of funding the court may authorize for investigative and/or expert services.²⁴² The court may permit funding in excess of these amounts only if it finds by clear and convincing evidence that “extraordinary circumstances” exist.²⁴³

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Under Tennessee Supreme Court Rule 13, private court-appointed counsel may be entitled to compensation without prior court approval for “certain necessary expenses directly related to the representation of indigent parties.”²⁴⁴ For example, the court will reimburse for long distance telephone charges, travel mileage, lodging and meals if an overnight stay is required, parking, photocopying costs not to exceed \$500, computerized research, miscellaneous expenses such as postage, and expenses related to improving the indigent party’s physical appearance in the courtroom.²⁴⁵

Rule 13 prohibits compensation for the “services or time of a paralegal, law clerk, secretary, legal assistant, or other administrative assistants” and typical overhead expenses.²⁴⁶

Conclusion

The State of Tennessee does not appear to be providing adequate funding for defense counsel, experts, and investigators in death penalty cases. Additionally, in at least some instances, it does not appear that attorneys handling death penalty cases are being fully

²⁴⁰ 18 U.S.C. § 3599(f) (2006).

²⁴¹ 18 U.S.C. § 3599(g)(2) (2006).

²⁴² TENN. SUP. CT. R. 13, § 5(d)(4), (5).

²⁴³ TENN. SUP. CT. R. 13, § 5(d)(4), (5).

²⁴⁴ TENN. SUP. CT. R. 13, § 4(a)(1).

²⁴⁵ TENN. SUP. CT. R. 13, § 4(a)(3)(A)-(J).

²⁴⁶ TENN. SUP. CT. R. 13, § 4(a)(2).

compensated at a rate that is commensurate with the provision of high quality legal representation. The State of Tennessee, therefore, is not in compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

The Tennessee Supreme Court Rules (Rules) require all attorneys admitted to the Tennessee Bar to complete three hours of ethics and professionalism training and twelve hours of continuing legal education credit each year.²⁴⁷ The Rules further require that before being appointed to a death penalty case, trial counsel also must have completed at least six hours of specialized capital defense training.²⁴⁸

- a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

The State of Tennessee provides funding for the training, professional development, and continuing education of some, but not all, members of the defense team.

Each year, the Office of the Post-Conviction Defender assists the Tennessee Association of Criminal Defense Attorneys in producing a capital defense seminar, which provides attorneys with twelve hours of continuing legal education.²⁴⁹ The Administrative Office of the Courts pays the tuition associated with this seminar for all defense attorneys employed by the State, but not for private attorneys.²⁵⁰ Although the seminar is also open to investigators and defense experts, the State does not provide funding for them to attend.²⁵¹

- b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
 - i. Relevant state, federal, and international law;**
 - ii. Pleading and motion practice;**

²⁴⁷ TENN. SUP. CT. R. 21, § 3.01; *see also* Telephone Interview by Sarah Turberville, with Donna Voors, Communications Coordinator, Tennessee Commission on Continuing Legal Education and Specialization in Nashville, Tennessee (Jan. 19, 2007).

²⁴⁸ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

²⁴⁹ Email Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender, (Jan. 23, 2007).

²⁵⁰ Email Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender, (Jan. 24, 2007).

²⁵¹ Email Interview by Banafsheh Amirzadeh, with Don Dawson, Office of the Post-Conviction Defender, (Jan. 23, 2007).

- iii. **Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
- iv. **Jury selection;**
- v. **Trial preparation and presentation, including the use of experts;**
- vi. **Ethical considerations particular to capital defense representation;**
- vii. **Preservation of the record and of issues for post-conviction review;**
- viii. **Counsel’s relationship with the client and his/her family;**
- ix. **Post-conviction litigation in state and federal courts;**
- x. **The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;**
- xi. **The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.**

In addition to the general CLE requirements mandated by law, an attorney who wishes to qualify for appointment in a capital case at the trial level must have completed at least six hours of capital defense training prior to the first appointment and an additional six hours every two years thereafter.²⁵²

In order to qualify as appellate counsel, an attorney is required to complete six hours of training in the trial and appeal of capital cases, unless s/he already possesses capital appellate experience.²⁵³ Similarly, to qualify as counsel in post-conviction proceedings, an attorney may, but is not required, to participate in six hours of training in the trial and appeal of capital cases.²⁵⁴ Post-conviction counsel also may, but is not required, to participate in “six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts.”²⁵⁵

Tennessee Supreme Court Rule 13, however, does not specify the exact contents of such training and we were unable to determine whether these trainings encompass all of the issues listed above.

- c. **Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

After his/her first appointment to a capital case, an attorney is required to participate in at least six hours of capital defense training every two years thereafter in order to remain qualified to represent a capital defendant at trial.²⁵⁶ No similar requirements apply to appellate or post-conviction counsel.

²⁵² TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

²⁵³ TENN. SUP. CT. R. 13, § 3(e), (f), (g).

²⁵⁴ *Id.*; TENN. SUP. CT. R. 13, § 3(h).

²⁵⁵ TENN. SUP. CT. R. 13, § 3(h).

²⁵⁶ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

- d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

We were unable to determine whether the State provides all non-attorneys wishing to participate on the defense team with continuing professional education that is related to their areas of expertise.

Conclusion

The State of Tennessee provides some funding for the training of capital defense attorneys, but not for all members of the defense team. Additionally, all attorneys who represent capital defendants or death-sentenced inmates are not required to participate in specialized training on capital defense, and of those who are, not all are required to receive training that covers all of the topics included in Recommendation #5. Therefore, the State of Tennessee is only in partial compliance with Recommendation #5.

CHAPTER SEVEN

THE DIRECT APPEAL PROCESS

INTRODUCTION

Every death row inmate must be afforded at least one level of judicial review.¹ This process of judicial review is called the direct appeal. As the U.S. Supreme Court stated in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction of sentence, and death penalty cases are no exception.”² The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeals process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or the judge’s decision could be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought, but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

² *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION

A defendant who is convicted of first-degree murder and sentenced to death may be afforded two tiers of review on direct appeal—the first by the Court of Criminal Appeals, and, if the Court of Criminal Appeals affirms the conviction and sentence, a second by the Tennessee Supreme Court.³ Both reviews are nearly identical in nature, as each court must conduct its review in accordance with section 39-13-206(c)(1) of the Tennessee Code Annotated (T.C.A.) and the Tennessee Rules of Appellate Procedure.⁴

A. Review of the Defendant's Conviction and Death Sentence by the Tennessee Court of Criminal Appeals

A defendant may challenge his/her conviction⁵ and/or death sentence by initiating a direct appeal with the Tennessee Court of Criminal Appeals.⁶ In order to pursue an appeal, the defendant must file a notice of appeal with the trial court within thirty days of the entry of the judgment⁷ or within thirty days of the trial court's entry of an order denying a new trial,⁸ unless the Court of Criminal Appeals waives the filing "in the interest of justice."⁹

³ TENN. CODE ANN. § 39-13-206(a)(1) (2005).

⁴ See TENN. CODE ANN. § 39-13-206(c)(1) (2005) (obligating both the Tennessee Supreme Court and the Court of Criminal Appeals to review the sentence of death); see also TENN. CODE ANN. § 39-13-206(a)(1) (stating that once the Court of Criminal Appeals affirms the conviction and sentence of death, the case follows the Tennessee Rules of Appellate Procedure); TENN. CODE ANN. § 39-13-206(b) (stating that the appeal of the conviction and sentence must be heard in accordance with the Rules of the Tennessee Supreme Court); TENN. SUP. CT. R. 1 (stating that the Tennessee Rules of Appellate Procedure "shall govern all matters on appeal before this Court"); TENN. SUP. CT. R. 12(2) (stating that a capital case on appeal before the Tennessee Supreme Court must proceed in accordance with the Tennessee Rules of Appellate Procedure except when provided otherwise by the Rules of the Supreme Court); TENN. R. APP. P. 1 (stating that the rules "govern procedure in proceedings before the Supreme Court, Court of Appeals, and Court of Criminal Appeals).

⁵ See TENN. R. APP. P. 3(b) (noting the instances in which an "appeal as of right" lies from a conviction entered in the trial court on a plea of guilty or *nolo contendere*, including instances in which the issues presented for review were not waived as a matter of law by the plea of guilty or *nolo contendere* and are apparent from the record); *State v. Risner*, No. E2002-01112-CCA-R3-PC, 2003 WL 21492929, at *10 (Tenn. Crim. App. June 30, 2003) (stating that as a general matter, "an accused who enters a plea of guilty to a criminal offense waives the right to appeal so long as the plea is voluntarily, knowingly, and intelligently made").

⁶ TENN. CODE ANN. § 39-13-206(a)(1), (c)(1) (2005); see *State v. Carter*, 114 S.W.3d 895, 898 (Tenn. 2003) (indicating review of a death sentence by the Court of Criminal Appeals and the Tennessee Supreme Court where the defendant had originally pled guilty and had been re-sentenced to death).

⁷ TENN. R. APP. P. 4(a).

⁸ TENN. R. APP. P. 4(c). Furthermore, if the defendant files a motion or petition under Rule 29(c) for a judgment of acquittal, under Rule 32(a) for a suspended sentence, under Rule 32(f) for withdrawal of a plea of guilty, or under Rule 34 for arrest of judgment, s/he must file a notice of appeal with the trial court within thirty days of the entry of the order denying a new trial or "granting or denying any other such motion or petition." *Id.*

⁹ TENN. R. APP. P. 4(a). A copy of the notice of appeal must also be served on the district attorney general of the county in which the judgment was entered and on the State's Attorney General. TENN. R.

To proceed with the appeal, the appellate court clerk must then file the record of the trial court proceedings with the Court of Criminal Appeals.¹⁰ A copy of the trial court judge’s “Rule 12 report,” which must be completed by the trial court judge in all cases in which the defendant was convicted of first-degree murder,¹¹ must also be filed with the record.¹²

However, if the defendant fails to initiate any appellate review of the conviction or sentence of death, the record relating to the defendant’s sentence will still be forwarded to the Court of Criminal Appeals for review.¹³

1. Scope of Review

Generally, the Court of Criminal Appeals reviews only those issues “presented for review.”¹⁴ However, the court may exercise its discretion to consider other issues, specifically when necessary “to prevent needless litigation, to prevent injury to the interest of the public, [or] to prevent prejudice to the judicial process.”¹⁵

In all capital cases, the Court of Criminal Appeals will first consider “any errors assigned” and will then review the sentence of death.¹⁶

a. Review of Trial Error

i. Trial Errors Properly Preserved and Raised

A defendant may raise on appeal any question of law¹⁷ and s/he is entitled to appellate review of all issues s/he properly preserves in the trial court, raises in a motion for new

APP. P. 5(b). The notice must also prominently state “CAPITAL CASE APPEAL” below the docket number. TENN. CT. CRIM. APP. R. 21.

¹⁰ TENN. R. APP. P. 26(a), cmt; TENN. CODE ANN. § 39-13-206(a)(2) (2005). See TENN. R. APP. P. 24, 25 (requiring the defendant to order the preparation of the transcript and outlining the procedures by which the record is prepared and completed for transmission to the appellate court).

¹¹ TENN. SUP. CT. R. 12(1). Rule 12 reports also must be completed for first-degree murder cases which have been “remanded by the appellate court for retrial and/or resentencing” or in which the defendant pled guilty. *Id.* Additionally, Rule 12 reports are to be completed with the assistance of the prosecution and defense counsel. *Id.* Each Rule 12 report should detail facts about the crime, the trial, the defendant and his/her counsel, any co-defendants or accomplices, the victim, the trial, the aggravating and mitigating circumstances found by the jury, and other general considerations. *Id.* at Report of Trial Judge in First Degree Murder Cases.

¹² TENN. SUP. CT. R. 12(1).

¹³ See TENN. CODE ANN. § 39-13-206(a)(2) (2005); see also *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005) (recognizing that the “Tennessee General Assembly has mandated limited appellate review of a sentence of death, even if a defendant chooses not to appeal the conviction of first-degree murder. . .”). The Tennessee Supreme Court also conducts a mandatory review of cases in which death was imposed. TENN. CODE ANN. § 39-13-206(a)(1) (2005); *State v. Stevens*, 78 S.W.3d 817, 829 (Tenn. 2002).

¹⁴ TENN. R. APP. P. 13(b).

¹⁵ TENN. R. APP. P. 13(b) (numbers deleted). The reasons listed above are not inclusive; the court may exercise its discretion accordingly. *Id.*

¹⁶ TENN. CODE ANN. § 39-13-206(b) (2005).

trial,¹⁸ and properly presents to the Court of Criminal Appeals.¹⁹ However, the court may exercise its discretion to review issues which have been “waived due to a procedural default. . . [or] a change in legal theory, or [have] not been presented for review by either party.”²⁰

ii. Plain Error

When a defendant fails to raise an error in a motion for a new trial or before the Court of Criminal Appeals, the court may in its discretion review the error if it rises to the level of “plain error.”²¹ Plain error is error that “affect[s] the substantial rights of the accused,”²² and that “probably changed the outcome of the trial.”²³ The Court of Criminal Appeals may reverse for plain error only if: (1) the record clearly establishes what occurred in the trial court, (2) a “clear and unequivocal” rule of law was breached, (3) a substantial right was adversely affected, (4) the issue was not waived by the defendant for “tactical reasons,” and (5) “consideration of the error is ‘necessary to do substantial justice.’”²⁴

b. Review of the Death Sentence

¹⁷ TENN. R. APP. P. 13(a) (stating that any question of law may be raised for review and relief on appeal except as provided for in Tenn. R. App. P. 3(e)). *See infra* note 18.

¹⁸ Under Rule 3(e) of the Tennessee Rules of Appellate Procedure, if following a jury trial, the defendant fails to raise in a motion for new trial any of the following issues—“the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought”—, the defendant waives the right to raise those issues on appeal. TENN. R. APP. P. 3(e).

¹⁹ *State v. Adkisson*, 899 S.W.2d 626, 636 (Tenn. Crim. App. 1994); *State v. Walls*, No. M2003-01854-CCA-R3-CD, 2006 WL 151923, at *11 (Tenn. Crim. App. Jan. 19, 2006) (slip copy); *State v. Gomez*, 163 S.W.3d 632, 643 (Tenn. 2005).

²⁰ *See Adkisson*, 899 S.W.2d at 636. For example, claims that are raised by the defendant in his/her appellate brief but that are “not supported by argument, citation to authorities, or appropriate references to the record” will be considered waived. TENN. CT. CRIM. APP. R. 10(b). Nonetheless, the Court of Criminal Appeals may choose to address the unsupported claims. *See, e.g., State v. Thomas*, 158 S.W.3d 361, 393-94 (Tenn. 2005) (affirming the Court of Appeals’ decision to address the defendant’s contention that the admission of photos was error in spite of the defendant’s failure to cite to the record on appeal).

²¹ TENN. R. CRIM. P. 52(b). In the comment pertaining to Rule 52(b), the Advisory Commission noted that “[p]lain error may, not must, be noticed by the appellate court, even where substantial justice is involved.” TENN. R. CRIM. P. 52(b)cmt. *See Adkisson*, 899 S.W.2d at 637-38 (delineating that the rule itself and the advisory comment to Rule 52(b) “make it clear that consideration of issues pursuant to [Rule 52(b)] rests within the sound discretion of the appellate court”); *see also State v. Hardy*, No. M2004-02249-CCA-R3-CD, 2006 WL 359677, at *10 (Tenn. Crim. App. Feb. 10, 2006) (slip copy) (noting that appellate courts have interpreted Rule 52(b) of the Tennessee Rules of Criminal Procedure to permit plain error review even when no contemporaneous objection is made to the alleged error, and finding the defendant’s claim to have been waived because the issue was not supported by reference to the record in accordance with Tenn. Crim. App. R. 10(b) and because the defendant failed to make a contemporaneous objection or request a corrective instruction at trial).

²² *Hardy*, 2006 WL 359677, at *10 (slip copy); TENN. R. CRIM. P. 52(b).

²³ *State v. Hugueley*, 185 S.W.3d 356, 382 (Tenn. 2006) (citing *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005)).

²⁴ *Hardy*, 2006 WL 359677, at *10 (slip copy) (listing the five factors that must be present in order for the court to review plain error); *State v. Thomas*, 158 S.W.3d 361, 413 (Tenn. 2005) (citing *State v. Adkisson*, 899 S.W.2d 626, 641-42) (Tenn. Crim. App. 1994)).

In all capital cases, the Court of Criminal Appeals must review the sentence of death to determine whether:

- (1) The sentence of death was imposed in any arbitrary fashion;
- (2) The evidence supports the jury's finding of statutory aggravating circumstance(s);
- (3) The evidence supports the jury's finding that the aggravating circumstance(s) outweigh any mitigating circumstances; and
- (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.²⁵

i. The Imposition of a Death Sentence in an Arbitrary Fashion

To determine whether the defendant's death sentence was imposed in an arbitrary fashion, the Court of Criminal Appeals assesses whether the sentencing phase of the trial was conducted according to the applicable statutory provisions and rules of criminal procedure.²⁶

ii. The Sufficiency of Evidence Supporting the Imposition of a Death Sentence

1. The Finding of Statutory Aggravating Circumstance(s)

In assessing the sufficiency of evidence supporting the existence of statutory aggravating circumstances, the Court of Criminal Appeals must "after reviewing the evidence in the light most favorable to the State" assess whether "a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt."²⁷

2. The Finding That the Aggravating Circumstance(s) Outweigh the Mitigating Circumstance(s)

In determining whether the evidence sufficiently supports the finding that the statutory aggravating factors outweigh the mitigating evidence, the Court of Criminal Appeals must decide whether "after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt."²⁸

iii. Comparative Proportionality Review: The Imposition of an Excessive or Disproportionate Death Sentence

²⁵ TENN. CODE ANN. § 39-13-206(c)(1) (2005).

²⁶ See *State v. Rogers*, No. M2002-01798-CCA-R3-DD, 2004 WL 1462649, at *38 (Tenn. Crim. App. June 30, 2004); *State v. Berry*, 141 S.W.3d 549, 570 (Tenn. 2004).

²⁷ *State v. Hugueley*, No. W2004-00057-CCA-R3-CD, 2005 WL 645179, at *14 (Tenn. Crim. App. March 17, 2005); *State v. Robinson*, 146 S.W.3d 469, 499 (Tenn. 2004).

²⁸ See *State v. Reid*, No. M2003-00539-CCA-R3-DD, 2005 WL 1315689, at *52 (Tenn. Crim. App. June 3, 2005); see also *State v. Cole*, 155 S.W.3d 885, 906 (Tenn. 2005).

1. The Purpose of Comparative Proportionality Review

In 1977, in response to the United States Supreme Court's decision in *Gregg v. Georgia*,²⁹ the Tennessee legislature adopted comparative proportionality review to serve "as an additional safeguard against arbitrary or capricious sentencing."³⁰ While the Tennessee Supreme Court has recognized that proportionality review assures "rationality and consistency in the imposition of the death penalty," the Court has also remained cognizant of the fact that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'"³¹

2. The Standard and Scope of Comparative Proportionality Review

Section 39-13-206(c)(1)(D) of the T.C.A. requires that the Court of Criminal Appeals determine whether the defendant's death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."³² The court commences its review under the presumption that the death sentence is proportionate,³³ and must ensure that no "aberrant death sentence is affirmed."³⁴ The court will only find a death sentence to be disproportionate "[i]f the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed."³⁵

When conducting its proportionality review, the Court of Criminal Appeals may consider Rule 12 reports,³⁶ which are required to be filed in all cases resulting in a first-degree

²⁹ 428 U.S. 153, 206 (1976) (upholding the constitutionality of Georgia's death penalty statute which provides for proportionality review).

³⁰ *State v. Barber*, 753 S.W.2d 659, 665 (Tenn. 1988).

³¹ *Barber*, 753 S.W.2d at 665-66 (citing *Zant v. Stephens*, 462 U.S. 862, 884 (1983)).

³² TENN. CODE ANN. § 39-13-206(c)(1)(D) (2005).

³³ *See State v. Rogers*, No. M2002-01798-CCA-R3-DD, 2004 WL 1462649, at *38 (Tenn. Crim. App. June 30, 2004) (relying on the standards of proportionality review promulgated by the Tennessee Supreme Court); *State v. Hall*, 976 S.W.2d 121, 135 (Tenn. 1998). However, some decisions by the Court of Criminal Appeals have limited the application of this presumption. *See, e.g., State v. Rollins*, No. E2003-01811-CCA-R3-DD, 2005 WL 924292, at *16 (Tenn. Crim. App. April 21, 2005) (stating the presumption of proportionality applies only when "the sentencing procedures focus discretion on the 'particularized nature of the crime and the particularized characteristics of the individual defendant'") (citing *Terry v. State*, 46 S.W.3d 147, 163 (Tenn. 2001)).

³⁴ *Rogers*, 2004 WL 1462649, at *38; *State v. Bland*, 958 S.W.2d 651, 665 (Tenn. 1997).

³⁵ *State v. Holton*, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995, at *27 (Tenn. Crim. App. July 17, 2002); *Bland*, 958 S.W.2d at 665. In *Bland*, the Court adopted the "precedent-seeking approach" to perform proportionality review, which means that the courts compare the case at hand to cases previously decided by examining the facts of each crime, the defendants' characteristics, and the aggravating and mitigating circumstances found. *Id.* at 664-65.

³⁶ *See State v. Copeland*, No. E2002-01123-CCA-R3-DD, 2005 WL 2008177, at *59 (Tenn. Crim. App. Aug. 22, 2005) ("The appellate court reviews Supreme Court 12 reports, which are merely a starting point when conducting comparative proportionality review.") (slip copy); *State v. Godsey*, 60 S.W.3d 759, 785 (Tenn. 2001); *see also State v. Barber*, 753 S.W.2d 659, 663 (Tenn. 1988) (Rule 12 reports were adopted so that the Tennessee Supreme Court could ensure a death sentence was not "imposed in an arbitrary fashion" and was not "excessive or disproportionate to the penalty imposed in similar cases").

murder conviction.³⁷ The court’s selection of “similar cases” as required by section 39-13-206(c)(1)(D), however, is limited to those cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined the defendant’s sentence—life imprisonment, life imprisonment without parole, or death.³⁸

When reviewing these similar cases, the Court of Criminal Appeals identifies and compares the cases using a myriad of factors: “(1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims’ circumstances including age, physical and mental conditions, and the victims’ 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 nondecendent victims.”³⁹ The court also considers numerous characteristics of the defendants, including their (1) prior criminal record or criminal activity; (2) age, race, and gender; (3) mental, emotional or physical condition; (4) involvement or role in the murder, (5) cooperation with authorities; (6) remorse; (7) knowledge of the victims’ helplessness; and (8) capacity for rehabilitation.⁴⁰ The Court of Criminal Appeals also may consider the sentence imposed on a co-defendant, but a co-defendant’s lesser sentence by itself does not serve as a basis for finding that a death sentence is disproportionate.⁴¹

2. Disposition of an Appeal in the Court of Criminal Appeals

Following its review of the conviction and/or death sentence, the Tennessee Court of Criminal Appeals has authority to correct any errors, and to grant any appropriate relief, including setting aside a trial court’s judgment and re-sentencing the defendant to life imprisonment or life imprisonment without the possibility of parole.⁴² The Tennessee Rules of Appellate Procedure allow for the trial court’s judgment to be set aside, when “considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.”⁴³

³⁷ See *supra* note 11 and accompanying text.

³⁸ See *Copeland*, 2005 WL 2008177, at *59 (slip copy); *Godsey*, 60 S.W.3d at 783; *State v. McKinney*, 74 S.W.3d 291, 311 (Tenn. 2002), *cert. denied*, 537 U.S. 926 (2002).

³⁹ *Rogers*, 2004 WL 1462649, at *39; *Bland*, 958 S.W.2d at 667 (noting this is a non-exhaustive list of factors).

⁴⁰ See *Rogers*, 2004 WL 1462649, at *39; *Bland*, 958 S.W.2d at 667 (noting this is a non-exhaustive list of factors). See also *State v. Chalmers*, 28 S.W.3d 913, 920 (Tenn. 2000), *cert. denied*, 532 U.S. 925 (2001) (clarifying that the race of the defendant is considered under the comparative proportionality review “to ensure that an aberrant death sentence was not imposed”).

⁴¹ See *State v. Robinson*, 146 S.W.3d 469, 503-04 (Tenn. 2004) (reversing the Court of Criminal Appeals’ determination that the case was disproportionate in part because the co-defendant was not sentenced to death).

⁴² TENN. CODE ANN. § 39-13-206(d)(1), (2) (2005); TENN. R. APP. P. 36(a) (granting authority to both the Tennessee Supreme Court and Court of Criminal Appeals). Any relief granted cannot “[contravene] the province of the trier of fact.” TENN. R. APP. P. 36(a) cmt. Additionally, a party who “invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error” is not entitled to relief. *Id.*

⁴³ TENN. R. APP. P. 36(b); see also TENN. R. CRIM. P. 52(a) (“[n]o conviction shall be reversed on appeal except for errors that affirmatively appear to have affected the result of the trial on the merits”).

B. Review of the Defendant's Conviction and Death Sentence by the Tennessee Supreme Court

If the Court of Criminal Appeals affirms the first-degree murder conviction and death sentence, a defendant's case is then subject to automatic review by the Tennessee Supreme Court, regardless of whether the defendant files an appeal.⁴⁴ The review undertaken by the Tennessee Supreme Court encompasses the affirmance of the conviction and death sentence by the Court of Criminal Appeals as well as the statutorily mandated proportionality review under section 39-13-206(c)(1)(D) of the T.C.A.⁴⁵ In nearly all respects, except in those discussed below, the review by the Tennessee Supreme Court mirrors the review conducted by the Court of Criminal Appeals.⁴⁶

In comparison to the Court of Criminal Appeals, the Tennessee Supreme Court is explicitly required to review "the record and briefs and consider *all* errors assigned."⁴⁷ After its initial review of the record and briefs, the Court may enter an order stating the issues reserved for oral argument and granting each party additional time to file a supplemental brief.⁴⁸

In conducting its review, the Tennessee Supreme Court appears to have adopted a standard of review which potentially prevents any significant errors in capital cases from being procedurally defaulted.⁴⁹ Specifically, the Tennessee Supreme Court has stated

⁴⁴ TENN. CODE ANN. § 39-13-206(a)(1) (2005). It is important to note that a capital defendant also may petition the court for a rehearing in the Court of Criminal Appeals. See TENN. R. APP. P. 39(a).

⁴⁵ TENN. CODE ANN. § 39-13-206(a)(1), (c)(1)(D) (2005).

⁴⁶ See *supra* notes 25 to 43 and accompanying text.

⁴⁷ TENN. SUP. CT. R. 12(2) (emphasis within text). The Tennessee Supreme Court commences this review after each party files its brief and before oral arguments are set. *Id.* The briefs filed by the parties cannot "incorporate or adopt by reference" any brief filed by either party before in the Court of Criminal Appeals. *Id.* Briefs must be complete, present "all issues, arguments and facts without any need for reference" to a prior Court of Criminal Appeals brief. *Id.* The appellant's brief also must have attached a copy of the Court of Criminal Appeals' opinion. *Id.*

⁴⁸ TENN. SUP. CT. R. 12(2); see, e.g., *State v. Keen*, 31 S.W.3d 196, 202 (Tenn. 2000).

⁴⁹ See *Cone v. Bell*, 359 F.3d 785, 791-94 (6th Cir. 2004), *reversed on other grounds by* 543 U.S. 447 (2005). In *Cone*, the Sixth Circuit Court of Appeals held that although Cone's challenge to the constitutionality of the "heinous, atrocious, and cruel" aggravator was neither raised at trial nor on direct review in the Tennessee Supreme Court, the Tennessee Supreme Court still "implicitly decided" the claim on its merits. *Id.* at 791, 794. In so holding, the Court of Appeals reasoned that the statutorily mandated review under T.C.A. § 39-2-205(c)(1)(1982) also entailed a review of Cone's "unmentioned vagueness 'challenge,'" which the Court had "implicitly considered and rejected." *Id.* at 793. The Court of Appeals considered the issue raised by Cone, the vagueness of an aggravator, to be intertwined with the Tennessee Supreme Court's statutory mandate of ensuring that no death sentence is "imposed in any arbitrary fashion." *Id.* As other constitutional violations may not implicate a death sentence being imposed in an "arbitrary fashion" or fall under any other provisions of the statutorily mandated review, "the implicit review principle . . . would not necessarily save those claims from procedural default." *Id.* See also *Rickman v. Dutton*, 864 F. Supp. 686, 707-08 (M.D. Tenn. 1994) (finding that Rickman's claim of an unconstitutional jury instruction was reviewed by the Tennessee Supreme Court on direct appeal even though the issue was not raised by Rickman). Interestingly, the Sixth Circuit in *Cone v. Bell* stated in dicta that the notion that the Tennessee Supreme Court is obligated to review significant errors, raised or not, is "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee in capital cases." 161 F.3d 320, 336 (6th Cir. 1998).

that “[i]n death penalty cases, this Court is required by statute to review the sentence and to consider significant errors whether or not called to the attention of the trial court.”⁵⁰

If the Tennessee Supreme Court affirms the defendant’s conviction and sentence on direct appeal, the Court must set an execution date, no less than four months from the date of the Court’s judgment.⁵¹

C. Discretionary Review by the United States Supreme Court

If the Tennessee Supreme Court affirms the death sentence, the defendant may petition for a writ of *certiorari* with the United States Supreme Court.⁵² The petition must be

A number of Tennessee Supreme Court cases illustrate that the Court’s requisite review of a death sentence includes review of issues which normally would have been procedurally barred. *See State v. West*, 19 S.W.3d 753, 753-54, 756 (Tenn. 2000) (holding both that the Tennessee Supreme Court “previously” decided West’s post-conviction evidentiary claim (i.e., constitutionality of an aggravating circumstance) through its statutorily mandated review of the death sentence on direct appeal under T.C.A. § 39-2-205 (1982) and that West “waived” the claim by not having raised it on direct appeal); *State v. Duncan*, 698 S.W.2d 63, 67-68 (Tenn. 1985) (reviewing evidentiary objections not made at trial, although raised on appeal, and stating that “in cases where the defendant is under sentence of death, this court is under the duty to ‘automatically’ review the sentence, which imposes the burden on this court to consider any alleged error, whether called to the trial court’s attention or not [citing to T.C.A. § 39-2-205(a)]. . . In short, there is no waiver of error directed to the admissibility of evidence when the defendant is under sentence of death.”); *State v. Martin*, 702 S.W.2d 560, 564 (Tenn. 1985), *overruled on other grounds by State v. Brown*, 836 S.W.2d 530 (Tenn. 1992) (stating that “[i]n death penalty cases, [], this Court is required by statute to review the sentence and to consider significant errors whether or not called to the attention of the trial court” and citing section 39-2-205(a) of the T.C.A. in support of this statement, before reviewing jury instructions that were neither objected to at trial nor raised in a motion for new trial); *see also State v. Nesbitt*, 978 S.W.2d 872, 881 (Tenn. 1998) (holding that in light of the court’s statutory obligation to review capital cases under T.C.A. § 39-13-206 (1997 Repl.), “this Court has jurisdiction to review the issues raised in appeal despite the defendant’s failure to timely file his motion for a new trial.”). Most recently, in *State v. Hugueley*, the Tennessee Supreme Court chose to address the issue of whether a prospective juror had been properly dismissed, despite its waiver by the defendant for having failed to raise the issue in his motion for a new trial. 185 S.W.3d 356, 377 (Tenn. 2006). In explaining its rationale, the Court highlighted the fact that the case implicated the death penalty and the defendant’s “fundamental constitutional rights to a fair and impartial jury.” *Id.*

But see Black v. Bell, 181 F. Supp. 2d 832, 868 (M.D. Tenn. 2001) (holding in *habeas corpus* proceedings that the capital defendant procedurally defaulted his claim relating to the constitutionality of aggravators by not raising it in the state courts). Although the capital defendant in *Black* did not advance “a basis for avoiding the procedural default,” the court noted that to the extent the defendant relied on section 39-2-205 of the T.C.A. “as a basis for excusing his failure to raise claims in state court, the Court is not persuaded that the state court’s review under this provision provides a basis for avoiding the procedural default bar.” *Id.* at n. 14. It is also important to note that most of these cases were decided upon section 39-2-205(a) of the T.C.A. (1982), which only called for review by the Tennessee Supreme Court. *See* TENN. CODE ANN. § 39-2-205(a) (providing the authority to review a sentence of death on direct appeal only to the Tennessee Supreme Court); TENN. CODE ANN. § 39-13-206(a)(1) (2005) (calling for two levels of review on appeal, one by the Court of Criminal Appeals and, if the conviction and sentence are affirmed, a second by the Tennessee Supreme Court).

⁵⁰ *Martin*, 702 S.W.2d at 564.

⁵¹ TENN. CODE ANN. § 40-30-120(a) (2005).

filed within ninety days of the judgment affirming the defendant's death sentence.⁵³ The United States Supreme Court may decline or accept the defendant's case for review.⁵⁴ If the United States Supreme Court reviews the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.⁵⁵

⁵² 28 U.S.C. § 1257(a) (2005). The defendant also may petition the court for a rehearing in the Tennessee Supreme Court. *See* TENN. R. APP. P. 39(a).

⁵³ SUP. CT. R. 13(1).

⁵⁴ SUP. CT. R. 16(2), (3).

⁵⁵ 28 U.S.C. § 2106 (2005).

II. ANALYSIS

A. Recommendation #1

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.

Section 39-13-206(c)(1)(D) of the T.C.A. requires both the Tennessee Supreme Court and the Court of Criminal Appeals to determine whether the defendant's death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."⁵⁶ Although the State's comparative proportionality review "purports to inquire . . . whether the [death] penalty is nonetheless unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime,"⁵⁷ the Tennessee Supreme Court has limited the scope of its and the Court of Criminal Appeal's duty under the T.C.A. to ensuring that "no aberrant death sentence is affirmed."⁵⁸ Accordingly, a death sentence will be found disproportionate only "if the case, taken as a whole is plainly lacking in circumstances consistent with those in *similar cases in which the death penalty has been imposed*."⁵⁹

The Tennessee Supreme Court itself has conceded that this articulated standard is not "easily satisfied."⁶⁰ Prior to its 2001 decision in *State v. Godsey*, the Tennessee Supreme Court had yet to invalidate a single death sentence under its proportionality review.⁶¹ By basing the determination of proportionality solely on cases in which the defendant received the death penalty, Tennessee courts have undercut the review's statutorily defined purpose—to determine whether a death sentence is excessive or disproportionate *in comparison to similar cases*.⁶² As stated by Tennessee Supreme Court Justice Birch, "[p]roportionality implies consistency and balance in sentencing, neither of which is accomplished when distinguishable penalties are imposed in indistinguishable cases."⁶³

⁵⁶ TENN. CODE ANN. § 39-13-206(c)(1)(D) (2005).

⁵⁷ *State v. Godsey*, 60 S.W.3d 759, 781 (Tenn. 2001) (citing *Bland*, 958 S.W.2d at 662).

⁵⁸ *Godsey*, 60 S.W.3d at 784; *Rogers*, 2004 WL 1462649, at *38.

⁵⁹ *Godsey*, 60 S.W.3d at 782 (emphasis added); *State v. Holton*, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995, at *27 (Tenn. Crim. App. July 17, 2002) (emphasis added).

⁶⁰ *Godsey*, 60 S.W.3d at 782.

⁶¹ *Id.* at 783. In *Godsey*, the Tennessee Supreme Court stated that the fact that no other death sentence had been invalidated on the grounds of disproportionality indicated that Tennessee's "capital sentencing scheme is functioning properly." *Id.*

⁶² See *Godsey*, 60 S.W.3d at 793-94 (Birch, J. concurring in part and dissenting in part); TENN. CODE ANN. § 39-13-206(c)(1)(D) (2005).

⁶³ *Godsey*, 60 S.W.3d at 794 (Birch, J. concurring in part and dissenting in part). In *Godsey*, Justice Birch, concurring in part and dissenting in part, highlighted three main problems with the Court's proportionality review in a minority opinion—" (1) the proportionality test is overbroad; (2) the 'pool' of cases used for comparison is inadequate; and (3) the review is too subjective." *Id.* at 793.

In conducting proportionality review, Tennessee courts may still consider any similar cases in which “the State seeks the death penalty, a capital sentencing hearing is held, and the sentencing jury determines whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death.”⁶⁴ In other words, courts may consider capital cases in which death was sought, even though a sentence of either life imprisonment or life imprisonment without parole was imposed.⁶⁵ However, capital cases in which death was sought, but resulted in a sentence of life imprisonment or life imprisonment without parole do not serve as a basis for invalidating a death sentence under section 39-13-206(c)(1)(D) of the T.C.A., as the courts must only decide “if the case, taken as a whole, is plainly lacking in circumstances consistent with those in *similar cases in which the death penalty has been imposed*.”⁶⁶ The State’s proportionality analysis does not obligate Tennessee courts to determine whether a particular case is “subjectively ‘more or less’ like other ‘death’ cases or other ‘life’ cases.”⁶⁷ In fact, so long as there is some discernable basis for the lesser sentence, a death sentence is not disproportionate where another defendant receives a life sentence for an offense with similar circumstances.⁶⁸

Tennessee courts also fail to include as part of the proportionality review cases in which the death penalty could have been sought but was not.⁶⁹ In 2005, while dissenting from the majority’s decision in *State v. Reid*, Justice Birch stated that excluding those cases “in which the State did not seek the death penalty, or in which no capital sentencing hearing was held, frustrates any meaningful comparison for proportionality purposes.”⁷⁰

⁶⁴ See *State v. Copeland*, No. E2002-01123-CCA-R3-DD, 2005 WL 2008177, at *59 (Tenn. Crim. App. Aug. 22, 2005) (slip copy); see also *Godsey*, 60 S.W.3d at 783; *State v. McKinney*, 74 S.W.3d 291, 311 (Tenn. 2002), cert. denied, 537 U.S. 926 (2002). Excluded from this pool of similar cases are those first-degree murder cases in which the State could have, but elected not to seek the death penalty and cases in which a plea-bargaining agreement was reached in regards to the punishment. See *Godsey*, 60 S.W.3d at 783-84; *McKinney*, 74 S.W.3d at 311.

⁶⁵ See, e.g., *McKinney*, 74 S.W.3d at 313.

⁶⁶ *Id.*; see also *Godsey*, 60 S.W.3d. at 782 (emphasis added); *State v. Holton*, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995, at *27 (Tenn. Crim. App. July 17, 2002) (emphasis added). In other words, first-degree murder cases in which a sentence other than death was imposed can be considered when conducting proportionality review, but the existence of these sorts of cases does not mean that the imposition of the death sentence in the current case was disproportionate.

⁶⁷ *McKinney*, 74 S.W.3d at 313; see also *State v. Rogers*, No. M2002-01798-CCA-R3-DD, 2004 WL 1462649, at *38 (Tenn. Crim. App. June 30, 2004) (stating that comparative proportionality review as outlined by the Tennessee Supreme Court “does not require a finding that a sentence ‘less than death was never imposed in a case with similar characteristics’”).

⁶⁸ *Godsey*, 60 S.W.3d. at 784. But see *id.* at 794 (Birch, J., concurring in part and dissenting in part) (“Even if a defendant can show that others received life sentences for similar crimes and no discernible basis exists to distinguish the cases, the sentence will ‘not necessarily [be found] disproportionate.’”).

⁶⁹ See *supra* note 64 and accompanying text. Cases in which a sentence of death was not sought have been used for the limited purposes of providing context or illustrating possible remedies, “in view of [a] conclusion that the sentence was disproportionate.” *Godsey*, 60 S.W.3d at 786.

⁷⁰ *State v. Reid*, 164 S.W.3d 286, 325 n.2 (Tenn. 2005) (Birch J., concurring in the affirmance of the conviction but dissenting to the affirmance of the death sentence). Justice Birch has expressed his “displeasure” with Tennessee’s current comparative proportionality analysis since its adoption in 1997 in *Bland*. *Id.* at 324.

However, in *State v. Godsey*, the majority of the Court asserted that including these cases would in effect usurp prosecutorial discretion.⁷¹

Interestingly, the decision-making process used by prosecutors in determining whether to seek the death penalty has been questioned by the Comptroller of the Treasury. In fact, in its 2004 report, *Tennessee's Death Penalty: Costs and Consequences* (the Report), the Comptroller noted “[p]rosecutors are not consistent in their pursuit of the death penalty.”⁷² To prevent “some of the arbitrariness of prosecutorial discretion,” the Report recommended that the Tennessee legislature establish a formal protocol for prosecutors to use in deciding to seek the death penalty.⁷³

In light of these identified problems and in an effort to ensure that capital defendants are ensured meaningful proportionality review, the Tennessee Supreme Court and the Court of Criminal Appeals should include in their review *and* determination of proportionality those cases in which the death penalty could have been sought, but was not, and cases in which the death penalty was sought, but not imposed.⁷⁴

Additionally, given that courts rely on Rule 12 reports to conduct proportionality review, it is imperative that the State of Tennessee ensure that trial judges file complete Rule 12 reports for all cases resulting in a first-degree murder conviction, especially capital cases, as mandated by Tennessee Supreme Court Rule 12.⁷⁵ Unfortunately, as of July 2004, judges had failed to file a “considerable number” of Rule 12 reports for defendants convicted of first-degree murder,⁷⁶ which, in turn, may have restricted the courts’ abilities to identify similar cases and to ensure each capital defendant is afforded a thorough and meaningful review of his/her death sentence.

In sum, because the Tennessee Supreme Court and the Court of Criminal Appeals, in performing proportionality review, limit their determination of proportionality to cases in which the death penalty was imposed, the State of Tennessee only partially meets the requirements of Recommendation #1.

⁷¹ *Godsey*, 60 S.W.3d at 784. In *Godsey*, the court reasoned in part that the review of cases in which the death penalty was not sought “would necessarily require [the Court] to scrutinize what is ultimately a discretionary prosecutorial decision.” *Id.*

⁷² See John G. Morgan, Comptroller of the Treasury, *Tennessee's Death Penalty: Costs and Consequences* 13, 48 (July 2004), available at www.comptroller.state.tn.us/orea/reports. Although the Criminal Justice Section of the Tennessee Bar Association raised “concerns regarding the accuracy of conclusions reached and recommendations made” by the Report, those concerns focused on the financial aspects of the death penalty’s administration in Tennessee. See TENN. BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, Report to the Board of Governors and the House of Delegates of the Study Committee on Effective Assistance of Counsel in Capital Cases, at 39-44 (Dec. 31, 2004).

⁷³ Morgan *supra* note 72, at 48.

⁷⁴ This could be done by amending the Tennessee Supreme Court Rule 12 or through amendment of the T.C.A.

⁷⁵ See TENN. SUP. CT. R. 12(1).

⁷⁶ Morgan, *supra* note 72, at 46-7; *Godsey*, 60 S.W.3d at 785, 795-96 (acknowledging that Rule 12 reports have not been filed in all cases nor have included all requisite information).

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal *habeas corpus* relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; claims of unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal *habeas corpus* proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal *habeas corpus* proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal *habeas* proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal *habeas corpus* relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal *habeas* that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal *habeas* proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to obtain state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings do not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims—even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate's constitutional claims.

I. FACTUAL DISCUSSION

A. Overview of State Post-Conviction Proceedings

Sections 40-30-101 through 40-30-122 of the Tennessee Code Annotated (T.C.A.) govern all state post-conviction proceedings, including those initiated by death-row inmates.¹ Capital post-conviction proceedings must be given priority over all other matters for docketing purposes in the trial and appellate courts.²

1. The Filing of a Post-Conviction Petition

Any person in custody under a sentence imposed by a Tennessee court may petition the trial court for post-conviction relief where the conviction or sentence is “void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.”³

The petition must be filed in the trial court in which the petitioner was convicted or sentenced to death.⁴ The petition must be sworn and include: (1) every known and available ground for post-conviction relief,⁵ (2) allegations of fact supporting each claim for relief set forth in the petition,⁶ and (3) allegations of fact explaining why each ground for relief was not presented in any earlier proceeding.⁷ The petitioner may amend his/her petition; the amended petition must also be sworn, but need not include material already contained in the original petition.⁸

2. Time Limit for Filing a Post-Conviction Petition

Post-conviction petitioners, including those in capital cases, must follow a strict timeline for instituting the post-conviction process. Specifically, an inmate must file his/her petition for post-conviction relief within one year of completing his/her direct appeal.⁹ The right to file a petition for post-conviction relief is generally extinguished after the expiration of the one-year time limit,¹⁰ and although the T.C.A. expressly prohibits the tolling of the statute of limitations for post-conviction proceedings,¹¹ the Tennessee

¹ TENN. CODE ANN. §§ 40-30-101 through 40-30-122 (2006).

² TENN. CODE ANN. §§ 40-30-121 (2006).

³ TENN. CODE ANN. §§ 40-30-102(a), -103 (2006); TENN. SUP. CT. R. 28, § 2(A).

⁴ TENN. CODE ANN. § 40-30-104(a) (2006); TENN. SUP. CT. R. 28, § 4(A).

⁵ TENN. CODE ANN. § 40-30-104(d) (2006).

⁶ TENN. CODE ANN. § 40-30-104(e) (2006).

⁷ *Id.*

⁸ TENN. CODE ANN. § 40-30-104(e), (g) (2006).

⁹ TENN. CODE ANN. § 40-30-102(a) (2006). The direct appeal is complete on either (1) the date of the final action of the highest state appellate court to which an appeal is taken, or (2) the date on which the judgment became final, if no appeal is taken. *Id.*

¹⁰ *Id.*

¹¹ TENN. CODE ANN. § 40-30-102(a) (2006).

Supreme Court has held that due process may require tolling if the petitioner was mentally incompetent during this one-year period.¹²

The post-conviction court also has jurisdiction to entertain a post-conviction petition after the one-year time limitation when the petitioner files a motion to reopen his/her first petition for post-conviction relief and alleges that:

- (1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required;¹³
- (2) The claim in the petition is based on new scientific evidence establishing that the petitioner is actually innocent of the offense(s) for which s/he was convicted;¹⁴
- (3) The claim in the petition seeks relief from a sentence that was enhanced because of a previous conviction which was not the product of a guilty plea with an agreed sentence, and the previous conviction has subsequently been held invalid;¹⁵ or
- (4) The facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have his/her conviction set aside or sentence reduced.¹⁶

However, a post-conviction petition, which seeks to prove actual innocence through Tennessee's Post-Conviction DNA Analysis Act of 2001, is not subject to the one-year time limitation and may be filed at any time.¹⁷

The motion to reopen must include the factual basis underlying the claims and must be supported by a sworn affidavit.¹⁸ The court will deny the motion unless the factual allegations, if true, satisfy one of the four above-mentioned exceptions.¹⁹

¹² See *Seals v. State*, 23 S.W.3d 272, 279 (Tenn. 2000) (permitting the court to toll the statute of limitations when necessary to comport with due process). The *Seals* petitioner had previously filed timely petitions for post-conviction relief and later, after the expiration of the statute of limitations, a "next friend" sought to have the statute of limitations tolled alleging that *Seals* was mentally incompetent before he pled guilty. *Id.* at 274.

¹³ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006). The petitioner must file his/her petition within one year of the appellate court's establishment of the new constitutional right requiring retroactive application. *Id.*

¹⁴ TENN. CODE ANN. §§ 40-30-102(b)(2), -117(a)(2) (2006).

¹⁵ TENN. CODE ANN. §§ 40-30-102(b)(3), -117(a)(3) (2006). The petitioner must file his/her petition within one year of the invalidation of the previous conviction that is the basis for enhancement of his/her current sentence. *Id.*

¹⁶ TENN. CODE ANN. § 40-30-117(a)(4) (2006).

¹⁷ TENN. CODE ANN. §§ 40-30-301 through 40-30-313 (2006).

¹⁸ TENN. CODE ANN. § 40-30-117(b) (2006).

¹⁹ *Id.* If the motion is denied, the petitioner will have ten days to seek permission from the Court of Criminal Appeals to move forward with an appeal. TENN. CODE ANN. § 40-30-117(c) (2006); TENN. SUP. CT. R. 28, § 10(B). The State will then have ten days to respond. TENN. CODE ANN. § 40-30-117(c) (2006); TENN. SUP. CT. R. 28, § 10(B). The Court of Criminal Appeals may only grant leave to appeal if it appears that the trial court abused its discretion in denying the motion, at which point the court of criminal appeals must remand the motion to the trial court for further proceedings. TENN. CODE ANN. § 40-30-

The petitioner may withdraw the petition any time before the evidentiary hearing (if one is held) without prejudice to re-file. But the withdrawn petition will not toll the one-year time limitation for filing a petition for post-conviction relief.²⁰

3. Contents of the Post-Conviction Petition

The post-conviction petition must allege a “clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.”²¹ A conclusory or bare allegation that a constitutional right has been violated and mere conclusions of law, without more, are not sufficient to warrant an evidentiary hearing.²²

Specifically, the petition should contain:

- (1) Each and every error that petitioner asserts as a ground for relief, including a description of how petitioner was prejudiced by the error(s);
- (2) Specific facts supporting each claim for relief asserted by petitioner; and
- (3) Specific facts explaining why each claim for relief was not previously presented in any earlier proceeding.²³

4. Types of Claims Usually Raised in a Post-Conviction Petition

The petitioner may assert a number of constitutional violations in a post-conviction petition, including, but not limited to: (1) the failure of the prosecution to disclose exculpatory evidence before or during trial,²⁴ and (2) the involuntariness of the petitioner’s guilty plea.²⁵ One of the more common claims raised in post-conviction petitions addresses the ineffective assistance of trial and appellate counsel.

a. Ineffective Assistance of Counsel

117(c) (2006); TENN. SUP. CT. R. 28, § 10(B). If the petitioner wishes to continue his/her appeal with the Tennessee Supreme Court after the Court of Criminal Appeals affirms the denial of his/her motion to reopen, s/he has sixty days to initiate the discretionary appeal procedures in Rule 11 of the Tennessee Rules of Appellate Procedure. TENN. SUP. CT. R. 28, § 10(B); *see also* TENN. R. APP. P. 11(b).

²⁰ TENN. CODE ANN. § 40-30-109(c) (2006); TENN. SUP. CT. R. 28, § 6(C)(8).

²¹ TENN. CODE ANN. § 40-30-106(d) (2006).

²² *Id.*

²³ TENN. SUP. CT. R. 28, § 5(E)(1)-(6), app. A. In addition, the petition should include the biographical and case identifying information contained in the form petition in the appendix to Tennessee Supreme Court Rule 28, the petitioner’s affidavit, and the names of any attorneys who prepared or assisted in preparing the petition. *Id.*

²⁴ *See Wright v. State*, 987 S.W.2d 26 (Tenn. 1999) (holding that the denial of due process resulting from the prosecution’s suppression of exculpatory evidence is a personal trial right directly relating to the justice or integrity of the conviction and sentence and, therefore, may be attacked collaterally in a petition for post-conviction relief).

²⁵ *See State v. Wilson*, 31 S.W.3d 189 (Tenn. 2000) (holding that the petitioner’s allegations that his/her guilty plea is involuntary is not cognizable on direct appeal, and is properly raised in a petition for post-conviction relief).

In order to assert a legally sufficient claim of ineffective assistance of trial counsel, the petitioner must show deficient performance by counsel.²⁶ This requires the petitioner to demonstrate that his/her trial counsel's performance "fell below an objective standard of reasonableness" to such a degree that, by making such serious errors, counsel was "not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment" of the U.S. Constitution or Article 1, Section 9 of the Tennessee Constitution.²⁷ The petitioner also must demonstrate the prejudicial effect of the deficient performance by showing that a reasonable probability exists that, but for trial counsel's deficient performance, the result of the proceeding would have been different.²⁸

The petitioner is not precluded from raising a claim of his/her trial counsel's ineffectiveness, even where such deficient performance was known to the petitioner at the time of his/her direct appeal, because resolution of this claim usually requires further development of the record through a post-conviction evidentiary hearing.²⁹

Claims of ineffective assistance of appellate counsel can be raised in a petition for post-conviction relief.³⁰ The standard applied to these claims parallels the standard applied to claims involving the effectiveness of trial counsel as set forth above.³¹ However, a claim of ineffective assistance of post-conviction counsel does not provide a viable avenue of relief under the Tennessee or United States Constitutions,³² nor is it a proper ground to reopen the petitioner's first petition under section 40-30-217 of the Tennessee Code Annotated.³³

5. The State's Response to the Petition for Post-Conviction Relief

After the petition is filed, the State has thirty days to file an answer to the petition³⁴ stating the reasons, if any, why the petition should be dismissed, such as:

- (1) The petition is barred by the statute of limitations;³⁵

²⁶ See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Sexton*, 2007 WL 92352, *4 (Tenn. Crim. App. Jan. 12, 2007).

²⁷ *Strickland*, 466 U.S. at 687-88; *Sexton*, 2007 WL 92352, at *4.

²⁸ *Strickland*, 466 U.S. at 694; *Sexton*, 2007 WL 92352, at *4. A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694; *Sexton*, 2007 WL 92352, at *4.

²⁹ *Sexton*, 2007 WL 92352, at *3 (frowning on claims of ineffective assistance of trial counsel raised on direct appeal because such claims can rarely be established without holding an evidentiary hearing).

³⁰ *Kendricks v. State*, 13 S.W.3d 401, 404-05 (Tenn. Crim. App. 1999).

³¹ *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

³² *Lewis v. State*, 1998 WL 743650, *1 (Tenn. Crim. App. Oct. 15, 1998).

³³ *Hutch v. State*, 1998 WL 155567, *2 (Tenn. Crim. App. Mar. 31, 1998).

³⁴ TENN. CODE ANN. § 40-30-108(a) (2006); TENN. SUP. CT. R. 28, § 5(H). This period to file an answer to the petition for post-conviction relief may be extended for good cause, but good cause will not be satisfied by a routine statement that the State has other pressing business that has prevented it from timely filing an answer. TENN. CODE ANN. § 40-30-108(a) (2006). The State's failure to file an answer is not, by itself, a basis for relief for the petitioner. *Id.*

³⁵ TENN. CODE ANN. § 40-30-108(c)(1) (2006); TENN. SUP. CT. R. 28, § 5(G)(1).

- (2) The petition was not filed in the court of conviction;³⁶
- (3) The petition asserts a claim for relief from judgments entered in separate trials or proceedings;³⁷
- (4) A direct appeal or post-conviction petition attacking the same conviction is currently pending in the trial or appellate courts;³⁸
- (5) The facts alleged fail to show that the petitioner is entitled to relief;³⁹ or
- (6) The facts alleged fail to establish that the claims for relief have not been waived or previously determined.⁴⁰

The answer must respond to each of the petitioner's allegations and assert any appropriate affirmative defenses.⁴¹

6. Summary Disposition of a Post-Conviction Petition Without an Evidentiary Hearing

The court may summarily dispose of a post-conviction petition without an evidentiary hearing⁴² for any of the following reasons:

- (1) The petitioner files a second or subsequent petition attacking the same conviction and/or sentence as a previous petition already decided on the merits by the trial court, and no motion to reopen the post-conviction proceeding has been granted;⁴³
- (2) It appears, from the face of the petition, exhibits, and prior proceedings in the case, that the petition was not filed in the court of conviction or not filed within the one-year time restriction;⁴⁴
- (3) It appears that a post-conviction petition challenging the same conviction or sentence is already pending in the trial or appellate courts;⁴⁵
- (4) The petition fails to state a factual basis for the grounds alleged;⁴⁶
- (5) The court, after reviewing the petition, the State's response, the court files, and trial record, determines conclusively that, even if the facts alleged are true, the petitioner is entitled to no relief;⁴⁷ or

³⁶ TENN. CODE ANN. § 40-30-108(c)(2) (2006); TENN. SUP. CT. R. 28, § 5(G)(3).

³⁷ TENN. CODE ANN. § 40-30-108(c)(3) (2006); TENN. SUP. CT. R. 28, § 5(G)(4).

³⁸ TENN. CODE ANN. § 40-30-108(c)(4) (2006); TENN. SUP. CT. R. 28, § 5(G)(5).

³⁹ TENN. CODE ANN. § 40-30-108(c)(5) (2006); TENN. SUP. CT. R. 28, § 5(G)(6).

⁴⁰ TENN. CODE ANN. § 40-30-108(c)(6) (2006); TENN. SUP. CT. R. 28, § 5(G)(2).

⁴¹ TENN. CODE ANN. § 40-30-108(d) (2006); TENN. SUP. CT. R. 28, § 5(G).

⁴² An order dismissing a petition, or dismissing some claims in the petition, because the court conclusively determines that the petitioner is not entitled to relief must set forth the court's conclusions of law and may be filed no later than thirty days after the State's response to the petition for post-conviction relief. TENN. CODE ANN. § 40-30-109(a) (2006); TENN. SUP. CT. R. 28, § 6(B)(2), (4)(c), (5)-(6).

⁴³ TENN. CODE ANN. §§ 40-30-102(c), -106(b) (2006).

⁴⁴ TENN. CODE ANN. § 40-30-106(b) (2006); TENN. SUP. CT. R. 28, § 5(F)(1).

⁴⁵ TENN. CODE ANN. § 40-30-106(c) (2006); TENN. SUP. CT. R. 28, § 5(F)(2).

⁴⁶ TENN. CODE ANN. § 40-30-106(d) (2006); TENN. SUP. CT. R. 28, § 5(F)(3). If, however, the petition was filed *pro se*, the judge may enter an order granting the petitioner leave to file a petition that meets the pleading requirements within fifteen days or face summary dismissal without an evidentiary hearing. TENN. CODE ANN. § 40-30-106(d) (2006).

- (6) The petition does not state the reasons that the alleged claims are not barred by the statute of limitations, waived, or previously determined.⁴⁸

7. The Post-Conviction Evidentiary Hearing

If the petition alleges a colorable claim and the court does not dismiss the petition,⁴⁹ the court must enter a preliminary order within thirty days of the filing of the post-conviction petition. In its preliminary order, the court must set a date within four months of the court's order for an evidentiary hearing.⁵⁰ Such time may only be extended by court order after a finding that "unforeseeable circumstances render a continuance a manifest necessity."⁵¹ If the court grants an extension, it may not exceed sixty days.⁵² In its order, the court also should compel discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure, but only to the extent the items required to be disclosed under the Rule are related to the alleged claims in the petition.

Where an unrepresented capital post-conviction petitioner requests counsel and the court is satisfied that s/he is indigent, the court should appoint, in its preliminary order and at no expense to the petitioner, the Office of the Post-Conviction Defender to represent the petitioner during the post-conviction proceedings.⁵³ However, if a conflict of interest exists, such as the Office of the Post-Conviction Defender having represented the inmate during his/her direct appeal,⁵⁴ the court must appoint counsel from its roster of private attorneys.⁵⁵ Significantly, the court cannot appoint counsel (including the Office of the Post-Conviction Defender) when counsel "makes a clear and convincing showing that adding the appointment to [his/her] current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."⁵⁶ Unlike the appointment of trial and appellate attorneys in capital cases, Tennessee law does not mandate the appointment of two attorneys to represent the capital post-conviction petitioner.

At the evidentiary hearing, the petitioner may only offer evidence that relates to the allegations of fact in the petition.⁵⁷ The petitioner, therefore, may only appear and testify at the hearing if the allegations in the petition raise substantial questions of fact as to events in which the petitioner participated.⁵⁸

⁴⁷ TENN. CODE ANN. §§ 40-30-106(f), -109(a) (2006); TENN. SUP. CT. R. 28, § 5(F)(5).

⁴⁸ TENN. CODE ANN. §§ 40-30-106(f) (2006); TENN. SUP. CT. R. 28, § 5(F)(4).

⁴⁹ TENN. SUP. CT. R. 28, § 6(B)(2).

⁵⁰ TENN. CODE ANN. § 40-30-109(a) (2006); TENN. SUP. CT. R. 28, § 8(A)-(B).

⁵¹ TENN. CODE ANN. § 40-30-109(a) (2006); TENN. SUP. CT. R. 28, § 8(B).

⁵² TENN. CODE ANN. § 40-30-109(a) (2006); TENN. SUP. CT. R. 28, § 8(B).

⁵³ TENN. CODE ANN. §§ 40-30-107(b)(1), -206(a) (2006); TENN. SUP. CT. R. 28, § 6(B)(3)(a).

⁵⁴ TENN. CODE ANN. § 40-30-205(h) (2006).

⁵⁵ TENN. SUP. CT. R. 13, § 1(e)(4)(A)-(B); *see also* TENN. CODE ANN. § 40-30-207 (2006).

⁵⁶ TENN. SUP. CT. R. 13, § 1(e)(4)(D).

⁵⁷ TENN. CODE ANN. § 40-30-110(c) (2006).

⁵⁸ TENN. CODE ANN. § 40-30-110(a) (2006); TENN. SUP. CT. R. 28, § 8(C)(1)(b).

The petitioner has the burden of proving the factual allegations by clear and convincing evidence.⁵⁹ Each party has the right to examine witnesses and the hearing is limited to issues raised in the petition.⁶⁰ If either party offers evidence relating to an issue not raised in the petition or the answer, the court may allow amendments to the pleadings.⁶¹ The Tennessee Rules of Evidence govern the hearing and Tennessee law requires that the hearing be recorded, stenographically or otherwise.⁶²

8. Decisions on Post-Conviction Petitions After an Evidentiary Hearing

Within sixty days of the conclusion of the evidentiary hearing,⁶³ the court must issue an order making specific written findings of fact and conclusions of law relating to each ground for relief presented in the petition.⁶⁴ If the court finds a denial or infringement of the petitioner's rights which rendered his/her conviction and/or sentence void or voidable, it must enter the appropriate order vacating the conviction and/or sentence.⁶⁵ The court also can issue any supplementary orders that may be necessary and proper.⁶⁶

The court must render a final decision on a capital post-conviction petition within one year of the filing of the petition.⁶⁷

9. Appealing Decisions on Post-Conviction Petitions

The court's order on a post-conviction petition is a final judgment⁶⁸ and is appealable to the Tennessee Court of Criminal Appeals as a matter of right.⁶⁹ The appellate court will afford the findings of fact in the post-conviction court's order the weight of a jury verdict, and is bound by the court's findings unless the evidence in the record preponderates against those findings.⁷⁰ The appellate court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court.⁷¹

⁵⁹ TENN. CODE ANN. § 40-30-110(f) (2006); TENN. SUP. CT. R. 28, § 8(D)(1).

⁶⁰ TENN. SUP. CT. R. 28, § 8(D)(3)-(4).

⁶¹ TENN. SUP. CT. R. 28, § 8(D)(5).

⁶² TENN. CODE ANN. § 40-30-110(d)-(e) (2006); TENN. SUP. CT. R. 28, § 8(D)(6).

⁶³ TENN. CODE ANN. § 40-30-111(d) (2006); TENN. SUP. CT. R. 28, § 9(A). The parties may not stipulate to an extended time for the court's ruling and such time may only be extended by court order after a finding that "unforeseeable circumstances render a continuance a manifest necessity." TENN. CODE ANN. § 40-30-111(d) (2006); TENN. SUP. CT. R. 28, § 9(A). Any extension cannot exceed thirty days. TENN. CODE ANN. § 40-30-111(d) (2006); TENN. SUP. CT. R. 28, § 9(A).

⁶⁴ TENN. CODE ANN. § 40-30-111(b) (2006); TENN. SUP. CT. R. 28, § 9(A).

⁶⁵ TENN. CODE ANN. § 40-30-111(a) (2006); TENN. SUP. CT. R. 28, § 9(B)-(C).

⁶⁶ TENN. CODE ANN. § 40-30-111(a) (2006); TENN. SUP. CT. R. 28, § 9(C).

⁶⁷ TENN. CODE ANN. § 40-30-111(d) (2006). Copies of all orders extending deadlines in capital post-conviction proceedings must be sent to the Administrative Office of the Courts for annual reporting to the legislature on (1) the compliance by the courts with the post-conviction time requirements established for capital cases, and (2) reasons for non-compliance, if any, with the time-limits established for capital cases. *Id.*

⁶⁸ TENN. CODE ANN. § 40-30-116 (2006); TENN. SUP. CT. R. 28, §§ 6(B)(10), 10(A).

⁶⁹ TENN. CT. OF CRIM. APP. R. 21.

⁷⁰ *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997).

⁷¹ *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001).

The post-conviction court's conclusions of law, however, are reviewed under a *de novo* standard with a presumption that the findings are correct unless demonstrated otherwise by a preponderance of the evidence.⁷²

The appellate court must render a decision on the appeal within either (1) nine months of the date of oral arguments in the case, or (2) if no oral arguments are heard, within nine months of the submission of the case to the appellate court.⁷³

If the Tennessee Court of Criminal Appeals affirms the denial of the petition, the petitioner may seek discretionary review in the Tennessee Supreme Court. If the Tennessee Supreme Court denies review or affirms the lower court decision, the petitioner may file a petition for *certiorari* with the United States Supreme Court.⁷⁴ If the United States Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

B. Procedural Restrictions on Post-Conviction Petitions

A petitioner will be precluded from relief on post-conviction claims and his/her petition will be dismissed if the claims:

- (1) Were determined on the merits against the petitioner in a prior proceeding in the case;⁷⁵ or
- (2) Were not presented for determination in any previous proceeding in the case in which the claim could have been presented.⁷⁶

Additionally, Tennessee law contemplates the filing of only one post-conviction petition and explicitly prohibits the filing of a second or successive⁷⁷ post-conviction petition attacking a single conviction and/or sentence.⁷⁸ However, the petitioner may file a

⁷² See *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

⁷³ TENN. CODE ANN. § 40-30-116 (2006). The appellate court may enter an order extending the deadline for a decision on appeal if it finds that it is unable to comply with the statutory deadlines and circumstances exist which render a decision beyond the stated time-limits a necessity. *Id.* Copies of extension orders must be sent to the Administrative Office of the Courts for reporting to the legislature on compliance by appellate courts with the statutory time restrictions for disposition of appeals in capital post-conviction proceedings. *Id.*

⁷⁴ 28 U.S.C. § 1257(a) (2004).

⁷⁵ TENN. CODE ANN. § 40-30-106(f) (2006). A claim has been previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. TENN. CODE ANN. § 40-30-106(h) (2006). A full and fair hearing refers only to the opportunity for the petitioner to call witnesses or present other evidence, regardless of whether s/he actually introduces any evidence. *Id.*

⁷⁶ TENN. CODE ANN. § 40-30-106(g) (2006). Such a claim, however, is not waived if (1) it is based upon a constitutional right not recognized as existing at the time of the trial if either the federal or Tennessee Constitution requires retroactive application of that right, or (2) the failure to raise that claim was the result of state action in violation of the federal or state constitution. TENN. CODE ANN. § 40-30-106(g)(1)-(2) (2006).

⁷⁷ Successive petitions are those petitions that challenge a judgment of conviction and/or sentence filed after the initial post-conviction petition challenging the same judgment of conviction and/or sentence. See *Fowler v. State*, 2006 WL 521498, *1 (Tenn. Crim. App. 2006).

⁷⁸ TENN. CODE ANN. § 40-30-102(c) (2006).

motion to reopen his/her first post-conviction petition, pursuant to section 40-30-117 of the Tennessee Code Annotated in the following limited circumstances:

- (1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required;⁷⁹
- (2) The claim in the petition is based on new scientific evidence establishing that the petitioner is actually innocent of the offenses for which s/he was convicted;⁸⁰
- (3) The claim in the petition seeks relief from a sentence that was enhanced because of a previous conviction which was not the product of a guilty plea and agreed sentence, and the previous conviction has subsequently been held invalid;⁸¹ or
- (4) The facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have his/her conviction set aside or his/her sentence reduced.⁸²

However, a post-conviction petition that seeks to prove actual innocence through Tennessee's Post-Conviction DNA Analysis Act of 2001 is not subject to the one-year time limitation and may be filed at any time.⁸³

1. Newly Discovered Evidence Exception to a Procedural Bar

Newly discovered evidence claims are not cognizable in a normal post-conviction petition and must be alleged in a petition for writ of error *coram nobis*. A convicted criminal defendant may seek this relief by demonstrating that:

- (1) S/he was without fault in failing to present certain evidence at the proper time;
- (2) The newly discovered evidence relates to matters which were litigated at trial; and
- (3) Such evidence may have resulted in a different judgment, had it been presented at trial.⁸⁴

The decision to grant the petition rests within the sound discretion of the trial court.⁸⁵ If the judge determines that the petitioner has demonstrated these requirements, the

⁷⁹ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006). The petitioner must file his/her petition within one year of the appellate court's establishment of the new constitutional right requiring retroactive application. *Id.*

⁸⁰ TENN. CODE ANN. §§ 40-30-102(b)(2), -117(a)(2) (2006).

⁸¹ TENN. CODE ANN. §§ 40-30-102(b)(3), -117(a)(3) (2006). The petitioner must file his/her petition within one year of the invalidation of the previous conviction that is the basis for enhancement of his/her current sentence. *Id.*

⁸² TENN. CODE ANN. § 40-30-117(a)(4) (2006).

⁸³ TENN. CODE ANN. §§ 40-30-301 through 40-30-313 (2006).

⁸⁴ TENN. CODE ANN. § 40-26-105(b) (2006).

⁸⁵ *State v. Hart*, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995).

conviction and sentence must be set aside and the petitioner must be granted a new trial.⁸⁶

Generally, a petition for writ of error *coram nobis* must be filed within one year after the judgment of conviction becomes final. For the purposes of this petition, “[a] judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed. If a post-trial motion is timely filed, the judgment becomes final upon entry of an order disposing of the post-trial motion.”⁸⁷

Due process, however, may dictate that the time for filing be tolled in limited circumstances where the governmental interest in not tolling the time restriction is outweighed by the detriment to the personal interest of the petitioner. For example, a capital petitioner’s interest in obtaining a hearing on newly discovered evidence that may establish actual innocence of a capital offense outweighs the need to respect the one-year time limit and its obvious consequence in such a case—the execution of the petitioner.⁸⁸ In such a case where due process requires tolling of the statute of limitations, the “petitioner [must] be afforded a ‘reasonable opportunity after the expiration of the limitations period to present his[her] claim in a meaningful time and manner.’”⁸⁹

C. Review of Error

If a post-conviction court finds error, it may deny the post-conviction petition on the ground that the error was harmless.⁹⁰

Generally, for errors involving a petitioner’s constitutional rights, the error is not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.⁹¹ The State generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.⁹² However, certain claims of constitutional error, such as ineffective assistance of counsel claims and *Brady*⁹³ claims, place the burden on the petitioner to demonstrate that s/he was prejudiced by the constitutional error.

For example, if the petitioner raises a claim of ineffective assistance of counsel, s/he bears the burden to demonstrate a “reasonable probability” that counsel’s deficient

⁸⁶ *Id.* The Tennessee Supreme Court hears appeals from orders on petitions for writ of error *coram nobis*. *Id.*

⁸⁷ *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999).

⁸⁸ *See Workman v. State*, 41 S.W.3d 100, 103-04 (Tenn. 2001) (noting that the newly discovered evidence was X-rays that would demonstrate that the petitioner was not the shooter and, therefore, ineligible for conviction of a capital offense).

⁸⁹ *Id.* (citing *Williams v. State*, 44 S.W.3d 64 (Tenn. 2001)).

⁹⁰ TENN. R. CRIM. P. 52(b).

⁹¹ *See Momon v. State*, 18 S.W.3d 152, 164 (Tenn. 1999) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

⁹² *See Chapman*, 386 U.S. at 24.

⁹³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

performance affected the outcome of the proceeding,⁹⁴ rather than the State bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the State failed to disclose favorable evidence and this failure was unknown to the petitioner on direct appeal—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.⁹⁵

D. Retroactivity of Rules

Tennessee law allows an individual to (1) file a post-conviction petition either after the one-year statute of limitations, or (2) reopen his/her first petition when the claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required.⁹⁶

Such a new rule of federal constitutional law applies only to those cases on direct review or not yet final, and would not be applicable to those cases that have become final before the new rule was announced.⁹⁷ Thus, new rules of criminal procedure are not retroactively applied in collateral post-conviction proceedings unless: (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;⁹⁸ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures implicit in the concept of ordered liberty”⁹⁹ and whose non-application would seriously diminish the “likelihood of an accurate conviction.”¹⁰⁰

The Tennessee Supreme Court, however, has stated that while United States Supreme Court precedent controls retroactive application of new federal constitutional rules in both state and federal court, state courts maintain the right to determine the extent to which new state constitutional rules are retroactively applied.¹⁰¹ The Court, therefore, held that in post-conviction proceedings, retroactive application of a new constitutional rule announced pursuant to the Tennessee Constitution is necessary when the new state rule enhances the integrity and reliability of the fact-finding process at trial.¹⁰²

⁹⁴ *State v. Sexton*, 2007 WL 92352, *3-4 (Tenn. Crim. App. Jan. 12, 2007) (noting that Tennessee law requires the petitioner to prove the two prongs of the *Strickland* test for ineffective assistance of counsel by clear and convincing evidence).

⁹⁵ *State v. Roberson*, 2007 WL 92354, *6 (Tenn. Crim. App. Jan. 11, 2007) (citing *Brady*, 373 U.S. at 87; *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995)).

⁹⁶ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006).

⁹⁷ *See Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001) (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Adkins v. State*, 911 S.W.2d 334, 345 (Tenn. Crim. App. 1994).

¹⁰¹ *See Meadows v. State*, 849 S.W.2d 748, 754 (Tenn. 1993).

¹⁰² *Id.* (citing *Hellard v. State*, 629 S.W.2d 4, 5 (Tenn. 1982)). Stated another way, the court will apply a new state rule retroactively in a post-conviction proceeding when the old rule substantially impairs the truth-finding function of the trial and thereby raises serious questions about the accuracy of guilty verdicts in past trials. *Id.*

E. Waiver of Post-Conviction Proceedings

A capital petitioner is not required to take advantage of post-conviction review of his/her conviction and/or sentence and may withdraw his/her post-conviction petition and waive further post-conviction proceedings under certain circumstances.¹⁰³ If a death-sentenced petitioner seeks to withdraw an already-filed petition for post-conviction relief and waive further post-conviction proceedings, the trial court must examine the petitioner in open court¹⁰⁴ and determine that s/he:

- (1) Does not desire to proceed with any post-conviction proceedings;
- (2) Understands the significance and consequences of withdrawing the post-conviction petition;
- (3) Is knowingly, intelligently, and voluntarily, without coercion, withdrawing the petition; and
- (4) Is competent¹⁰⁵ to decide whether to withdraw the post-conviction petition.¹⁰⁶

The trial court must enter an order granting or denying withdrawal of the petition and stating its findings regarding items (1) through (4) above.¹⁰⁷ An order of the trial court granting withdrawal and dismissing the petition shall become final thirty days after its entry.¹⁰⁸ Thus, the petitioner still may revoke the withdrawal and reinstate his/her post-conviction proceedings before the order granting withdrawal becomes final.¹⁰⁹

¹⁰³ TENN. SUP. CT. R. 28, § 11(A).

¹⁰⁴ This hearing must be recorded. *Id.*

¹⁰⁵ Under this section, the standard for determining competency of a petitioner to withdraw a post-conviction petition and waive further post-conviction relief is:

[W]hether the petitioner possesses the present capacity to appreciate the petitioner's position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity.

TENN. SUP. CT. R. 28, § 11(B)(1). The law presumes that a capital post-conviction petitioner is competent to withdraw his/her post-conviction petition and waive further post-conviction proceedings. TENN. SUP. CT. R. 28, § 11(B)(2). If, however, there is a question of fact as to his/her competence, Tennessee court rules allow for a procedure to monitor and determine competency, which is explained in further detail in this Assessment Report in Chapter Thirteen: Mental Retardation and Mental Illness.

¹⁰⁶ TENN. SUP. CT. R. 28, § 11(A)(1)-(4). The judge may consider any evidence and argument relating to these four points of inquiry. TENN. SUP. CT. R. 28, § 11(A).

¹⁰⁷ TENN. SUP. CT. R. 28, § 11(A).

¹⁰⁸ *Id.*

¹⁰⁹ The ability to reinstate the post-conviction petition after a granting of withdrawal only applies to inmates who seek to revoke an initial waiver of post-conviction relief. *See Pike v. State*, 164 S.W.3d 257, 267 (Tenn. 2005). The court has the discretion to bar inmates from reinstating post-conviction proceedings who abuse the process of the court by repeatedly seeking to waive and then reinstate post-conviction review to delay their execution. *Id.*

II. ANALYSIS

A. Recommendation #1

All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.

Several aspects of Tennessee law governing post-conviction proceedings foster the adequate development and judicial consideration of all post-conviction claims. For example, Tennessee law (1) requires an automatic stay of execution upon the filing of an initial post-conviction petition, and (2) may provide a right to counsel after the filing of a post-conviction petition.

Stay of Execution

Tennessee law requires that when the Tennessee Supreme Court issues an opinion affirming a conviction and death sentence on appeal, it must contemporaneously set a date for execution, which is no less than four months from the date of the affirmance.¹¹⁰ When the capital petitioner files his/her petition for post-conviction relief, the court in which the petition is filed must issue a stay of the execution for the duration of the state post-conviction proceedings.¹¹¹

Even where the courts have disposed of a petitioner's initial petition for post-conviction relief, the court may exercise its discretion to further stay the execution if:

- (1) The petitioner first files and the court grants a motion to reopen the first post-conviction petition under section 40-30-117 of the Tennessee Code Annotated; and
- (2) The petitioner files a separate motion for a stay of execution demonstrating that, after a consideration of the claims in the motion to reopen, "there is a significant possibility that the death sentence will be invalidated and that there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded."¹¹²

¹¹⁰ TENN. CODE. ANN. § 40-30-120(a) (2006).

¹¹¹ *Id.* The execution may not be stayed until the filing of the post-conviction petition unless the petitioner demonstrates his/her inability to file a post-conviction petition before the execution date and that such inability is caused by "extraordinary circumstances beyond the petitioner's control." *Id.*

¹¹² TENN. CODE. ANN. § 40-30-120(b)-(c) (2006).

A decision on a motion to stay the execution may be reviewed by the Court of Criminal Appeals, and subsequently by the Tennessee Supreme Court pursuant to an abuse of discretion standard.¹¹³

Thus, it appears that Tennessee law requires the trial court, upon the filing of an initial post-conviction petition, to stay an execution during the pendency of the initial post-conviction proceedings to allow the petitioner to fully develop grounds for post-conviction relief and to give the court the opportunity to consider those grounds. Additionally, the court has the discretion to stay the execution during successive post-conviction proceedings if the petitioner meets certain requirements.

Post-Conviction Counsel

Capital post-conviction petitioners may receive access to state-funded counsel from the Office of the Post-Conviction Defender in connection with their post-conviction claims after they file their post-conviction petition, the court sets the date for an evidentiary hearing, and the court finds the inmate to be indigent.¹¹⁴

Upon being appointed, post-conviction counsel must review the initial *pro se* post-conviction petition, interview relevant witnesses, interview the petitioner and prior counsel, diligently investigate and present all reasonable claims, and file an amended petition asserting additional claims that the petitioner failed to include in the initial petition.¹¹⁵ However, counsel and petitioner have only thirty days after the appointment of counsel to fully develop all available claims for relief and amend the initial post-conviction petition to include all such claims.¹¹⁶

The State of Tennessee has facilitated the development and judicial consideration of post-conviction claims in the aforementioned ways. Numerous aspects of Tennessee law, however, still restrict the adequate development and judicial consideration of grounds for post-conviction relief. As mentioned above, Tennessee law does not provide for the appointment of counsel until after the court sets an evidentiary hearing date and provides a limited period of time for appointed post-conviction counsel to develop and amend all available claims. In addition, as discussed below, Tennessee law generally gives a petitioner one year to file a petition for post-conviction relief after one's direct appeal is completed, and allows the post-conviction judge numerous opportunities to summarily deny the petition without an evidentiary hearing.

Filing Deadlines

¹¹³ TENN. CODE ANN. § 40-30-120(d) (2006); TENN. SUP. CT. R. 28, § 10(C).

¹¹⁴ TENN. CODE ANN. §§ 40-30-107(b)(1), -206(a) (2006); TENN. SUP. CT. R. 28, § 6(B)(3)(a).

¹¹⁵ *Id.*; TENN. SUP. CT. R. 28, § 6(C)(2).

¹¹⁶ TENN. CODE ANN. § 40-30-107(b)(2) (2006).

A death-row petitioner must file his/her post-conviction petition within one year after the completion of his/her direct appeal.¹¹⁷ The court may only entertain a petition filed after the one-year time limitation when the petitioner first files, and the court grants, a motion to reopen post-conviction proceedings alleging one of the following:

- (1) The claim in the untimely petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required;¹¹⁸
- (2) The claim in the untimely petition is based on new scientific evidence establishing that the petitioner is actually innocent of the offenses for which s/he was convicted;¹¹⁹
- (3) The claim in the untimely petition seeks relief from a sentence that was enhanced because of a previous conviction which was not the product of a guilty plea and agreed sentence, and the previous conviction has subsequently been held invalid;¹²⁰ or
- (4) The facts underlying the untimely claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have his/her conviction set aside or his/her sentence reduced.¹²¹

The Post-Conviction Evidentiary Hearing

If, after an initial review of the petition, the court finds that it alleges colorable claims, the court must set a date for and hold an evidentiary hearing on those claims.¹²² However, a post-conviction court in Tennessee can summarily dispose of any post-conviction petition without an evidentiary hearing if:

- (1) The petitioner filed a second or subsequent petition attacking the same conviction and/or sentence as a previous petition already decided on the merits by the trial court, and no motion to reopen the post-conviction proceeding has been granted;¹²³

¹¹⁷ TENN. CODE ANN. § 40-30-102(a) (2006). The direct appeal is complete on either (1) the date of the final action of the highest state appellate court to which an appeal is taken, or (2) the date on which the judgment became final, if no appeal is taken. *Id.*

¹¹⁸ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006). In this instance, the petitioner must file his/her petition within one year of the appellate court's establishment of the new constitutional right requiring retroactive application. *Id.*

¹¹⁹ TENN. CODE ANN. §§ 40-30-102(b)(2), -117(a)(2) (2006). A post-conviction petition that seeks to prove actual innocence through Tennessee's Post-Conviction DNA Analysis Act of 2001 is not subject to the one-year time limitation and may be filed at any time. *Id.*; see TENN. CODE ANN. §§ 40-30-301 through 40-30-313 (2006).

¹²⁰ TENN. CODE ANN. §§ 40-30-102(b)(3), -117(a)(3) (2006). In this instance, the petitioner must file his/her petition within one year of the invalidation of the previous conviction that is the basis for enhancement of his/her current sentence. *Id.*

¹²¹ TENN. CODE ANN. § 40-30-117(a)(4) (2006).

¹²² TENN. SUP. CT. R. 28, § 6(B)(2).

¹²³ TENN. CODE ANN. §§ 40-30-102(c), -106(b) (2006).

- (2) It appears from the face of the petition, exhibits, and prior proceedings in the case that the petition was not filed in the court of conviction or not filed within the one-year time restriction;¹²⁴
- (3) It appears that a post-conviction petition challenging the same conviction or sentence is already pending in the trial or appellate courts;¹²⁵
- (4) The petition fails to state a factual basis for the grounds alleged;¹²⁶
- (5) The court, after reviewing the petition, the State's response, the court files, and trial record, determines conclusively that, even if the facts alleged are true, the petitioner is entitled to no relief;¹²⁷ or
- (6) The petition does not state the reasons that the alleged claims are not barred by the statute of limitations, waived, or previously determined.¹²⁸

Given the multiple ways the court may summarily dispose of a petition without first holding an evidentiary hearing, it is imperative that post-conviction petitioners be given adequate time to fully develop their claims to avoid dismissal of their petition on procedural grounds. Additionally, it is imperative that the right to appointed post-conviction counsel occur prior to the filing of the initial post-conviction petition, not after. It also is unclear whether the one-year time period for filing a post-conviction petition, and any subsequent periods afforded by granted motions to reopen post-conviction proceedings, provide adequate time for all death-sentenced inmates to fully develop viable claims and file legally sufficient petitions.

Conclusion

The State of Tennessee provides for a mandatory stay of execution during the duration of initial state post-conviction proceedings and for state-funded counsel after the filing of the initial post-conviction petition, both of which permit the petitioner an opportunity to develop his/her claims in order to have them considered by the court. There are other aspects of the Tennessee post-conviction scheme, however, that prevent the full development and judicial consideration of claims by (1) failing to provide counsel prior to the filing of the initial post-conviction petition; (2) failing to provide adequate time for the appointed post-conviction counsel to investigate, fully develop, and amend all claims in an amended post-conviction petition; (3) failing to provide adequate time for filing post-conviction petitions; and (4) allowing for the dismissal of alleged claims without an evidentiary hearing to give full judicial consideration to those claims. The State of Tennessee's post-conviction framework, therefore, is only in partial compliance with Recommendation #1.

¹²⁴ TENN. CODE ANN. § 40-30-106(b) (2006); TENN. SUP. CT. R. 28, § 5(F)(1).

¹²⁵ TENN. CODE ANN. § 40-30-106(c) (2006); TENN. SUP. CT. R. 28, § 5(F)(2).

¹²⁶ TENN. CODE ANN. § 40-30-106(d) (2006); TENN. SUP. CT. R. 28, § 5(F)(3). If, however, the petition was filed *pro se*, the judge may enter an order granting the petitioner leave to file a petition that meets the pleading requirements within fifteen days or face summary dismissal without an evidentiary hearing. TENN. CODE ANN. § 40-30-106(d) (2006).

¹²⁷ TENN. CODE ANN. §§ 40-30-106(f), -109(a) (2006); TENN. SUP. CT. R. 28, § 5(F)(5).

¹²⁸ TENN. CODE ANN. §§ 40-30-106(f) (2006); TENN. SUP. CT. R. 28, § 5(F)(4).

In order to ensure that claims of factual innocence receive full judicial consideration, the Tennessee Death Penalty Assessment Team recommends that the State create an independent commission with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate's claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges, who would review the claim without regard to any procedural bars. This sort of commission, which would supplement either the current post-conviction or clemency process, is necessary, in large part because procedural restrictions and inadequate lawyering sometimes prevent claims of factual innocence from receiving full judicial consideration. In addition, the Tennessee Death Penalty Assessment Team recommends that the State provide for the appointment of counsel in state post-conviction proceedings for indigent death-row inmates prior to the filing date for a petition for post-conviction relief.

B. Recommendation #2

The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

Post-conviction petitioners in Tennessee, including those sentenced to death, are entitled as a matter of right to post-conviction discovery.¹²⁹ Tennessee law states that post-conviction discovery is only “available . . . as provided under Rule 16 of the Tennessee Rules of Criminal Procedure.”¹³⁰ Rule 16 of the Tennessee Rules of Criminal Procedure (Rule 16) provides that the petitioner may obtain, or inspect and copy, the following types of discoverable evidence to the extent that they are “relevant to the issues raised in the post-conviction petition:”¹³¹

- (1) The substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the State intends to offer the statement in evidence at the trial;
- (2) The defendant's relevant written or recorded statements, or copies thereof, if the statement is within the State's possession, custody, or control, and the district attorney general knows, or through due diligence could know, that the statement exists;
- (3) The defendant's recorded grand jury testimony, which related to the offense charged;

¹²⁹ TENN. SUP. CT. R. 28, §§ 6(C)(7), 7(A) (stating that in the court's preliminary order setting an evidentiary hearing, the court shall mandate that the State provide the petitioner with all discovery required by Tennessee Rule of Criminal Procedure 16 and the Tennessee and federal constitutions). *But see* Troletti v. State, 483 S.W.2d 755, 757 (Tenn. Crim. App. 1972) (decided before the enactment of current Tennessee Supreme Court Rule 28 and holding that a post-conviction petitioner is not entitled to discovery as a matter of right).

¹³⁰ TENN. CODE ANN. § 40-30-109(b) (2006); TENN. SUP. CT. R. 28, §§ 6(C)(7), 7(A).

¹³¹ TENN. SUP. CT. R. 28, § 6(C)(7).

- (4) All of the previous three types of evidence as it relates to any codefendants, where the defendant was charged jointly;
- (5) The defendant's prior criminal record, if any, that is within the State's possession, custody, or control if the district attorney general knows, or through due diligence could know, that the record exists;
- (6) Books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the State's possession, custody, or control and (a) the item is material to preparing the defense, (b) the government intended to use the item in its case-in-chief at trial, or (c) the item was obtained from or belongs to the defendant; and
- (7) The results or reports of physical or mental examinations, and of scientific tests or experiments if (a) the item is within the State's possession, custody, or control, (b) the district attorney general knows, or through due diligence could know, that the item exists, and (c) the item is material to preparing the defense or the State intended to use the item in its case-in-chief at trial.¹³²

Rule 16 does not require the disclosure of:

- (1) Reports, memoranda, or other internal state documents made by the prosecution, law enforcement, or other state agents in connection with investigating or prosecuting the case;
- (2) Statements made by state witnesses or prospective state witnesses; and
- (3) A grand jury's recorded proceedings.¹³³

The court may deny a petitioner's motion to compel discovery of items, which are not required to be disclosed under Rule 16, or which are already available to the petitioner.¹³⁴

The extensive discovery procedures contained in Rule 16 which are applicable in post-conviction discovery likely are sufficient to allow the petitioner to effectively present his/her post-conviction claims. We were unable, however, to ascertain whether in practice Tennessee post-conviction petitioners are receiving the benefit of "full" and "meaningful" discovery.

Based on this information, we are unable to determine whether the State of Tennessee is in compliance with the requirements of Recommendation #2.

C. Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

¹³² TENN. R. CRIM. P. 16(a)(1)(A)-(G).

¹³³ TENN. R. CRIM. P. 16(a)(2)-(3).

¹³⁴ See *Van Davis v. State*, 1996 WL 529615, *2 (Tenn. Crim. App. Sept. 19, 1996).

Rule 16 of the Tennessee Rules of Criminal Procedure does not set a specific time for discovery. In fact, in its preliminary order setting the date for an evidentiary hearing, the court is only required to order the State to disclose any items of evidence required to be disclosed under Rule 16, to the extent the items are relevant to the grounds alleged in the petition, and any other disclosure required by the State or federal Constitution.¹³⁵ The court is not required to set a specific time limit for discovery, but the evidentiary hearing must be held within four months of the order scheduling the hearing, with a maximum possible extension of sixty days beyond the hearing date.¹³⁶

Thus, the petitioner may only partake in post-conviction discovery for a maximum of six months, assuming the date for the evidentiary hearing is extended. Although six months may be sufficient time to perform full and meaningful discovery in preparation for the capital post-conviction evidentiary hearing, the post-conviction court has considerable discretion to determine the specific time for the completion of discovery and could certainly lessen that time to expedite the proceedings. We were unable to ascertain, in practice, whether petitioners are given the maximum time possible for post-conviction discovery.

We, therefore, are unable to conclude whether the State of Tennessee is in compliance with the requirements of Recommendations #3.

D. Recommendation #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.

Capital petitioners may appeal the denial of their post-conviction petition as a matter of right to the Tennessee Court of Criminal Appeals¹³⁷ and, if the denial of their post-conviction petition is affirmed, seek additional discretionary review by the Tennessee Supreme Court. Tennessee law does not require the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, when they grant review, to issue opinions that explicitly address the issues of fact and law raised by petitioners and explain the disposition of the petitioners' post-conviction claims. In fact, Tennessee law allows both appellate courts to issue unpublished memorandum opinions in certain circumstances.¹³⁸

A review of capital post-conviction appellate rulings in Tennessee, however, indicates that both published and unpublished memorandum opinions from both appellate courts appear to explicitly address the issues of fact and law raised by petitioners and explain the disposition of the petitioners' post-conviction claims.

¹³⁵ TENN. SUP. CT. R. 28, § 6(B)(3)(c).

¹³⁶ TENN. SUP. CT. R. 28, § 8(A)-(B).

¹³⁷ TENN. CODE ANN. § 40-30-116 (2006); TENN. CT. OF CRIM. APP. R. 21.

¹³⁸ TENN. CT. OF CRIM. APP. R. 20; TENN. SUP. CT. R. 4.

Based on this information, the State of Tennessee appears to meet the requirements of Recommendation #4.

E. Recommendation #5

On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.

Tennessee post-conviction courts do not use a “knowing, understanding, and voluntary” standard for determining whether an individual actually procedurally defaulted on a claim of constitutional error by not properly preserving it at trial or raising it on appeal.

Under Tennessee law, if constitutional error is claimed in an initial post-conviction petition that could have been, but was not objected to at trial, or could have been, but was not raised on direct appeal, the claim of error is procedurally barred during post-conviction proceedings.¹³⁹ Such a claim will not be waived only if (1) it is based upon a constitutional right not recognized as existing at the time of the trial and the federal or Tennessee Constitution requires retroactive application of that right, or (2) the failure to raise the claim was the result of state action in violation of the federal or State Constitution.¹⁴⁰

The State of Tennessee, therefore, fails to meet the requirements of Recommendation #5.

F. Recommendation #6

When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

The Tennessee Court of Criminal Appeals, hearing an appeal from the denial of a post-conviction petition, does not use the “knowing, understanding, and voluntary” standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction motion could have been, but was not objected to at trial, or could have been, but was not raised on appeal, the claim of error is procedurally barred during post-conviction proceedings.¹⁴¹ Such a claim, however, is not waived if (1) it is based upon a constitutional right not recognized as existing at the time of the trial and the federal or Tennessee Constitution requires retroactive application of that right, or (2) the failure to

¹³⁹ TENN. CODE ANN. § 40-30-106(g) (2006).

¹⁴⁰ TENN. CODE ANN. § 40-30-106(g)(1)-(2) (2006).

¹⁴¹ TENN. CODE ANN. § 40-30-106(g) (2006).

raise the claim was the result of state action in violation of the federal or State constitution.¹⁴²

Additionally, on post-conviction review, Tennessee does not apply a “fundamental” or “plain” error exception with respect to errors of state law in capital cases.

The State of Tennessee, therefore, fails to meet the requirements of Recommendation #6.

G. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resource centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal *habeas corpus*, and clemency proceedings.

In 1995, the Tennessee Legislature created the Office of the Post-Conviction Defender,¹⁴³ whose primary responsibility is to provide representation exclusively to indigent inmates convicted of capital offenses and sentenced to death.¹⁴⁴ Additionally, the Post-Conviction Defender must:

- (1) Maintain a clearinghouse of materials and repository of briefs prepared by the Post-Conviction Defender and made available to public defenders and private counsel who represent indigents charged with or convicted of capital crimes;
- (2) Provide continuing legal education training to public defenders, assistant post-conviction defenders, and to private counsel representing indigents in capital post-conviction cases, as resources are available;
- (3) Provide consulting services to all attorneys representing petitioners in capital post-conviction cases on a non-case-specific basis; and
- (4) Recruit qualified members of the private bar who are willing to provide representation in state death penalty proceedings.¹⁴⁵

The Post-Conviction Defender, in certain circumstances, also may represent indigent death-sentenced inmates at other proceedings. For example, the Post-Conviction Defender may represent any indigent capital defendant in federal *habeas corpus* proceedings, but “only to the extent that compensation for representation and reimbursement for expenses is provided by section 18 U.S.C. § 3006A or any other non-state funded source.”¹⁴⁶ Likewise, in the interest of justice, the Post-Conviction

¹⁴² TENN. CODE ANN. § 40-30-106(g)(1)-(2) (2006). In contrast, waiver of errors that do not violate the State and federal Constitutional rights of an inmate “in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action of inaction of his[/her] attorney.” *House v. State*, 911 S.W.2d 705, 714 (Tenn. 1995).

¹⁴³ TENN. CODE ANN. § 40-30-205(f) (2006).

¹⁴⁴ TENN. CODE ANN. §§ 40-30-205(g), -206(a) (2006).

¹⁴⁵ TENN. CODE ANN. § 40-30-206(d)(1)-(4) (2006).

¹⁴⁶ TENN. CODE ANN. § 40-30-206(c) (2006).

Defender may choose to represent a death-row inmate¹⁴⁷ during clemency proceedings and in proceedings challenging the inmate's competency to be executed.¹⁴⁸ In the interest of justice and where competent counsel is unavailable, the Post-Conviction Defender may even represent an indigent capital defendant on direct appeal.¹⁴⁹ If the Office of the Post-Conviction Defender represents an indigent capital defendant on direct appeal, however, it will be barred from representing the individual in any collateral proceedings.¹⁵⁰ In fulfilling any of these duties, the Post-Conviction Defender is allowed to employ assistant post-conviction defenders, investigators, and support staff.¹⁵¹

If a conflict of interest exists, such as the Office of the Post-Conviction Defender having represented the inmate during his/her direct appeal,¹⁵² the court must appoint counsel from the roster of private attorneys.¹⁵³ Significantly, the court cannot appoint counsel (including the Office of the Post-Conviction Defender) when counsel "makes a clear and convincing showing that adding the appointment to [his/her] current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."¹⁵⁴

We commend the State of Tennessee for establishing the Office of the Post-Conviction Defender as a state-funded agency to represent death-sentenced inmates in state and federal post-conviction proceedings, as well as clemency. However, Tennessee law allows the Office of the Post-Conviction Defender to avoid such an appointment in state post-conviction proceedings when a conflict exists or if it will create too heavy of a burden on the Office, and makes such an appointment in federal *habeas* and clemency proceedings non-mandatory.

Based on this information, the State of Tennessee is in only partial compliance with Recommendation #7.

H. Recommendation #8

For state post-conviction proceedings, the State should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The State should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Qualifications of Post-Conviction Counsel

¹⁴⁷ The Post-Conviction Defender may represent such an individual only if s/he "is presently represented by the post-conviction defender or if the individual is not currently represented by the post-conviction defender but is unable to secure counsel due to indigency." TENN. CODE ANN. § 40-30-206(e) (2006).

¹⁴⁸ TENN. CODE ANN. § 40-30-206(e) (2006).

¹⁴⁹ TENN. CODE ANN. § 40-30-206(b) (2006).

¹⁵⁰ TENN. CODE ANN. § 40-30-205(h) (2006).

¹⁵¹ TENN. CODE ANN. § 40-30-208 (2006).

¹⁵² TENN. CODE ANN. § 40-30-205(h) (2006).

¹⁵³ TENN. SUP. CT. R. 13, § 1(e)(4)(A)-(B); *see also* TENN. CODE ANN. § 40-30-207 (2006).

¹⁵⁴ TENN. SUP. CT. R. 13, § 1(e)(4)(D).

To be appointed counsel in post-conviction proceedings, the attorney must be someone other than petitioner’s counsel at trial or on direct appeal, unless both the petitioner and counsel consent to continued representation,¹⁵⁵ and the attorney must possess knowledge of federal *habeas corpus* practice, “which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts.”¹⁵⁶ Additionally, counsel must:

- (1) Qualify as appellate counsel by possessing three years of experience in criminal trials and appeals, and either (a) capital appellate experience as counsel, or (b) criminal appellate experience as counsel in three felony convictions within the past three years and six hours of training in the trial and appeal of capital cases;¹⁵⁷ or
- (2) Possess trial and appellate experience as counsel in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case.¹⁵⁸

The actual Post-Conviction Defender, who is appointed to serve a term of four years by the Post-Conviction Defender Commission,¹⁵⁹ must be an attorney in good standing with the Tennessee Supreme Court and possess “a demonstrated experience” in capital litigation.¹⁶⁰ It is unclear whether the Post-Conviction Defender and assistant post-conviction defenders are required to meet the qualifications delineated in Tennessee Supreme Court Rule 13, and if they are, whether the State of Tennessee monitors and enforces compliance with such qualifications.

Compensation for Attorneys at the Office of the Post-Conviction Defender

The Post-Conviction Defender receives an annual salary of \$124,900.¹⁶¹ In 1994, the Tennessee legislature set compensation for entry-level assistant post-conviction defenders at \$40,440, increasing after twenty-five years of service to \$106,000 and subject to any annual salary increases.¹⁶²

In contrast, private attorneys, appointed in capital post-conviction cases when the Office of the Post-Conviction Defender cannot represent a death-sentenced inmate, are entitled to “reasonable compensation as determined by the court in which such services are rendered.”¹⁶³ The Tennessee Supreme Court has set rates of compensation for appointed counsel in capital post-conviction cases at \$60 per hour for out-of-court work and \$80 per

¹⁵⁵ TENN. SUP. CT. R. 13 § 3(h).

¹⁵⁶ *Id.*

¹⁵⁷ TENN. SUP. CT. R. 13, § 3(g)-(h).

¹⁵⁸ TENN. SUP. CT. R. 13, § 3(h).

¹⁵⁹ TENN. CODE ANN. § 40-30-205(b), (d) (2006).

¹⁶⁰ TENN. CODE ANN. § 40-30-205(c) (2006).

¹⁶¹ TENN. CODE ANN. §§ 8-7-105(a), 8-14-207(a), 40-30-209(a) (2006).

¹⁶² TENN. CODE ANN. §§ 8-14-207(b)(1), (2), 40-30-209(b) (2006).

¹⁶³ TENN. SUP. CT. R. 13, § 3(j).

hour for in-court work.¹⁶⁴ Because capital post-conviction proceedings, from the end of direct appeal to the completion of state collateral proceedings, can take hundreds or even thousands of hours,¹⁶⁵ private attorneys may be hesitant to take on such a lengthy appointment at these set rates. Likewise, although there does not appear to be a cap on the hours worked for which an appointed capital post-conviction attorney may receive state compensation, the State likely has not contemplated payment for such a lengthy appointment. Still, it is unclear whether the rates of \$60 per hour for out-of-court work and \$80 per hour for in-court work are adequate to allow appointed private counsel in capital post-conviction cases to sufficiently represent their clients.

Additionally, the amount requested by each attorney for fees must be “reviewed and approved by the judge who presided over final disposition of the case” and is then subject to review by the Administrative Office of the Courts.¹⁶⁶ In fact, upon review of the claim, the AOC can object to and contest the billing, which could result in the court decreasing the amount awarded or denying the claim in full.¹⁶⁷ In making this determination, the AOC is to give “due consideration to state revenues.”¹⁶⁸ If the AOC rejects an attorney’s fee claim “in whole or in substantial part,” the Chief Justice of the Tennessee Supreme Court must review the denial and render a final decision.¹⁶⁹

Funding for the Office of the Post-Conviction Defender

The State provides all funding for the Office of the Post-Conviction Defender.¹⁷⁰ In Fiscal Year 2004-2005, the State allocated \$1,176,600 for the Office,¹⁷¹ and for Fiscal Year 2006-2007, the Governor recommended allocating \$1,268,800 in funding.¹⁷² Although it is unclear whether these allocations are adequate for the Office of the Post-Conviction Defender to provide meaningful representation to death-sentenced inmates, salaries of the Post-Conviction Defender, assistant Post-Conviction Defenders, support staff, and investigators¹⁷³ must come from this appropriation, leaving what is likely to be an inadequate budget to pay for other services—investigative, expert, or otherwise—that are vital to the litigation of post-conviction claims.

¹⁶⁴ TENN. SUP. CT. R. 13, § 3(k)(1)-(8). The Tennessee Supreme Court Rules define “out-of-court” as “time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party” and define “in-court” as “time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.” TENN. SUP. CT. R. 13, § 3(l).

¹⁶⁵ See, e.g., SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998). Although not in Tennessee, the Spangenberg Group estimated that on average 3,300 “attorney hours” are required to take a case from denial of certiorari by the United States Supreme Court after direct appeal to the Florida Supreme Court to denial of certiorari from state post-conviction proceedings. *Id.*

¹⁶⁶ TENN. SUP. CT. R. 13, § 6(b)(1).

¹⁶⁷ TENN. SUP. CT. R. 13, § 6(b)(1), (2), (5).

¹⁶⁸ TENN. SUP. CT. R. 13, § 6(b)(2).

¹⁶⁹ TENN. SUP. CT. R. 13, § 6(b)(5).

¹⁷⁰ See STATE OF TENNESSEE, THE BUDGET FISCAL YEAR 2006-2007, vol. 1, at B-201 (2006).

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ TENN. CODE ANN. § 40-30-208 (2006).

Funding for Investigators, Experts, and Other Expenses

The court may, in its discretion, pre-authorize funds for expert and investigative services for post-conviction proceedings if such services are “necessary to ensure that the constitutional rights of the defendant are properly protected.”¹⁷⁴ In any motion seeking funding for an expert or an investigator, the post-conviction counsel must itemize:

- (1) The nature of the expert services requested and/or type of investigation to be conducted;
- (2) The name, address, qualifications, and licensure status of the person or entity proposed to provide the expert and/or investigative services;
- (3) A statement of the itemized costs of the expert services, including the hourly rate and the amount of any expected additional or incidental costs related to the services; or an itemized list of anticipated expenses for the investigation;
- (4) If applicable, the means, date, time, and location at which any expert services are to be provided; and
- (5) If applicable, the specific facts that suggest an investigation likely will result in admissible evidence.¹⁷⁵

If these threshold requirements are met, the court will grant an *ex parte* hearing to determine if the “requested services are necessary to ensure the protection of the defendant’s constitutional rights.”¹⁷⁶ In other words, there must be a particularized need for the requested services and the hourly rate charged for the services to be reasonable.¹⁷⁷ During post-conviction proceedings, a particularized need is established “when a petitioner shows, by reference to the particular facts and circumstances of the petitioner’s case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence.”¹⁷⁸

If a capital petitioner demonstrates a particularized need and that the rate of services is reasonable, the court may, in its discretion, grant prior authorization for expert and/or investigative services.¹⁷⁹ However, the Tennessee Supreme Court Rules do not permit payment for hourly expert services over a maximum amount, including:

- (1) \$115 per hour for Accident Reconstruction;
- (2) \$250 per hour for Medical Services/Doctors & Psychiatrists;
- (3) \$150 per hour for Psychologists;
- (4) \$50 per hour for Investigators (Guilt/Sentencing);

¹⁷⁴ TENN. SUP. CT. R. 13, § 5(a)(1).

¹⁷⁵ TENN. SUP. CT. R. 13, § 5(b)(2), (3).

¹⁷⁶ TENN. SUP. CT. R. 13, § 5(b)(4).

¹⁷⁷ TENN. SUP. CT. R. 13, § 5(c)(1).

¹⁷⁸ TENN. SUP. CT. R. 13, § 5(c)(3).

¹⁷⁹ TENN. SUP. CT. R. 13, § 5(a)(1), (c)(1).

- (6) \$65 per hour for Mitigation Specialists;
- (7) \$200 per hour for DNA Experts;
- (8) \$125 per hour for Forensic Anthropologists; and
- (9) \$75 per hour for Ballistics Experts, Fingerprint Experts, or Handwriting Experts.¹⁸⁰

In post-conviction proceedings, the court may not authorize more than a total of \$20,000 for all investigative services or a total of \$25,000 for all expert services, unless the court finds that extraordinary circumstances exist to permit funding in excess of these amounts.¹⁸¹

Even if the court pre-authorizes funding for investigative and/or expert services, the defense is still not guaranteed this funding. The Director of the Administrative Office of the Courts (AOC) must approve the court's order granting pre-authorization.¹⁸² If the Director denies the court's order, the Chief Justice of the Tennessee Supreme Court will review the claim and make a final determination as to whether prior approval for investigative and/or expert services will be granted.¹⁸³

Additionally, the court may reimburse counsel for foreign language interpreters and translators if the court finds that the indigent party has limited English proficiency.¹⁸⁴

Private court-appointed post-conviction attorneys also may be entitled to compensation without prior court approval for "certain necessary expenses directly related to the representation of indigent parties."¹⁸⁵ For example, the court will reimburse for long distance telephone charges, travel mileage, lodging and meals if an overnight stay is required, parking, photocopying costs not to exceed \$500, computerized research, miscellaneous expenses such as postage, and expenses related to improving the indigent party's appearance.¹⁸⁶

Conclusion

Although capital post-conviction counsel, from the Office of the Post-Conviction Defender and private court-appointed counsel, appear to be required to meet minimum qualifications, these qualifications are not as stringent as those required by the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty*

¹⁸⁰ TENN. SUP. CT. R. 13, § 5(d)(1).

¹⁸¹ TENN. SUP. CT. R. 13, § 5(d)(4), (5). The extraordinary circumstances must be proven by clear and convincing evidence. *Id.*

¹⁸² TENN. SUP. CT. R. 13, § 5(e)(4).

¹⁸³ *Id.* These provisions of Tennessee Supreme Court Rule 13 appear to be in conflict with section 40-14-207(b), which states that "[i]n capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary." TENN. CODE ANN. § 40-14-207(b) (2006).

¹⁸⁴ TENN. SUP. CT. R. 13, § 4(d)(1).

¹⁸⁵ TENN. SUP. CT. R. 13, § 4(a)(1).

¹⁸⁶ TENN. SUP. CT. R. 13, § 4(a)(3)(A)-(J).

Cases. We are also unable to determine whether the funds allocated to the Office of the Post-Conviction Defender or the compensation of individual attorneys at that office and private court-appointed post-conviction attorneys are adequate. We suspect, however, that the low salary for assistant Post-Conviction Defenders and low hourly rates for private court-appointed attorneys do little to attract high quality attorneys to perform the task of protecting the rights of death-sentenced inmates. Moreover, while Post-Conviction Defenders are authorized to hire their own experts and investigators, the funds for private court-appointed counsel to hire experts and investigators are subject to court approval as well as approval by the AOC and are capped at maximum rates. Based on this information, the State of Tennessee is only in partial compliance with Recommendation #8.

I. Recommendation #9

State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.

Tennessee law allows an individual to (1) file a post-conviction petition either after the one-year statute of limitations, or (2) reopen his/her first petition when the claim in the petition is based upon a final ruling of an appellate court, United States Supreme Court or otherwise, establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required.¹⁸⁷

Post-conviction courts in Tennessee will give full retroactive effect to changes in federal constitutional law in limited circumstances when (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;¹⁸⁸ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures implicit in the concept of ordered liberty”¹⁸⁹ and whose non-application would seriously diminish the “likelihood of an accurate conviction.”¹⁹⁰ Additionally, the Tennessee Supreme Court has held that in post-conviction proceedings, retroactive application of a new constitutional rule under the Tennessee Constitution is necessary when the new state rule enhances the integrity and reliability of the fact-finding process of the trial.¹⁹¹

¹⁸⁷ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006).

¹⁸⁸ *See Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001).

¹⁸⁹ *Id.*

¹⁹⁰ *Adkins v. State*, 911 S.W.2d 334, 345 (Tenn. Crim. App. 1994).

¹⁹¹ *Id.* (citing *Hellard v. State*, 629 S.W.2d 4, 5 (Tenn. 1982)). Stated another way, the court will apply a new state rule retroactively in a post-conviction proceeding when the old rule substantially impairs the truth-finding function of the trial and thereby raises serious questions about the accuracy of guilty verdicts in past trials. *Id.*

All other new rules of constitutional law, state or federal, including those announced by the United States Supreme Court, will be applied retroactively only to cases on direct appeal.¹⁹²

Because Tennessee law only gives retroactive effect to changes in constitutional law in limited circumstances, the State of Tennessee partially meets the requirements of Recommendation #9.

J. Recommendation #10

State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.

Tennessee law contemplates the filing of only one post-conviction petition and explicitly prohibits the filing of a second or successive¹⁹³ post-conviction petition attacking a single conviction and/or sentence.¹⁹⁴ However, the petitioner may file a motion to reopen his/her first post-conviction petition, pursuant to section 40-30-117 of the Tennessee Code Annotated, in the following limited circumstances:

- (1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized at the time of trial and retroactive application of that right is required;¹⁹⁵
- (2) The claim in the petition is based on new scientific evidence establishing that the petitioner is actually innocent of the offenses for which s/he was convicted;¹⁹⁶
- (3) The claim in the petition seeks relief from a sentence that was enhanced because of a previous conviction which was not the product of a guilty plea and agreed sentence, and the previous conviction has subsequently been held invalid;¹⁹⁷ or
- (4) The facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have his/her conviction set aside or his/her sentence reduced.¹⁹⁸

Only one of the exceptions to the bar against successive petitions required by this Recommendation—an intervening court decision that changed the law subsequent to the first petition, resulting in a meritorious claim not being raised and litigated in the first

¹⁹² *Id.*

¹⁹³ Successive petitions are those petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment of conviction and sentence. *See Fowler v. State*, 2006 WL 521498, *1 (Tenn. Crim. App. 2006).

¹⁹⁴ TENN. CODE ANN. § 40-30-102(c) (2006).

¹⁹⁵ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006).

¹⁹⁶ TENN. CODE ANN. §§ 40-30-102(b)(2), -117(a)(2) (2006).

¹⁹⁷ TENN. CODE ANN. §§ 40-30-102(b)(3), -117(a)(3) (2006).

¹⁹⁸ TENN. CODE ANN. § 40-30-117(a)(4) (2006).

petition—appears to be a basis for reopening an individual’s first petition for post-conviction relief. This exception to the bar against successive petitions, however, is even more limited because the petitioner must file his/her petition within one year of the appellate court’s establishment of the new constitutional right requiring retroactive application.¹⁹⁹

Moreover, the procedures for reopening a first petition for post-conviction relief do not contain the other exception required by this Recommendation—some deficiency or omission by post-conviction counsel that prevented a meritorious claim from being raised and litigated in the first petition. In fact, Tennessee law specifically prohibits claims of ineffective assistance of post-conviction counsel in a successive petition, as post-conviction petitioners are not constitutionally entitled to effective assistance of counsel in post-conviction proceedings.²⁰⁰

Although we commend the State of Tennessee for allowing other important exceptions to the bar against successive petitions, such as allowing petitions that seek to prove actual innocence through Tennessee’s Post-Conviction DNA Analysis Act of 2001 at any time,²⁰¹ the State of Tennessee only partially meets the requirements of Recommendation #10.

K. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the United States Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”²⁰² The burden to show that the error was harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”²⁰³

There is some case law in Tennessee indicating that during post-conviction proceedings, errors involving a petitioner’s constitutional rights are generally not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.²⁰⁴ The State generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.²⁰⁵

¹⁹⁹ TENN. CODE ANN. §§ 40-30-102(b)(1), -117(a)(1) (2006).

²⁰⁰ See *Lewis v. State*, 1998 WL 743650, *1 (Tenn. Crim. App. Oct. 15, 1998); *Hutch v. State*, 1998 WL 155567, *1 (Tenn. Crim. App. Mar. 31, 1998).

²⁰¹ TENN. CODE ANN. §§ 40-30-301 through 40-30-313 (2006).

²⁰² 386 U.S. 18, 24 (1967).

²⁰³ *Id.*

²⁰⁴ See *Momon v. State*, 18 S.W.3d 152, 164 (Tenn. 1999) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

²⁰⁵ *Chapman*, 386 U.S. at 24.

However, certain claims of constitutional error, such as ineffective assistance of counsel claims and *Brady*²⁰⁶ claims, provide an exception to the harmless error test in post-conviction proceedings by placing the burden with the petitioner to demonstrate that s/he was prejudiced by the constitutional error.

For example, if the petitioner raises a claim of ineffective assistance of counsel, s/he bears the burden to demonstrate a “reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding,²⁰⁷ rather than the State bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the State failed to disclose favorable evidence and this failure was unknown to the petitioner on direct appeal—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.²⁰⁸

Because claims of ineffective assistance of counsel form the bulk of claims raised in Tennessee post-conviction proceedings, it is more likely that the petitioner regularly bears the burden to prove that s/he was prejudiced by the constitutional error (failure to receive effective counsel under the Sixth Amendment of the United States Constitution or Article 1, Section 9 of the Tennessee Constitution), rather than the State bearing the burden of demonstrating that such an error was harmless beyond a reasonable doubt.

The State of Tennessee, therefore, only partially meets the requirements of Recommendation #11.

L. Recommendation #12

During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.

Although Governor Bredesen imposed a ninety-day moratorium on executions on February 1, 2007, no commission has been charged with undertaking a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death. Accordingly, the State of Tennessee is not in compliance with Recommendation #12.

²⁰⁶ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁰⁷ *State v. Sexton*, 2007 WL 92352, *3-4 (Tenn. Crim. App. Jan. 12, 2007) (noting that Tennessee law requires the petitioner to prove the two prongs of the *Strickland* test for ineffective assistance of counsel by clear and convincing evidence).

²⁰⁸ *State v. Roberson*, 2007 WL 92354, *6 (Tenn. Crim. App. Jan. 11, 2007) (citing *Brady*, 373 U.S. at 87; *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995)).

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. This process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. In *Herrera v. Collins*, the United States Supreme Court declared: "Executive clemency has provided the 'fail safe' in our criminal justice system It is an unalterable fact that our justice system, like the human beings who administer it, is fallible."¹ Notwithstanding the Court's confidence in *Herrera*, since 1972, when the U.S. Supreme Court temporarily barred the death penalty as unconstitutional, there has been a precipitous decline in the grants of clemency. Between 1960 and 1970, 261 death-row inmates were executed while 204 death-row inmates were granted clemency, including five death-row inmates in Tennessee.² However, from 1977 through February 1, 2007, 1061 death-row inmates have been executed and only 229 death-row inmates have received executive clemency.³ One hundred sixty-seven of the 229 were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.⁴

Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, a state's use of its clemency power is an important measure of the fairness of a state's justice system as a whole. While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."⁵

¹ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

² Michael Korengold *et al.*, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 *HAMLIN L. REV.* 349, 350 (1996).

³ Lee Seifer Greene, *Lead Me On: Frank Goad Clement and Tennessee Politics* 328 (1982).

⁴ See Death Penalty Information Center, Clemency, available at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Feb. 9, 2007).

⁵ *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the conviction and/or death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION

A. Clemency Decision-Makers

1. The Governor of Tennessee

The State of Tennessee provides the Governor with the sole constitutional and statutory power to grant or deny clemency, including reprieves,⁶ commutations,⁷ and pardons⁸ in all criminal cases after conviction, except in cases of impeachment.⁹ The Governor, however, may ask the Board of Probation and Parole to make non-binding recommendations concerning all requests for pardons, reprieves, and commutations.¹⁰

In death penalty cases, the Governor may commute an inmate's death sentence to life imprisonment under two circumstances:

- (1) Upon an application for a pardon by a death-row inmate, the Governor is "of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon;" or
- (2) Upon the certificate of the Tennessee 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."¹¹

In addition to the Governor's power to grant reprieves, commutations, and pardons, s/he may, after considering the facts, circumstances, and any newly discovered evidence in a particular case, also grant "exoneration" to any inmate whom the Governor finds did not commit the crime for which s/he was convicted.¹² Upon granting the exoneration, all of the records of the inmate's arrest, indictment, and conviction will be expunged and all of his/her rights that were lost by the conviction will automatically be restored.¹³

⁶ The Rules of the Tennessee Board of Paroles defines "reprieve" as "a discretionary act of the [G]overnor which withholds a sentence from an interval of time or a sentence of death for a stated specific period of time, thus having the effect of suspending the execution of the sentence for the duration of the reprieve" Rules of the Tennessee Board of Paroles 1100-1-1-.03(9)(d) (1999).

⁷ The Rules of the Tennessee Board of Paroles defines "commutation" as "a discretionary act of the Governor, which reduces a prisoner's sentence from a greater to a lesser degree with the extent of such reduction being totally within the discretion of the Governor." Rules of the Tennessee Board of Paroles 1100-1-1-.03(9)(a) (1999).

⁸ The Rules of the Tennessee Board of Paroles defines "pardon" as "a discretionary act of the Governor which forgives the defendant or extinguishes his[/her] crime thereby granting such defendant full relief from all or any portion of his[/her] sentence remaining at the time of pardon." Rules of the Tennessee Board of Paroles 1100-1-1-.03(9)(c) (1999).

⁹ TENN. CONST. art. III, § 6; TENN. CODE ANN. § 40-27-101 (2006).

¹⁰ TENN. CODE ANN. §§ 40-28-104(10); 40-28-126(a) (2006); *see also* Rules of the Tennessee Board of Paroles 11-1-1-.15(1) (1999).

¹¹ TENN. CODE ANN. §§ 40-27-105 (allowing the Governor to commute the sentence to "imprisonment for life in the penitentiary"); 40-27-106 (2006).

¹² TENN. CODE ANN. § 40-27-109(a) (2006).

¹³ TENN. CODE ANN. § 40-27-109(b) (2006); *see also* Rules of the Tennessee Board of Paroles 1100-1-1-.03(9)(e) (1999).

2. The Board of Probation and Parole

The Board of Probation and Parole (Board) is composed of seven members, all of whom are appointed by the Governor.¹⁴ When appointing members to the Board, the Governor must give preference to candidates with training, education, or experience in the “criminal justice system, law, medicine, education, social work or the behavioral sciences.”¹⁵ Once appointed, the seven Board members serve six-year terms, and are eligible for reappointment,¹⁶ and one of the seven Board members will be appointed by the Governor to serve a two-year term as Chair of the Board.¹⁷

The Board is, upon the request of the Governor, responsible for making non-binding recommendations concerning all requests for pardons, reprieves, and commutations.¹⁸ To make such recommendations, the Board may, upon the Governor’s request, collect records, make investigations, and report to the Governor the “facts, circumstances, criminal records, and the social, physical, mental and psychiatric conditions and histories of prisoners under consideration by the [G]overnor for pardon or commutation of sentence.”¹⁹

B. Avenues for Applying for and Obtaining Clemency

To apply for clemency, an inmate or his/her attorney should obtain an application for a pardon or commutation from the Board of Probation and Parole.²⁰ However, in unusual or emergency medical situations, the medical staff of the institution in which the inmate is incarcerated may petition the Board for clemency if the inmate is not competent to do so on his/her own behalf.²¹ Additionally, in lieu of applying for clemency to the Board or in addition to his/her application to the Board, an inmate may petition the Tennessee Supreme Court for a certificate of commutation.²²

C. Applying for Clemency to the Board of Probation and Parole

1. Applications for Clemency

¹⁴ TENN. CODE ANN. § 40-28-103(a) (2006). The Board is currently composed of the following individuals: Charles M. Traughber, Chairman; James H. Austin; Patsy Bruce; Ronnie Cole; Lynn Duncan; Yusuf Hakeem; and Larry L. Hassell. To review the Board members’ biographies, see http://www2.state.tn.us/bopp/bopp_BM2.htm (last visited Feb. 7, 2007).

¹⁵ TENN. CODE ANN. § 40-28-103(c) (2006).

¹⁶ TENN. CODE ANN. § 40-28-103(b) (2006).

¹⁷ TENN. CODE ANN. § 40-28-103(e) (2006).

¹⁸ TENN. CODE ANN. §§ 40-28-104(10); 40-28-126(a) (2006); see also Rules of the Tennessee Board of Paroles 11-1-1-.15(1) (1999).

¹⁹ TENN. CODE ANN. § 40-28-106(c) (2006).

²⁰ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(a)(1) (1999).

²¹ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(e) (1999); Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(a)(2) (1999). In these cases, “a complete medical report and a detailed statement of the emergency situation will accompany the Board’s report to the Governor.” Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(e) (1999).

²² TENN. CODE ANN. § 40-27-106 (2006).

a. Applying for a Pardon

The “Application For Pardon” requests the petitioner to provide the following information: (1) general information, including marital status and number of children; (2) criminal information, including a list of all prior felonies; (3) educational information, including the highest level of education completed; (4) military information, including branch of service; (5) family information, including parents’ and siblings’ names; and (6) employment information, including current and past employment history.²³ In addition to completing the application, the petitioner must include with the application the following information, if applicable: (1) a certified copy of any outstanding court orders concerning child support; (2) certified copies of convictions/judgments; (3) a certified copy of the order granting probation; (4) a certified copy of the order of discharge from probation or parole; (5) a certified copy of his/her criminal history; (6) copies of his/her diploma, degree(s), certificate(s), or current professional license; and (7) a copy of his/her military discharge.²⁴ Additionally, the application must be “accompanied by information and evidence sufficient to enable the Board to determine whether the [petitioner] is entitled to consideration for a pardon under the Governor’s [G]uidelines.”²⁵

The Governor’s Guidelines (Guidelines), established by Governor Bredesen in February 2003, were drafted to provide guidance to the Board in reviewing pardon petitions and in making its recommendations to the Governor. The Guidelines provide:

- (1) The Governor will give serious consideration to Pardon requests where:
 - a. Petitioner has been neither convicted, nor confined under sentence, nor placed under community supervision within five (5) years since the completion of the sentence(s) from which [s/]he seeks a pardon; and
 - b. Petitioner has demonstrated good citizenship since the completion of the sentence(s) from which [s/]he seeks a pardon which shall mean both specific achievements and incident-free behavior; and
 - c. Petitioner has demonstrated with proper verification, a specific and compelling need for a pardon.
- (2) Petitioner has the obligation to provide written verification of good citizenship and of a compelling and specific need in conjunction with 1(b) and 1(c) above. The demonstration of good citizenship shall, among other things, include written communication from at least five (5) persons other than the petitioner or a member of the petitioner’s family verifying the period of good citizenship. In addition, the demonstration of a compelling and specific need for a pardon must be verified, in writing, by at least one (1) source other

²³ Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

²⁴ *Id.*

²⁵ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(b)(1) (1999).

than the petitioner or a member of the petitioner's family; provided, however, the Board may waive this requirement if the circumstances warrant. Generally, the need for a pardon will not be found compelling when other provisions of the law provide appropriate relief for the petitioner.²⁶

Failure to provide the information and evidence necessary to determine whether the petitioner meets these Guidelines will preclude the Board from considering the petitioner's case until such information and evidence is provided.²⁷

Upon receipt of a properly completed Application for Pardon, the Board must review the application and supporting information to determine whether the petitioner's case should be scheduled for a hearing.²⁸ To hold a hearing, a majority of the Board must vote in favor of such a hearing.²⁹ If the Board finds that the petitioner is not eligible for consideration, it must inform the petitioner of his/her ineligibility and the reasons for the ineligibility.³⁰

Based on the Application for Pardon, it does not appear that a death-row inmate would be eligible for consideration for a pardon because the application requires that the petitioner have completed his/her sentence before being considered.³¹ The application specifically states: "Before a petition for the Board considers pardon, the petitioner shall have completed his sentence, including any community supervision."³² However, the Tennessee Code implies that a death-row inmate may apply for a pardon by stating that: "Upon application for a pardon by a person sentenced to capital punishment, if the [G]overnor is of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon, the [G]overnor may commute the punishment of death to imprisonment for life in the penitentiary."³³

2. Application for Commutation

Like the Application for Pardon, the "Application for Commutation" requests general, educational, military, and criminal information, but also requests institutional and parole information.³⁴ In addition to completing the application, the petitioner must include with the application the following information, if applicable: copies of his/her diploma, degree(s), certificate(s), or current professional license(s); and a copy of his/her military discharge.³⁵

²⁶ Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

²⁷ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(b)(1) (1999).

²⁸ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(b)(2) (1999).

²⁹ Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

³⁰ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(b)(3) (1999).

³¹ Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

³² *Id.*

³³ TENN. CODE ANN. § 40-27-105 (2006). If death-row inmates are eligible to apply for a pardon, it appears that only 1(c) and 2 of the Governor's Guidelines would be relevant to such applications.

³⁴ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

³⁵ *Id.*

Upon receipt of the application, the Board must review the application and supporting information to determine: (1) whether the inmate “falls within the Governor’s [G]uidelines and the Board’s screening factors,” and (2) whether the inmate’s case should be scheduled for a hearing.³⁶ The Application for Commutation clearly outlines the Governor’s Guidelines for commutation requests in non-capital cases, but the Guidelines for capital cases are not as clear. The Guidelines for these cases are as follows:

- (1) Pursuant to T.C.A. Section 40-27-105, upon application for a pardon by a person sentenced to capital punishment, if the Governor is of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon, the Governor may commute the punishment of death to imprisonment for life in the penitentiary or imprisonment for life without parole in the penitentiary.
- (2) Pursuant to T.C.A. Section 40-27-106, the Governor may commute the punishment from death to imprisonment for life or imprisonment for life without parole, 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.³⁷

The Governor also may grant a temporary reprieve from execution without commuting the inmate’s death sentence. According to the Board of Pardon and Parole, “[t]he Governor will give serious consideration to reprieve requests where the petitioner has been sentenced to death and has exhausted all possible judicial remedies.”³⁸

In order to schedule a hearing on an application for a commutation, a majority of the Board must vote in favor of such a hearing.³⁹ If the inmate does not fall within the Governor’s Guidelines, the Board must inform the inmate that s/he is ineligible for consideration and will not receive a commutation hearing.⁴⁰ The Board must also advise the inmate as to the date on which s/he will be eligible to reapply for consideration.⁴¹

3. Clemency Hearing Before the Board of Probation and Parole

In cases in which an inmate has been found to be eligible for consideration for a pardon, commutation, or reprieve and the Board has scheduled a hearing on the case, the Board must inform the inmate of the date, time, and place of the hearing.⁴² The Board must also advise the inmate on “the type of evidence considered by the Board” and on the fact

³⁶ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(c)(1) (1999).

³⁷ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(c)(2) (1999).

⁴¹ *Id.*

⁴² Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(1) (1999); *see also* Rules of the Tennessee Board of Paroles 1100-1-1-.05(2)(c) (1999).

that s/he is entitled to appear at the hearing and present witnesses and other types of evidence.⁴³

In addition to informing the inmate about the hearing, notice must also be sent to the appropriate judge and district attorney general.⁴⁴ The notice to the judge and district attorney general will indicate that the Board “solicits and welcomes their view and recommendations concerning clemency for the [inmate].”⁴⁵

In advance of the clemency hearing, the Board’s staff may compile any or all of the following information for the Board’s consideration at the hearing:

- (1) A reclassification/parole summary completed by the institutional staff;
- (2) Information about the facts and circumstances surrounding the offense and conviction;
- (3) A psychiatric/psychological evaluation if the inmate was convicted of a sexual offense or sex related crime;
- (4) Information about medical, mental and/or family problems or needs obtained through investigation by a parole officer or other individuals designated by the Board; and
- (5) The application, original request, and supporting evidence, and any correspondence in the Board’s file concerning the application.⁴⁶

If the inmate is applying for a pardon, however, the Board’s staff must obtain the following information, in addition to the information required in advance of a clemency hearing:

- (1) Information obtained for FBI and local records checks;
- (2) Information regarding recent social history and reputation in the community; and
- (3) Information verifying reasons for the pardon request.⁴⁷

At the hearing, which is a formal proceeding open to the news media and the public,⁴⁸ the Board must consider, but is not limited to, the following factors:

- (1) The nature of the crime and its severity;

⁴³ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(1) (1999).

⁴⁴ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(2) (1999).

⁴⁵ *Id.*

⁴⁶ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(3) (1999).

⁴⁷ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(4) (1999).

⁴⁸ Rules of the Tennessee Board of Paroles 1100-1-1-.05(1)(a) (1999); *see also* Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003. The hearing is usually held at the prison where the inmate is incarcerated. *See* Emily Wilson, Brian Doss, Sonya Phillips, *Tennessee’s Death Penalty: Costs and Consequences*, Comptroller of the Treasury Office of Research, at 31 (July 2004). Despite the fact that the hearing is open to the news media and the public, the information contained in the Board’s records is confidential. *See* Rules of the Tennessee Board of Paroles 1100-1-1-.14 (1999). It is unclear how these two rules work together in practice.

- (2) The inmate's institutional record;
- (3) The inmate's previous criminal record, if any;
- (4) The views of the trial judge and district attorney general who prosecuted the case;
- (5) The sentences, ages, and comparative degree of guilt of co-defendants or others involved in the inmate's offense;
- (6) The inmate's circumstances if returned to the community;
- (7) Any mitigating circumstances surrounding the offense;
- (8) The views of the community, victims of the crime or their families, institutional staff, parole officers or other interested parties; and
- (9) Medical and/or psychiatric evaluation when applicable.⁴⁹

All Board members are not required to be present at the hearing, but any Board member who is not present at the hearing should administratively review the case file prior to casting his/her non-binding recommendation.⁵⁰

4. The Board of Probation and Parole's Clemency Recommendation and the Governor's Clemency Decision

The Board may inform the inmate of its recommendation to grant or deny clemency at the hearing, or it may take the case under advisement and render its recommendation at a later date.⁵¹ Regardless, at the hearing, the Board must advise the inmate that its recommendation is non-binding and that the Governor will review any recommendation of the Board.⁵²

To transmit the Board's recommendation to the Governor, one member of the Board—as designated by the Chair—is required to write a case report, which must include:

- (1) A brief statement of the reasons for the recommendation;
- (2) The complete file;
- (3) The views of the various Board Members, if the recommendation is not unanimous; and
- (4) The specifics of the recommendation—whether it is a positive or negative one and if a positive recommendation, any terms and conditions recommended by the Board.⁵³

The Board's written recommendation to the Governor, as well as all information contained in Board files that are produced, supplied, or generated by other government agencies, are confidential.⁵⁴

⁴⁹ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(6) (1999).

⁵⁰ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁵¹ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(7) (1999).

⁵² *Id.*

⁵³ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(8) (1999).

⁵⁴ Rules of the Tennessee Board of Paroles 11-1-1-.14(1)(a)(1), (7) (1999); *see also* Rules of the Tennessee Board of Paroles 11-1-1-.14(1)(a)(1)-(10) (1999).

Once the Governor makes his/her decision to grant or deny clemency, the Governor's counsel must notify the Board of the Governor's clemency decision and the Board, in turn, must then notify the petitioner.⁵⁵ The Governor must keep a written record of "any reasons for granting pardons or commuting punishment, and preserve on file all documents on which the [G]overnor acted."⁵⁶

D. Certificate of Commutation

Under the Governor's Guidelines for commutations, the Governor may commute an inmate's death sentence to life imprisonment upon the certificate of the Tennessee Supreme Court, stating that "in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted."⁵⁷ When determining whether there are extenuating circumstances attending the case and whether the punishment should be commuted, the Tennessee Supreme Court is only authorized to consider "facts in the record . . . , or a combination of record facts and new evidence that is uncontroverted."⁵⁸ Therefore, the Court will not grant a certificate of commutation "when a death-sentenced [inmate], in what amounts to an original action, relies upon extra-judicial facts and challenges the accuracy of the jury's verdict and the credibility of the evidence upon which his or her conviction was based."⁵⁹

Interestingly, the Tennessee Supreme Court has not granted a certificate of commutation since before the adoption of the Post-Conviction Procedure Act in 1967.⁶⁰ And, even before 1967, the Tennessee Supreme Court never granted a certificate of commutation to a death-row inmate who "file[d] what amounts to an original action . . . and relie[d] upon extra-judicial 'new evidence' to challenge the accuracy of the jury's verdict and the credibility of the evidence upon which his or her conviction was based."⁶¹ Based on the infrequency with which the Tennessee Supreme Court issues certificates of commutation, this procedure will not be discussed in the analysis section.

⁵⁵ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁵⁶ TENN. CODE ANN. § 40-27-107 (2006).

⁵⁷ TENN. CODE ANN. § 40-27-106 (2006).

⁵⁸ *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000).

⁵⁹ *Id.* at 808.

⁶⁰ *Id.* at 811 (Drowota, J. concurring).

⁶¹ *Id.*

II. ANALYSIS

A. Recommendation #1

The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.

The State of Tennessee does not require the Governor, who possess the sole constitutional and statutory power to grant or deny clemency, to conduct any specific type of review or consider any specific facts, evidence, or circumstances when making his/her clemency decision. In contrast, the Board of Probation and Parole is required to conduct a specific type of review when determining an inmates' eligibility for clemency and is required to consider specific facts, evidence, and circumstances during clemency hearings.

In cases in which a death-row inmate has applied for a pardon or a commutation, the Board is required to determine whether the inmate meets the Governor's Guidelines for a pardon or a commutation. For example, in cases in which a death-row inmate has applied for a pardon, the Board must determine whether the inmate has "demonstrated with proper verification, a specific and compelling need for a pardon."⁶² Similarly, in cases in which a death-row inmate has applied for a commutation, the Board must determine whether the inmate qualifies by virtue of a pardon not being warranted or upon a certificate from the Tennessee Supreme Court.⁶³ However, in order to make this determination, the Board is not required to collect any specific type of information. Rather, this determination is based solely on the inmate's application and supporting materials.⁶⁴ In fact, it is not until the death-row inmate meets the applicable Governor's Guidelines and the Board schedules a hearing that the Board is allowed to and/or required to collect specific types of information.

Under these circumstances, the Board may collect:

- (1) A reclassification/parole summary completed by the institutional staff;
- (2) Information about the facts and circumstances surrounding the offense and conviction;
- (3) A psychiatric/psychological evaluation if the inmate was convicted of a sexual offense or sex related crime;
- (4) Information about medical, mental and/or family problems or needs obtained through investigation by a parole officer or other individuals designated by the Board; and
- (5) The application, original request, and supporting evidence, and any

⁶² Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁶³ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁶⁴ See e.g., Rules of the Tennessee Board of Paroles 11-1-1.15(1)(b)(2) (1999).

correspondence in the Board's file concerning the application.⁶⁵

If the inmate is applying for a pardon, however, the Board's staff must obtain the following information:

- (1) Information obtained for FBI and local records checks;
- (2) Information regarding recent social history and reputation in the community; and
- (3) Information verifying reasons for the pardon request.⁶⁶

Although the Board is required to collect at least some of this information, it is not required to consider any of it. However, during the clemency hearing, the Board is required to consider, but not be limited to, the following factors:

- (1) The nature of the crime and its severity;
- (2) The inmate's institutional record;
- (3) The inmate's previous criminal record, if any;
- (4) The views of the trial judge and district attorney general who prosecuted the case;
- (5) The sentences, ages, and comparative degree of guilt of co-defendants or others involved in the inmate's offense;
- (6) The inmate's circumstances if returned to the community;
- (7) Any mitigating circumstances surrounding the offense;
- (8) The views of the community, victims of the crime or their families, institutional staff, parole officers, or other interested parties; and
- (9) Medical and/or psychiatric evaluation when applicable.⁶⁷

Once the Board makes its non-binding recommendation, it must transmit its recommendation with the petitioner's complete case file to the Governor.⁶⁸

Despite the fact that this information must be transmitted to the Governor, neither Tennessee law nor the Rules of the Tennessee Board of Paroles require the Governor to consider any of this information or any other specific information as part of his/her clemency decision-making process. Given that the State of Tennessee does not require the Governor to conduct any specific type of review or consider any specific factors, the review conducted by the Governor and the factors considered by him/her are largely unknown.

The current Governor of Tennessee, Phil Bredesen, however, has made a number of statements concerning the scope of his clemency review and the factors that he will consider under this review. For example, Governor Bredesen has stated that "he does not believe it is a governor's role to second-guess a jury, 'but to look to see if something is

⁶⁵ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(3) (1999).

⁶⁶ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(4) (1999).

⁶⁷ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(6) (1999).

⁶⁸ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(7) (1999).

missing.”⁶⁹ Similarly, he has stated: “The way I look at it, I don’t think it’s the role of the governor to substitute your judgment for that of the courts But I do think there is a role to make sure that some of the things that might slip between the cracks in the courts— the adequacy-of-representation issues, issues of racism and so on— are ones that are legitimately to be considered.”⁷⁰

In the case of Paul Dennis Reid, a death-row inmate, Reid’s lawyers argued that he was not competent to waive his appeals. In rejecting this claim, Governor Bredesen wrote: “Because the issue of Mr. Reid’s mental capacity has been and continues to be thoroughly reviewed by both the state and federal courts, I do not believe that intervention by my office through the use of the Governor’s clemency powers is appropriate.”⁷¹ Despite Governor Bredesen’s claims of a thorough review, however, Reid’s post-conviction petition was dismissed as insufficient by the Tennessee Supreme Court, shortly after the Court clarified the requirements of “next friend” post-conviction petitions for defendants who were allegedly mentally incompetent. Consequently, the Court did not adjudicate Reid’s mental competency.⁷² In a second case decided around the same time, the Tennessee Supreme Court announced the procedures for determining competency for a capital defendant in a post-conviction proceeding. The Court, again, failed to assess Reid’s competency.⁷³ Indeed, the federal district court granted a stay of execution in Reid’s case because it had a reasonable doubt as to Reid’s competence.⁷⁴ The Sixth Circuit has upheld the stay.⁷⁵

Similarly, in denying Sedley Alley’s clemency petition, “the [G]overnor issued a statement denying clemency, saying he believes ‘this matter has been thoroughly and appropriately reviewed by the courts.’”⁷⁶ In actuality, one of the last issues before Alley’s June 2006 execution was whether DNA tests should be performed on some materials and whether other materials should be retested.⁷⁷

In short, while the Governor is correct in saying that legal or factual issues have been “thoroughly and appropriately reviewed by the courts,” it is not necessarily correct that the courts have addressed the merits of the issue.

⁶⁹ Rob Johnson and Bonna de la Cruz, *Governor to Ask Board to Review Workman’s Plea*, THE TENNESSEAN, 4B (Aug. 13, 2003).

⁷⁰ Rob Johnson, *Bredesen Facing Two Life-and-Death Cases*, THE TENNESSEAN, April 20, 2003.

⁷¹ See <http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/reidPD/06272006/Clemency.pdf>.

⁷² See *State v. Holton*, 201 S.W.3d 626, 634-35 (Tenn. 2006).

⁷³ *Reid v. State*, 197 S.W.3d 694 (Tenn. 2006).

⁷⁴ *Martiniano v. Bell*, No. 3:06-cv-00632 (M.D. Tenn. June 27, 2006), available at <http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/reidPD/06272006/3-06-0632%20Order%20Stay%20of%20Execution.pdf>.

⁷⁵ *Martiniano v. Bell*, No. 06-5860 (6th Cir. July 7, 2006), available at <http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/reidPD/07072006/reid.pdf>.

⁷⁶ Richard Locker and Lawrence Buser, *Judge Grant’s Alley’s 11th Hour Plea*, COMMERCIAL APPEAL, at B1 (June 28, 2006). See also Update – Sedley Alley clemency request on June 28, 2006. <http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm>

⁷⁷ See *Alley v. State*, 2006 WL 1703820 (Tenn. Crim. App. 2006) (affirming denial of motion for DNA testing).

It has been reported that when making his clemency decision, Governor Bredesen and his staff review the case information and familiarize themselves with the applicant's defense counsel, the Governor meets with the applicant's defense counsel, and the Governor's staff reviews the hearing transcript and testimony.⁷⁸

Based on this information, it appears that Governor Bredesen will only consider issues that were not previously litigated, which means that he would not consider issues, such as mental illness, that were fully litigated. However, based on this information alone, it is impossible to determine whether this is the full extent of the Governor's review and whether it meets Recommendation #1.

In conclusion, due to the non-existence of laws, rules, procedures, standards, and guidelines requiring the Governor to conduct any specific type of review or consider specific factors and the lack of information on current and past-Governors' decision-making processes, it is unclear what exactly the Governor's clemency decision-making process entails. Therefore, we are unable to assess whether the State of Tennessee is in compliance with Recommendation #1.

Accordingly, the Tennessee Death Penalty Assessment Team recommends that:

- (1) The Governor adopt a policy to ensure that s/he issues a brief written statement in every clemency decision, making specific reference to the various factors/ claims that may have been considered; and
- (2) In order to ensure that claims of factual innocence receive full consideration, the State create an independent commission with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. If the commission sustains the inmate's claim of factual innocence, it would either (a) forward to the Governor a recommendation for pardon or (b) submit the case to a panel of judges, who would review the claim without regard to any procedural bars. This sort of commission would supplement either the current post-conviction or clemency process.

B. Recommendation #2

The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.

Recommendation #2 requires clemency decision-makers to consider "all factors" that might lead the decision-maker to conclude that death is not the appropriate punishment. According to the ABA, "all factors" include, but are not limited to, the following, which are not listed in any particular order of priority:

⁷⁸ See Wilson et al., *supra* note 48, at 32.

- (1) Constitutional claims that were barred in court proceedings due to procedural default, non retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court rulings;
- (2) Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) Lingering doubts of guilt (as discussed in Recommendation #4);
- (4) Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) Inmates’ mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) Inmates’ age at the time of the offense (as discussed in Recommendation #4).⁷⁹

As discussed under Recommendation #1, the Governor of Tennessee—who possesses the sole constitutional and statutory power to grant or deny clemency—is not required to consider any specific factors when making his/her clemency decision. The current Governor of Tennessee, Phil Bredesen, has indicated that before he makes his decision, he and his staff consider the case information, familiarize themselves with the inmate’s counsel, and review the hearing transcript and testimony.⁸⁰ Additionally, it has been reported that Governor Bredesen will consider “things that might slip between the cracks in the courts, [such as] the adequacy-of-representation issues, issues of racism and so on.”⁸¹ Based on this information, the Governor’s review appears to be somewhat limited, but it also is unclear whether this is the full extent of his review.

Although the Governor is not required to consider any specific factors, the Board of Probation and Parole is required to consider, but not be limited to, nine specific factors, as mentioned under Recommendation #1. These factors, however, only pertain to two of the factors delineated by Recommendation #2. Additionally, despite the fact that the Board is required to consider specific factors and transmit this information to the Board, Tennessee law does not require the Governor to consider any of these factors when assessing a death-sentenced inmate’s petition for clemency.

A review of Tennessee’s past clemency decisions does not further illuminate the factors considered by the Governor in determining whether to grant clemency. In fact, since the State of Tennessee reinstated the death penalty, not one death-row inmate has been granted clemency, and given that neither the Governor nor any other member of the

⁷⁹ AMERICAN BAR ASSOCIATION, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

⁸⁰ See Wilson et. al., *supra* note 48, at 32.

⁸¹ Rob Johnson, *Bredesen Facing Two Life-and-Death Cases*, THE TENNESSEAN, at 19A (April 20, 2003).

Board is required to publicly explain his/her clemency decision or recommendation,⁸² it is difficult to ascertain the reasons why inmates have been denied clemency.

In one case in which former-Governor Don Sundquist denied clemency to a death-row inmate,⁸³ however, he released a statement explaining the basis for his clemency decision. Specifically, in the case of Philip Ray Workman, former-Governor Sundquist stated: “I have reviewed the application for clemency . . . and have determined that executive clemency is not appropriate. . . . This decision is based on four criteria: [1] I am convinced Philip Workman is guilty of the crime for which he was sentenced to death; [2] This case involves the murder of a law enforcement officer; [3] The punishment is appropriate under the law; and [4] I am confident that he has had adequate access to the courts.”⁸⁴ Based on this statement, it appears that the Governor’s review was based only on the “application for clemency” and limited to the following four narrow factors—none of which overlap with the factors delineated in Recommendation #2: (1) the inmate’s guilt; (2) the inmate’s crime; (3) the appropriateness of the punishment; and (4) the inmate’s access to the courts, but it is unclear whether this was the full extent of his review.

In conclusion, it appears that the Board is required to consider at least some of the factors delineated by Recommendation #2, but we were unable to ascertain whether the Governor considers any of these factors. Therefore, we are unable to ascertain whether the State of Tennessee is in compliance with Recommendation #2.

To help ensure that “all factors” suggested by the ABA are considered when reviewing petitions for clemency, the Tennessee Death Penalty Assessment Team recommend that the Governor adopt guidelines delineating the factors that s/he should consider, but not be limited to, when reviewing death-sentenced inmates’ grounds for clemency. In addition, the Team recommends that the Governor and the Board of Pardon and Parole consider all mitigating circumstances and recognize that guilt of murder, by itself, is not a sufficient reason to execute a death-row inmate.

C. Recommendation #3

Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death

⁸² See e.g., Rules of the Tennessee Board of Paroles 11-1-1-.14(1)(a)(1), (7) (1999); TENN. CODE ANN. § 40-27-107 (2006).

⁸³ In the other cases in which former-Governor Sundquist denied clemency to a death-row inmate, he only provided a brief statement. See e.g., Kirk Loggins, *Coe’s Defense Running Out of Chances*, THE TENNESSEAN, at 1A (March 22, 2000) (stating that in the case of Robert Glen Coe, former-Governor Sundquist released a two sentence statement saying: “I have reviewed the application for clemency submitted by Robert Glen Coe and have determined that executive clemency is not appropriate, Therefore, the request for clemency is denied.”); News Release, Statement of Gov. Don Sundquist on the Clemency of Abu-Ali Abdur’ Rahman, Office of Governor Don Sundquist (April 5, 2002) (including a three sentence statement, which was similar to the Coe Statement).

⁸⁴ News Release, Statement of Gov. Don Sundquist on the Clemency of Philip Workman, Office of Governor Don Sundquist (March 27, 2001).

penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.

Recommendation #4

Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.

Recommendation #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

As discussed under Recommendation #2, the Governor is not required to consider any specific factors when determining whether to grant a death-row inmate's clemency application. The Board, however, is required to consider, but is limited to, nine specific factors.⁸⁵ The nine factors that the Board is required to consider do not appear to be relevant to Recommendation #3, but are relevant to Recommendations #4 and #5. This information includes the inmate's medical and/or psychiatric evaluation, if applicable, and the inmate's institutional record.⁸⁶ Although the Board is required to consider information relevant to Recommendations #4 and #5 and transmit this information to the Governor, we were unable to obtain sufficient information to assess whether the Governor routinely considers the factors addressed in Recommendations #3-#5. We note that Governor Bredesen has indicated that "issues of racism" that "slip through the cracks of the courts" are issues that he would consider, but it is unclear whether he does so in all cases.

Based on this information, we are unable to ascertain whether the State of Tennessee is in compliance with Recommendations #3-#5. As recommended above, to help ensure that the factors included in Recommendations #3-#5 are considered when reviewing petitions for clemency, we recommend that a rule be adopted delineating the factors that the Governor and the Board should consider, but not be limited to, when reviewing death-sentenced inmates' ground for clemency.

D. Recommendation #6

In clemency proceedings, death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the American Bar Association *Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

⁸⁵ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(6) (1999).

⁸⁶ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(6)(ii), (ix) (1999).

The State of Tennessee does not have any laws, rules, procedures, or guidelines requiring the appointment of counsel to death-row inmates pursuing clemency. However, “[w]here the [P]ost-[C]onviction [D]efender determines that it is in the interest of justice,” the Office of the Post-Conviction Defender may provide representation to a death-row inmate pursuing clemency if (1) the Office was already representing the inmate, or (2) the inmate is unable to obtain counsel due to indigency.⁸⁷ Although some death-row inmates may be represented by attorneys from the Office of the Post-Conviction Defender, it does not appear that these attorneys are required to possess qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.⁸⁸ Similarly, it does not appear that private attorneys representing death-row inmates pursuing clemency are required to meet the *ABA Guidelines*.⁸⁹ Based on this information, the State of Tennessee is only in partial compliance with Recommendation #6.

E. Recommendation #7

Prior to clemency hearings, death row inmates’ counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

As indicated above, the State of Tennessee does not have any laws, rules, procedures, standards, or guidelines entitling death-row inmates to counsel, but in some cases, an attorney from the Office of the Post-Conviction Defender may represent a death-sentenced inmate during clemency proceedings.⁹⁰ In these cases, the amount of compensation and the availability of resources are not at issue as these attorneys are salaried employees⁹¹ and they presumably should have some degree of access to experts and/or investigators to prepare for the clemency proceedings.⁹² However, it does not appear that all death-row inmates petitioning for clemency have the benefit of being represented by the Office of the Post-Conviction Defender. In cases in which inmates are not represented by such office, the private attorneys do not appear to be entitled to compensation or access to investigative and expert resources.

Although death-row inmates’ clemency counsel generally are not entitled to compensation or resources, it does appear that they have sufficient time to develop the

⁸⁷ TENN. CODE ANN. § 40-30-206(e) (2006).

⁸⁸ Compare TENN. CODE ANN. § 40-30-205(c) (2006) (requiring Post-Conviction Defenders to have a “demonstrated experience in the litigation of capital crimes.”); TENN. CODE ANN. § 40-30-208 (2006) (authorizing appointment of full time assistance post-conviction defenders, without mandating qualifications); and TENN. SUP. CT. R. 13, § 3 (listing minimal attorney qualification requirements to represent capital defendants) with ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (suggesting minimal requirements for capital defense attorneys).

⁸⁹ See, e.g., *id.*

⁹⁰ TENN. CODE ANN. § 40-30-206(e) (2006).

⁹¹ See, e.g., TENN. CODE ANN. § 40-30-209(b), (c) (2006).

⁹² See, e.g., TENN. CODE ANN. § 40-30-208 (2006).

basis for any factors upon which clemency might be granted that previously were not developed, as there are no filing deadlines for clemency petitions or for the submission of evidence. It is unclear, however, whether counsel has the opportunity—let alone sufficient time—to rebut opposing evidence from the state. Specifically, it is unclear whether the inmate or his/her attorney is authorized to cross-examine the state’s witnesses.⁹³

Based on this information, the State of Tennessee is only in partial compliance with Recommendation #7.

F. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

Recommendation #9

If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.

The State of Tennessee does not have any laws, rules, procedures, standards, or guidelines requiring the Governor or the Board of Probation and Parole to hold and preside over public clemency hearings or conduct in-person meetings with all death-sentenced inmates. However, the Board appears to have the option of holding a clemency hearing in every case in which a majority of the Board votes in favor of scheduling a hearing.⁹⁴ Additionally, all clemency hearings involving death-sentenced inmates are held in public (generally at the Riverbend Maximum Security Institution),⁹⁵

⁹³ See, e.g., Kirk Loggins, *Workman Hearing Set for Tomorrow*, THE TENNESSEAN, at 4B (March 8, 2000) (stating that in the case of Philip Workman, the Board granted each side two hours to present their cases, but neither side was authorized to cross-examine witnesses for the opposing side).

⁹⁴ Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁹⁵ Bonna de la Cruz, *Death Sentence for Alley in Limbo*, THE TENNESSEAN, at 1A (May 12, 2006) (stating that the hearing for Sedley Alley would be held at Riverbend Maximum Security Institution); John Shiffman, *Board Rejects Mercy for Abdur’Rahman*, THE TENNESSEAN, at 1A (March 29, 2002) (stating that the hearing for Abu-Ali Abdur’Rahman was held at Riverbend Maximum Security Institution); Kirk Loggins, *One Stop Along Death Row*, THE TENNESSEAN, at 13A (Jan. 23, 2000) (stating that the hearing for Philip Workman would be held at Riverbend Maximum Security Institution) *but see* Kirk Loggins and Bonna M. de la Cruz, *Workman Granted Clemency Hearing*, THE TENNESSEAN, at 1A (April 1, 2000) (stating that Workman’s clemency hearing would be held before the Governor’s designee instead of the Board due to the Board’s time constraints); Kirk Loggins, *Board Denies Clemency For Workman*, THE TENNESSEAN, at 1B (Jan. 26, 2001) (indicating that the Board held a hearing on Workman’s clemency request in January 2001 at Riverbend Maximum Security Institution).

attended by the inmate,⁹⁶ and presided over by members of the Board.⁹⁷ Although the Board members are to preside over the hearings, not all Board members are required to attend⁹⁸ and it does not appear that the Board members, who are present or otherwise, must jointly discuss the case before making their recommendation.⁹⁹ In addition, despite the fact that hearings are open to the public, the information contained within the Board's records is confidential. Given the apparent conflict of these two rules, it is unclear how they work together. While the Board may want and/or need to keep some of the materials confidential, some accommodation should exist that allows the inmate to rebut whatever information might be held against him/her in clemency proceedings.

Following the hearing, the Board is required to transmit its non-binding recommendation to the Governor; in order to do so, one of the Board members is required to write a case report, which must include: (1) a brief statement of the reasons for the recommendation; (2) the complete file; (3) the views of the various Board Members, if the recommendation is not unanimous; and (4) the specifics of the recommendation—whether it is a positive or negative one and if a positive recommendation, any terms and conditions recommended by the Board.¹⁰⁰ Once the Governor receives the Board's recommendation, however, the clemency decision-making process appears to be shielded from the public.

Neither the Tennessee Code Annotated nor the Rules of the Tennessee Board of Paroles require the Governor to consider the evidence presented during the clemency hearing, the Board's findings, or its non-binding recommendation. Similarly, nothing requires the Governor to explain the basis for his/her clemency decision to the petitioner or to the public. Therefore, not only are the hearings being conducted by individuals other than the Governor, but also nothing prevents the Governor from disregarding the evidence presented during the clemency hearing and the Board's non-binding recommendation.

Although the Governor is not required to consider any of the aforementioned information, it appears that Governor Bredesen and his staff review the clemency hearing transcript and testimony.¹⁰¹ Additionally, it has been reported that—separate and apart

⁹⁶ See Rules of the Tennessee Board of Paroles 1100-1-1-.15(1)(d)(1); Kirk Loggins, *Workman Hearing Set for Tomorrow*, THE TENNESSEAN, at 4B (March 8, 2000) (stating that Workman is expected to be in the hearing room).

⁹⁷ Rules of the Tennessee Board of Paroles 1100-1-1-.05(1)(a); see also Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003.

⁹⁸ See Application for Commutation, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; Application for Pardon, Board of Probation and Parole, State of Tennessee, eff. Feb. 13, 2003; see also Bonna de la Cruz, *Death Sentence for Alley in Limbo*, THE TENNESSEAN, at 1A (May, 12, 2006) (stating that all seven board members would be present for the hearing); John Shiffman, *Clemency Bid Asks Sundquist to Ignore Parole Board*, THE TENNESSEAN, at 4B (April 2, 2002) (indicating that only six Board members were present for the hearing).

⁹⁹ See, e.g., *A Final Hearing for Robert Glen Coe*, THE TENNESSEAN, at 14A (March 30, 2000) (noting that in the case of Robert Glen Coe in which the Board declined to hold a hearing, the Board members never met to discuss the case, but rather faxed in their responses declining to hold a hearing).

¹⁰⁰ Rules of the Tennessee Board of Paroles 11-1-1-.15(1)(d)(8).

¹⁰¹ See Wilson et al., *supra* note 48, at 32.

from the Board’s hearing—Governor Bredezen meets with death-row inmates’ counsel before making his clemency decision.¹⁰² Though Governor Bredezen appears to have adopted these procedures, nothing in Tennessee law requires that he do so. Further, the existing procedures may be modified without notice to the defendant.

Based on this information, the State of Tennessee is only in partial compliance with Recommendations #8 and #9. While neither the Governor nor the Board is required to conduct in-person meetings with death-sentenced inmates or hold hearings in all cases, the Board has the discretion to hold such hearings and the current Governor has at least in the past conducted in-person meetings with death-row inmates’ counsel. However, even though the Board may conduct such hearings, the clemency decision-maker—the Governor—is not present at such hearing and it is unclear what weight, if any, the Governor gives to the evidence presented at the hearing and the Board’s non-binding recommendation. Additionally, although the Governor holds a meeting with the death-row inmate’s counsel, it does not appear that the inmate is present for such hearing.

In light of this, the Tennessee Death Penalty Assessment Team recommends that the State of Tennessee provide each death-row inmate the opportunity for a hearing before the Board of Pardon and Parole and, regardless of whether the inmate requests such a hearing, encourage the Governor to exercise his/her discretion to meet with the inmate and his/her counsel prior to rendering a final decision on clemency.

In addition, because of the apparent conflict between keeping the clemency hearings open to the public and keeping the Board’s records confidential, the Tennessee Death Penalty Assessment Team recommends that some accommodation be created to ensure that the inmate has to opportunity to rebut whatever information might be held against him/her in clemency proceedings.

G. Recommendation #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

The State of Tennessee does not require the Governor to undergo formal training to be fully educated about the broad-based nature of clemency powers and the limitations on the judicial system’s ability to grant relief under circumstances that might warrant grants of clemency. However, the State of Tennessee does require the Governor, when appointing members to the Board of Probation and Parole, to give preference to candidates with training, education, or experience in the “criminal justice system, law, medicine, education, social work or the behavioral sciences.”¹⁰³ Once Board members

¹⁰² *Id.*

¹⁰³ TENN. CODE ANN. § 40-28-103(c) (2006). Under former-Governor Sundquist, “four of the seven [B]oard members ha[d] prior experience in law enforcement or the correctional system, and two others [we]re former members of the state legislature.” Kirk Loggins, *One Stop Along Death Row*, THE TENNESSEAN, at 13A (Jan. 23, 2000).

are appointed, however, it does not appear that they are required to undergo any formal training before they are authorized to carry out their duties.

Given that neither the Governor nor the Board is required to undergo formal training, the State of Tennessee does not appear to be in compliance with Recommendation #10.

H. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

In the State of Tennessee, the Governor possesses the sole constitutional and statutory authority to grant or deny clemency.¹⁰⁴ However, the Governor may ask the Board of Probation and Parole to make non-binding clemency recommendations.¹⁰⁵ Neither the Governor nor the Board is required to explain the reasons for its clemency recommendation or decision to the clemency petitioner or to the public. In certain circumstances, both the Board and the Governor are required to document the reasons for their respective recommendation and decision, but this information is confidential.¹⁰⁶ In fact, all information contained in Board files that are produced, supplied, or generated by other government agencies is confidential.¹⁰⁷ Therefore, the responsibility for and criticism associated with any particular clemency decision is placed solely on the Governor. Because the Governor is an elected official, s/he could conceivably take political issues into consideration when making a clemency decision and base his/her clemency decision on grounds unrelated to the interests of justice. However, it is impossible to determine the extent to which inappropriate political considerations impact the Tennessee clemency process. Therefore, we are unable to assess whether Tennessee is in compliance with Recommendation #11.

¹⁰⁴ TENN. CONST. art. III, § 6; TENN. CODE ANN. § 40-27-101 (2006).

¹⁰⁵ TENN. CODE ANN. §§ 40-28-104(10); 40-28-126(a) (2006); *see also* Rules of the Tennessee Board of Paroles 11-1-1.15(1) (1999).

¹⁰⁶ *See, e.g.*, Rules of the Tennessee Board of Paroles 11-1-1.15(1)(d)(8) (1999); TENN. CODE ANN. § 40-27-107 (2006). Specifically, the Board is required to provide a brief statement of the reasons for the recommendation and the view of the various Board Members, if the recommendation is not unanimous, to the Governor. *See* Rules of the Tennessee Board of Paroles 11-1-1.15(1)(d)(8) (1999). The Governor, on the other hand, is required to keep a written record of “any reasons for granting pardons or commuting punishment.” TENN. CODE ANN. § 40-27-107 (2006).

¹⁰⁷ Rules of the Tennessee Board of Paroles 11-1-1.14(1)(a)(1) (1999).

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.¹ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision-making. Often, however, jury instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his/her life. Such jurors may vote to impose a death sentence because they erroneously believe that otherwise, the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment. Unfortunately, jurors often believe that mitigation is the same as aggravation, or that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

¹ Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. *The Promulgation of Pattern Jury Instructions and Requested Instructions*

The Tennessee Pattern Jury Instructions–Criminal Committee of the Tennessee Judicial Conference created the *Tennessee Criminal Pattern Jury Instructions*. Neither the Tennessee Supreme Court nor the General Assembly has ever officially expressed approval of these pattern jury instructions.² Instead, the Tennessee Supreme Court has identified the instructions as “merely patterns or suggestions” that “should be used only after careful analysis.”³

The Tennessee Rules of Criminal Procedure allow the State and defense to tailor the pattern jury instructions or design new instructions for individual cases. These parties may submit to the court their own written requests for instructions at any time before the jury retires to consider its verdict.⁴ The party (or parties) filing the request for jury instructions must also furnish a copy of the request to opposing counsel.⁵ The judge is then obligated, prior to closing arguments, to inform counsel of its proposed action on the request(s) for jury instructions.⁶

Once the judge has instructed the jury, each party must be afforded an opportunity to object to the content of a given instruction or to the court’s omission of a requested instruction.⁷ But, even if counsel fails to raise an objection at trial, s/he may still raise the basis for the objection as error in a motion for a new trial.⁸

B. *Capital Felonies in Tennessee and the Applicable Pattern Jury Instructions*

The State of Tennessee defines first-degree murder, the State’s only capital offense,⁹ as:

- (1) A premeditated and intentional killing of another;
- (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or
- (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.¹⁰

² W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE § 26:2 (2007).

³ *Johnson v. State*, 145 S.W.3d 97, 122 (Tenn. Crim. App. 2004) (citing *State v. Hodges*, 944 S.W.2d 346, 354 (Tenn. 1997)). Jury instructions are based on substantive law contained in the T.C.A., the Tennessee Rules of Criminal Procedure, and case law.

⁴ TENN. R. CRIM. P. 30(a)(1).

⁵ TENN. R. CRIM. P. 30(a)(2).

⁶ TENN. R. CRIM. P. 30(a)(3).

⁷ TENN. R. CRIM. P. 30(b). The objection must be made “out of the hearing” of the jury. *Id.*

⁸ *Id.*

⁹ TENN. CODE ANN. § 39-13-202(c)(1) (2006).

¹⁰ TENN. CODE ANN. § 39-13-202(a)(1)-(3) (2006).

A defendant convicted of first-degree murder is sentenced pursuant to section 39-13-204 of the Tennessee Code Annotated (T.C.A.), which details the aggravating and mitigating circumstances that may be considered in first-degree murder cases and the procedure for determining a capital defendant's sentence.¹¹ Tennessee Criminal Pattern Jury Instructions 7.04(a) and 7.04(c), which are both derived from section 39-13-204, provide the jury charges for sentencing a capital defendant.¹²

C. The Application of Pattern Jury Instructions and the Applicable Law of Jury Instructions in First-Degree Murder Cases

The *Tennessee Criminal Pattern Jury Instructions* includes two jury instructions for the sentencing phase of a capital trial, which differ based on the date of the capital offense. Pattern Jury Instruction 7.04(a) applies to offenses committed on or after November 1, 1989 but prior to July 1, 1995, while Pattern Jury Instruction 7.04(c) applies to offenses committed on or after July 1, 1995.¹³

Both sets of instructions begin by describing the jury's duty in the sentencing phase—"to determine . . . the penalty which shall be imposed as punishment for this offense."¹⁴ The instructions then disclose the punishments that may be imposed for first-degree murder: death, life imprisonment without the possibility of parole,¹⁵ or life imprisonment.¹⁶ If the offense was committed on or after November 1, 1989 but prior to July 1, 1995, the applicable pattern jury instruction defines life imprisonment as rendering a defendant ineligible "for parole consideration until [s/he] has served at least twenty-five (25) full calendar years of such sentence."¹⁷ If, however, the offense was committed on or after July 1, 1995, the applicable pattern jury instruction states that the defendant must have served at least fifty-one years of his/her sentence before becoming eligible for parole.¹⁸ Both instructions state that a sentence of life imprisonment without parole signifies that the defendant "shall never be eligible for release on parole."¹⁹

In determining the appropriate sentence, the instructions authorize the jury to "weigh and consider any of the statutory aggravating circumstances proved beyond a reasonable doubt, and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both."²⁰ The judge also must notify the jury that it "is the sole judge of the

¹¹ TENN. CODE. ANN. § 39-13-204 (2006).

¹² TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ It is important to note that life imprisonment without parole is only a sentencing option for offenses committed on or after July 1, 1993. TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a) n.1.

¹⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

¹⁷ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a); *see also infra* note 87.

¹⁸ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

¹⁹ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c); *see also supra* note 15.

²⁰ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

facts, and of the law as it applies to the facts in the case.”²¹ The judge must further instruct the jury that:

In arriving at your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.²²

The judge must then instruct the jury that the State carries the burden of proving beyond a reasonable doubt the existence of any statutory aggravating circumstances and define reasonable doubt for the jurors.²³ The judge also must advise the jurors that they are the “sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.”²⁴ If the State introduced victim impact evidence, the judge also may instruct the jury that it may “consider this evidence in determining an appropriate punishment,” but must limit the scope of its consideration to “a rational inquiry into the culpability of the defendant.”²⁵ The pattern jury instructions emphasize that victim impact evidence does not constitute or prove an aggravating circumstance.²⁶

The pattern jury instructions state that “no sentence of death or sentence of imprisonment for life without [the] possibility of parole shall be imposed by a jury but upon a unanimous finding that the [S]tate has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances.”²⁷ While the instructions list all statutory aggravating circumstances for the offense of first-degree murder,²⁸ the judge must only instruct the jurors on the aggravating circumstances applicable to the case at hand.²⁹ After the aggravating circumstances have been read to the jurors, the judge must instruct the jurors that they “shall not consider any other facts or circumstances as an aggravating circumstance” in determining whether to impose a sentence of death or life imprisonment without the possibility of parole.³⁰

Under the pattern instructions, the jury must next be instructed that in determining the defendant’s punishment, it must consider any mitigating circumstances raised by the

²¹ *Id.*

²² *Id.*

²³ *Id.*; see also *infra* note 57 (defining reasonable doubt).

²⁴ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Pattern Jury Instruction 7.04(c), which applies to offenses committed on or after July 1, 1995, lists fifteen statutory aggravating circumstances, while Pattern Jury Instruction 7.04(a) lists only twelve. The twelve aggravating circumstances enumerated in Instruction 7.04(a) nearly mirror the first twelve in Instruction 7.04(c). The instructions also differ in two additional respects: (1) statutory aggravating circumstance #9 as listed in Instruction 7.04(c) applies also to emergency medical or rescue workers, emergency medical technicians, and paramedics; and (2) statutory aggravating circumstance #12 as listed in Instruction 7.04(c) provides a second definition of the term “mass murder” for offenses committed on or after May 30, 1997. See TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

²⁹ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

³⁰ *Id.*

evidence.³¹ The instructions may detail the mitigating circumstances, but must note that the mitigating circumstances listed are not exhaustive and include:

Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, . . . 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.³²

The instructions also inform the jury that the defendant does not carry the burden of proving a mitigating circumstance and that there “is no requirement of jury unanimity as to any particular mitigating circumstance, or that [the jurors] agree on the same mitigating circumstance.”³³ For offenses committed prior to April 29, 1997, the instructions provide that the court also must state that “[n]o distinction shall be made between the mitigating circumstances listed and those otherwise raised by the evidence.”³⁴ The instructions do not provide a similar admonition for offenses committed on or after April 29, 1997.³⁵

The pattern jury instructions provide for the imposition of a death sentence if the jury unanimously determines that the State has proven beyond a reasonable doubt at least one statutory aggravating circumstance and that the aggravating circumstance(s) outweigh(s) any mitigating circumstances beyond a reasonable doubt.³⁶ Alternatively, the instructions explain that if the jury does not unanimously find that the State has proven beyond a reasonable doubt a statutory aggravating circumstance, the sentence must be life imprisonment.³⁷ The instructions also explain that, even if one or more statutory aggravating circumstances have been found, but that those aggravating circumstances fail to outweigh the mitigating circumstances beyond a reasonable doubt, the jury may impose a sentence of life imprisonment or life imprisonment without the possibility of parole.³⁸ Any verdict imposed—death, life imprisonment, or life imprisonment without the possibility of parole—“must be unanimous and signed by each juror.”³⁹

1. Aggravating Circumstances in a First-Degree Murder Case

a. Pattern Jury Instructions

The pattern jury instructions direct the jury that under Tennessee law a sentence of death or life imprisonment without the possibility of parole may only be imposed upon finding that the State has proven beyond a reasonable doubt at least one statutory aggravating

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

³⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

circumstance.⁴⁰ Tennessee's capital sentencing scheme is comprised of an exclusive set of aggravating circumstances, detailed in section 39-13-204 of the T.C.A.⁴¹ According to the United States and Tennessee Supreme Courts, these statutory aggravating circumstances serve to "circumscribe the class of persons eligible for the death penalty."⁴² Neither Pattern Jury Instruction 7.04(a) nor 7.04(c) expressly defines the term "aggravating circumstance."

The fifteen aggravating circumstances enumerated within Pattern Jury Instruction 7.04(c), which applies to offenses committed after July 1, 1995, are derived from those listed in section 39-13-204 of the T.C.A.⁴³ However, Pattern Jury Instruction 7.04(a), which applies to offenses committed on or after November 1, 1989, but prior to July 1, 1995, contains twelve of the aggravating circumstances listed in section 39-13-204.⁴⁴ Additionally, the scopes of aggravating circumstances #9 and #12, as detailed in section 39-13-204, have been expounded upon in Pattern Jury Instruction 7.04(c) to reflect the language found in section 39-13-204.⁴⁵

Apart from these differences, the aggravating circumstances found in both pattern jury instructions follow the language set forth in section 39-13-204. The statutory aggravating circumstances as set forth in Pattern Jury Instructions 7.04(a) and 7.04(c) are as follows:

- (1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older;
- (2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. The [S]tate is relying upon the crime(s) of [____], which is (are) a felony involving the use of violence to the person;
- (3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;
- (4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

⁴⁰ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁴¹ TENN. CODE ANN. § 39-13-204(i) (2006).

⁴² *Zant v. Stephens*, 462 U.S. 862, 878 (1983); *State v. Harris*, 989 S.W.2d 307, 315 (Tenn. 1999).

⁴³ TENN. CODE ANN. § 39-13-204(i) (2006); TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁴⁴ Prior to 1995, only twelve aggravating circumstances were in effect. TENN. CODE ANN. § 39-13-204(i)(1)-(12) (2004). The three aggravating circumstances that were added after 1995 include:

- (1) The defendant knowingly mutilated the body of the victim after death;
- (2) The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability;
- (3) The murder was committed in the course of an act of terrorism.

TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

⁴⁵ *See supra* note 28.

- (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;
- (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
- (7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;⁴⁶
- (8) The murder was committed by the defendant while [s/he] was in lawful custody or in a place of lawful confinement during the defendant's escape from lawful custody or from a place of lawful confinement;
- (9) The murder was committed against any law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter engaged in the performance of official duties;⁴⁷
- (10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied said office;
- (11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;
- (12) The defendant committed "mass murder" which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight (48) month period;⁴⁸
- (13) The defendant knowingly mutilated the body of the victim after death;⁴⁹

⁴⁶ This aggravating circumstance applies only to offenses committed on or after May 30, 1995. For offenses committed prior to May 30, 1995, the court must provide the following instruction: "The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb." TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a).

⁴⁷ The phrase "emergency medical or rescue worker, emergency medical technician, paramedic" only applies to offenses committed on or after July 1, 1996. TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

⁴⁸ This aggravating circumstance applies only to offenses committed on or after May 30, 1997. For offenses committed prior to May 30, 1997, the court must provide the following instruction: "The defendant committed 'mass murder' which is defined as the murder of three (3) or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan." TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

- (14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability;⁵⁰ and
- (15) The murder was committed in the course of an act of terrorism.⁵¹

After instructing the jury on the aggravating circumstances that must be proven beyond a reasonable doubt, the judge must instruct the jury that it cannot “consider any other facts or circumstances as an aggravating circumstance” in determining the defendant’s punishment.⁵² The instructions, however, allow the judge to exclude aggravating circumstances or portions of them that are not relevant to the facts of the case.⁵³ In cases in which the “especially heinous, atrocious, or cruel” aggravator is applicable, the instructions provide definitions for the terms “heinous,” “atrocious,” “cruel,” and “torture.”⁵⁴

A judge has no obligation to instruct the jury that “there is a presumption of no aggravating circumstances in sentencing,” as s/he is similarly obligated to do with respect to a defendant’s presumption of innocence during the guilt phase of the trial.⁵⁵

b. Burden of Proof and Unanimity of Finding as to Statutory Aggravating Circumstances

To impose a sentence of death or life imprisonment without the possibility of parole, the pattern jury instructions, in accordance with Tennessee law, require the jury to find

⁴⁹ This aggravating circumstance applies only to offenses committed on or after July 1, 1995. *See* TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c); 1995 Tenn. Pub. Acts 356, § 1.

⁵⁰ This aggravating circumstance applies only to offenses committed on or after July 1, 1998. For offenses committed on or after July 1, 1997, but prior to July 1, 1998, the judge must provide the following instruction: “The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability.” TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

⁵¹ This aggravating circumstance applies only to offenses committed on or after July 4, 2002. *See* TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

⁵² TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁵³ *Id.*

⁵⁴ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a) n. 6, (c) n. 9. The pattern jury instructions provide the following definitions:

“Heinous” means grossly wicked or reprehensible, abominable; odious; vile.

“Atrocious” means extremely evil or cruel; monstrous; exceptionally bad; abominable.

“Cruel” means disposed to inflict pain or suffering; causing suffering; painful.

“Torture” means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.

TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁵⁵ *State v. Nichols*, 877 S.W.2d 722, 734 (Tenn. 1994).

“beyond a reasonable doubt” at least one or more statutory aggravating circumstances.⁵⁶ The instructions define reasonable doubt as:

[D]oubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the verdict.⁵⁷

The Tennessee Supreme Court has upheld the constitutionality of this instruction, which employs the term “moral certainty,” when it is considered in “conjunction with an instruction that ‘[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict.’”⁵⁸

Both the pattern jury instructions and the T.C.A. require the finding of each statutory aggravating circumstance to be unanimous.⁵⁹

c. The Need for Statutory Aggravating Circumstances to Be Set Forth in Writing

In accordance with Tennessee law, the pattern jury instructions note that, in its verdict form, the jury must set forth in writing any statutory aggravating circumstances proven by the State.⁶⁰

3. Mitigating Circumstances in a First-Degree Murder Case

a. Pattern Jury Instructions and Statutory Guidance

The pattern jury instructions advise that “in arriving at the punishment, the jury shall consider . . . any mitigating circumstances raised by the evidence . . .”⁶¹ Neither section 39-13-204 of the T.C.A. nor the pattern jury instructions define “mitigating circumstances” explicitly, but both do list all the statutory mitigating circumstances.⁶² Under the pattern jury instructions and section 39-13-204, among the mitigating circumstances the jury may consider, if raised by the evidence, are:

⁵⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c); TENN. CODE ANN. § 39-13-204(g)(1) (2006).

⁵⁷ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁵⁸ *State v. Nichols*, 877 S.W.2d 722, 734 (Tenn. 1994).

⁵⁹ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c); TENN. CODE ANN. § 39-13-204(g)(1) (2006).

⁶⁰ TENN. CODE ANN. § 39-13-204(g)(2)(A)-(B) (2006); TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁶¹ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁶² TENN. CODE ANN. 39-13-024(j) (2006); TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

- (1) The defendant has no significant history of prior criminal activity. (Conviction of the crime of [] is not an aggravating circumstance to be considered in determining the penalty, but a conviction of that crime may be considered in determining whether or not the defendant has a 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) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct;
- (5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
- (6) The defendant acted under extreme duress or under the substantial domination of another person;
- (7) The youth or advanced age of the defendant at the time of the crime;
- (8) The capacity of the defendant to appreciate the wrongfulness of [his]/[her] conduct or to conform [his]/[her] 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 affected [his]/[her] judgment; and
- (9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, 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.⁶³

This list is not exhaustive, as the ninth statutory mitigating circumstance, by its own terms, acts as a catch-all provision, and the Tennessee Supreme Court has considered other non-statutory mitigating circumstances, such as a defendant's remorse.⁶⁴ Moreover, the defendant may request in writing any non-statutory mitigating circumstances to be included in the charge.⁶⁵ The requested mitigator, however, cannot be "fact specific,"⁶⁶ but must instead "be phrased in general categories similar to the statutory mitigating circumstances."⁶⁷

⁶³ TENN. CODE ANN. § 39-13-204(j) (2006); TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁶⁴ See *State v. Carter*, 114 S.W.3d 895, 905 (Tenn. 2003).

⁶⁵ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a) n. 8, (c) n. 11; see also *State v. Odom*, 928 S.W.2d 18, 31 (Tenn. 1996) ("To ensure this reliability, the jury must be given specific instructions on those circumstances offered by the capital defendant as justification for a sentence less than death. In this regard, the party desiring such an instruction must submit the requested instruction in writing to the trial court.").

⁶⁶ See *State v. Reid*, 91 S.W.3d 247, 308 (Tenn. 2002) (affirming the Court of Criminal Appeals); see also *Odom*, 928 S.W.2d at 32.

⁶⁷ See *Reid*, 91 S.W.3d at 308 (affirming the Court of Criminal Appeals); *Odom*, 928 S.W.2d at 32.

b. Case Law Interpretation of the Definition and Use of the Term Mitigating Circumstances

The Tennessee Supreme Court has held that a judge need not define the term “mitigating circumstance” when s/he instructs the jury that it “may consider any aspect of the defendant’s character or record or any of the circumstances of the defense favorable to the defendant which is supported by the evidence”⁶⁸ Moreover, because “character,” “record,” “favorable,” and “other words of similar nature” are considered terms of common usage, judges need not define these terms in their instructions.⁶⁹

c. The Identification and Consideration of Specific Mitigating Circumstances

Judges are obligated to provide instructions on statutory and non-statutory mitigating circumstances⁷⁰ that are in evidence, and to instruct the jury to consider “any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.”⁷¹ However, a reviewing court cannot set aside a death sentence or a sentence of life imprisonment without the possibility of parole on the basis that the trial court failed to specifically instruct the jury on a requested non-statutory mitigating circumstance.⁷²

It is not error for a judge to refuse to instruct the jury on a statutory mitigating circumstance that was not raised by the evidence.⁷³

d. Burden of Proof and the Unanimity of Findings as to Mitigating Circumstances

The pattern jury instructions indicate that the defendant does not carry the burden of proving a mitigating circumstance.⁷⁴ However, a court’s failure to provide such an instruction may not constitute prejudice.⁷⁵ Under the pattern jury instructions, jurors do not have to unanimously agree upon the existence of any mitigating circumstances;⁷⁶ each juror may individually determine the existence of such circumstances.⁷⁷

e. Residual Doubt as a Mitigating Circumstance

⁶⁸ State v. Keen, 926 S.W.2d 727, 732 (Tenn. 1994).

⁶⁹ *Id.*

⁷⁰ The trial court must instruct the jury on non-statutory mitigating circumstance(s) if it is raised by the evidence and the defendant specifically requests the instruction. *See* State v. Odom, 928 S.W.2d 18, 30, (Tenn. 1996).

⁷¹ *Keen*, 926 S.W.2d at 734; *see also Odom*, 928 S.W.2d at 31; State v. Buck, 670 S.W.2d 600 (Tenn. 1984); State v. Hartman, 703 S.W.2d 106 (Tenn. 1985).

⁷² TENN. CODE ANN. § 39-13-204(e)(1) (2006); *Hartman*, 703 S.W.2d at 118.

⁷³ *Hartman*, 703 S.W.2d at 118.

⁷⁴ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁷⁵ *See* State v. Robinson, 146 S.W.3d 469, 527 (Tenn. 2004) (noting instead that the jurors were “instructed that the [S]tate had the burden of proving beyond a reasonable doubt any aggravating factor” and that there was “no requirement for unanimity with respect to any particular mitigating factor”).

⁷⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁷⁷ *Id.*

The Tennessee Supreme Court has held that a defendant may introduce evidence “establish[ing] residual doubt as a nonstatutory mitigating circumstance.”⁷⁸ Generally, residual doubt evidence encompasses evidence that indicates the defendant may be innocent, despite the guilty verdict rendered by the jury in the first phase of the trial.⁷⁹

4. Availability and Definitions of the Sentencing Options

a. Pattern Jury Instructions

The pattern jury instructions not only explain the specific circumstances under which the jury may impose any of the three sentencing options—death, life imprisonment without the possibility of parole, and life imprisonment—, but the instructions also define “life imprisonment without parole” and “life imprisonment.”⁸⁰

For offenses committed on or after November 1, 1989 but prior to July 1, 1995, life imprisonment is defined as rendering a defendant “[in]eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of such sentence.”⁸¹ For offenses committed on or after July 1, 1995, life imprisonment is defined as a defendant serving at least fifty-one years before being eligible for parole.⁸² Alternatively, life imprisonment without the possibility of parole is defined as rendering a defendant “never . . . eligible for release on parole.”⁸³

The instructions provide for a sentence of life imprisonment if the jury does not “unanimously determine that a statutory aggravating circumstance has been prove[n] by the State beyond a reasonable doubt.”⁸⁴ Additionally, the instructions direct the jury to impose in its “considered discretion” a sentence of either life imprisonment or life imprisonment without the possibility of parole, if the jury unanimously determines that the State has proven a statutory aggravating circumstance beyond a reasonable doubt, “but that said statutory aggravating circumstance or circumstances have not been proven by the State to outweigh any mitigating circumstances beyond a reasonable doubt.”⁸⁵ The instructions provide for the imposition of the death penalty only if the jury finds (1) that the State has proven beyond a reasonable doubt at least one statutory aggravating circumstance and (2) that the State has proven beyond a reasonable doubt that the statutory aggravating circumstance(s) outweigh any mitigating circumstances.⁸⁶

⁷⁸ State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001) (citing Franklin v. Lynaugh, 487 U.S. 164 (1998)).

⁷⁹ See State v. McKinney, 74 S.W.3d 291, 307 (Tenn. 2002).

⁸⁰ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁸¹ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a).

⁸² TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c).

⁸³ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

b. The Duty to Instruct on the Definitions of Life Imprisonment and Life Imprisonment Without the Possibility of Parole and Parole Practices

Section 40-35-501(i) of the T.C.A., along with Pattern Jury Instruction 7.04(c), state that a juror must be instructed that a defendant sentenced to life imprisonment is not eligible for parole until s/he has served at least fifty-one years in prison.⁸⁷ The T.C.A. also requires judges to instruct the jury that a defendant sentenced to life imprisonment without the possibility of parole will never be eligible for release on parole.⁸⁸ However, life imprisonment without the possibility of parole is only available to defendants who committed a capital offense on or after July 1, 1993.⁸⁹

5. Victim Impact Evidence

a. Pattern Jury Instructions

The pattern jury instructions indicate that the prosecution may introduce “victim impact evidence” during the sentencing phase of a capital felony trial. The instructions explain the purpose and utility of this evidence as follows:

The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim’s death on the members of the victim’s immediate family. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.

Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim’s family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by

⁸⁷ TENN. CODE ANN. § 40-35-501(i) (2006). Although section 39-13-204 of the T.C.A. mandates that a jury be instructed that a defendant receiving a sentence of imprisonment for life will not be eligible for parole until s/he has served at least twenty-five years of the sentence (*see* TENN. CODE ANN. § 39-13-204(e)(2) (2006); *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998) (citations omitted)), section 40-35-501(i) of the T.C.A., along with Pattern Jury Instruction 7.04(c), state that a juror must be instructed that a defendant sentenced to life imprisonment is not eligible for parole until s/he has served at least fifty-one years in prison. TENN. CODE ANN. § 40-35-501(i) (2006). While section 40-35-501(i), enacted July 1, 1995, is in conflict with Tennessee’s sentencing statute, section 39-13-204(e)(2), the Tennessee Attorney General has opined that where in conflict, section 39-13-204 has been repealed by section 40-35-501. TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c) n. 1; *see also* Tenn. Att’y Gen. Opin. 97-098.

⁸⁸ TENN. CODE ANN. § 39-13-204(e)(2) (2006).

⁸⁹ TENN. CODE ANN. § 39-13-204 cmt (2006).

evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt.⁹⁰

b. The Use and Purpose of Victim Impact Evidence

The United States Supreme Court has recognized that a victim's characteristics and the impact of the murder are relevant in determining a defendant's sentence, in that they may not only indicate the "blameworthiness and culpability" of the defendant, but also the harm caused by the defendant's conduct.⁹¹ Section 39-13-204(c) of the T.C.A. allows members or representatives of the victim's family "to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons."⁹² The statute further authorizes the jury to consider such information when determining the defendant's sentence.⁹³

c. Admissibility of Victim Impact Evidence

The testimony of family members or representatives should "be 'limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.'"⁹⁴

Victim impact testimony cannot be introduced if it is "so unduly prejudicial that it renders the trial fundamentally unfair."⁹⁵ In order to introduce victim impact testimony and permit the court to "supervise" its admission, the State is obliged to advise the trial court of its intent to introduce victim impact evidence.⁹⁶ The court will then conduct a hearing, outside of the presence of the jury, to determine whether the evidence is admissible.⁹⁷ The "victim impact evidence should not be admitted until the trial court determines that evidence of one or more aggravating circumstances is already in the record."⁹⁸

Additionally, in accordance with the Rules of Evidence, victim impact testimony may be excluded "if its probative value is substantially outweighed by its prejudicial effect."⁹⁹

⁹⁰ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

⁹¹ *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991).

⁹² TENN. CODE ANN. § 39-13-204(c) (2006).

⁹³ *Id.*

⁹⁴ *State v. Reid*, 91 S.W.3d 247, 280 (Tenn. 2002) (quoting *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998)).

⁹⁵ *Nesbit*, 978 S.W.2d at 889 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). In such cases, the defendant may seek relief under the Due Process Clause of the Fourteenth Amendment. *Id.*

⁹⁶ *Id.* at 891; *see also State v. Austin*, 87 S.W.3d 447, 463 (Tenn. 2002).

⁹⁷ *Nesbit*, 978 S.W.2d at 891.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing TENN. R. EVID. 403).

6. Additional Instructions After Jury Deliberations Have Begun

a. Pattern Jury Instructions and Case Law Requirements

If a jury becomes deadlocked, the pattern jury instructions provide the following charge:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.¹⁰⁰

This language mirrors precisely the Tennessee Supreme Court's own instruction in *Kersey v. State*, wherein the Court articulated the proper instructions for a deadlocked jury.¹⁰¹

The *Kersey* Court also directed trial courts to comply with Section 5.4 of the *ABA Standards Relating to Trial by Jury* when confronted with a deadlocked jury.¹⁰² The relevant section states:

- (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
 - (i) that in order to return a verdict, each juror must agree thereto;
 - (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
 - (iii) that each juror must decide the case for him[/her]self, but only after an impartial consideration of the evidence with his fellow jurors;
 - (iv) that in the course of deliberations, a juror should not hesitate to reexamine his[/her] own views and change his[/her] opinion if convinced it is erroneous; and
 - (v) that no juror should surrender his[/her] honest conviction as to the weight or effect of the evidence solely because of the opinion of

¹⁰⁰ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 43.02.

¹⁰¹ *Kersey v. State*, 525 S.W.2d 139, 145 (Tenn. 1975).

¹⁰² *Id.* at 144-45.

his[/her] fellow jurors, or for the mere purpose of returning a verdict.

- (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
- (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.¹⁰³

b. Statutory Requirements

Under the T.C.A., if the jury cannot “ultimately”¹⁰⁴ reach a decision as to the defendant’s punishment, the judge must ask the foreperson “whether the jury is divided over imposing a sentence of death.”¹⁰⁵ If the jury is at an impasse, the jury must be instructed that in its further deliberations, it may only consider the sentences of life imprisonment and life imprisonment without the possibility of parole.¹⁰⁶ If the jury still cannot decide upon the defendant’s sentence, the judge must dismiss the jury and impose a sentence of life imprisonment.¹⁰⁷

The judge is prohibited from instructing, and the defense and State are prohibited from commenting at any time on the effect of the jury’s failure to agree on a punishment.¹⁰⁸

7. Form of Instructions

Under the Tennessee Rules of Criminal Procedure, the court is obligated to provide oral and written instructions on the law.¹⁰⁹ The written instructions must accompany the jury when it retires to deliberate, and at the close of deliberations, be filed with the record.¹¹⁰

¹⁰³ *Id.* (citing ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4).

¹⁰⁴ *State v. Torres*, 82 S.W.3d 236, 257 (Tenn. 2002). The Tennessee Supreme Court has instructed that:

Where a jury returns from deliberations after only a short period of time and informs a trial court that it has failed to achieve unanimity, the trial court has the authority to give the *Kersey* instruction . . . Trial courts are afforded discretion to determine whether a jury has been ‘ultimately’ unable to agree on punishment. However, in exercising this discretion, trial courts must be mindful that the rationale for giving the instruction is not as compelling in a capital sentencing hearing and the need for reliability is greater because of the qualitative difference between death and other penalties.

¹⁰⁵ *Id.*

¹⁰⁶ TENN. CODE. ANN. § 39-13-204(h) (2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ TENN. R. CRIM. P. 30(c).

¹¹⁰ *Id.*

II. ANALYSIS

A. Recommendation #1

Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.

In 1997, Pamela Reeves, then President-Elect of the Tennessee Bar Association (TBA) established the TBA Jury Reform Commission to study the State's jury system and recommend improvements.¹¹¹ The TBA Jury Reform Commission (Commission) included as its members: attorneys, judges, former jurors, and a law professor.¹¹² In May 1999, the Commission recommended that a long-term committee or working group, comprised of attorneys, judges, jurors, and social scientists (representing the fields of linguistics and cognitive psychology), be appointed to rewrite the pattern instructions and modify the manner in which jurors were orally charged, so that lay jurors could better understand the instructions.¹¹³ The Commission stressed: "The guiding rule is that pattern jury instructions should be rewritten to be comprehensible to nonlawyers with limited formal education. Specifically, pattern instructions should be written so as to be comprehensible to an adult with a fifth- or sixth-grade education, which is the average reading level of an adult in the United States."¹¹⁴ To achieve this level of comprehensibility, the Commission suggested that jurors be given a "roadmap" or brief outline of the instructions; that more simple sentences be used; that "arcane" terms be avoided, but if "absolutely necessary" to define such terms clearly; and that concrete examples be provided to clarify abstract concepts.¹¹⁵ To date, no committee or working group appears to have been appointed to redraft the *Tennessee Pattern Criminal Jury Instructions*.¹¹⁶

It is also important to note that in 1997, in order to gauge juror understanding of Tennessee's capital sentencing instructions, Dr. Michael Blankenship of East Tennessee State University and Dr. James Luginbuhl of North Carolina State University conducted a

¹¹¹ Neil P. Cohen, Tennessee Bar Association Jury Improvement Project, JURY IMPROVEMENT PILOT PROJECT REPORT AND RECOMMENDATIONS (April 30, 2002), at 2.

¹¹² *Id.*

¹¹³ REPORT OF THE TENNESSEE BAR ASSOCIATION COMMISSION ON JURY REFORM, at 43, § 9.4 (May 1999). Although none of the Commission's other recommendations specifically touched on the issues highlighted in Recommendation #1, they did address facilitating jurors' understanding of instructions by recommending basic instructions be provided to jurors at the onset of a trial and by providing courts with the discretion to provide final jury instructions before closing arguments. See Neil P. Cohen, *supra* note 111, at 25-30. The Tennessee Rules of Criminal Procedure were amended to incorporate both recommendations. See TENN. R. CRIM. P. 30(d)(1), (2).

¹¹⁴ REPORT OF THE TENNESSEE BAR ASSOCIATION COMMISSION ON JURY REFORM 44 (May 1999).

¹¹⁵ *Id.*

¹¹⁶ The TPI-Criminal Committee of the Tennessee Judicial Conference is a permanent committee responsible for drafting the pattern jury instructions.

survey of 495 individuals summoned for jury duty in Shelby County, Tennessee; 311 of whom were determined to be eligible to serve on a capital jury.¹¹⁷ The results revealed that the vast majority—68.5 percent to be precise—of eligible jurors found capital sentencing instructions to be either “somewhat difficult or very difficult to understand.”¹¹⁸ Although 62.7 percent of eligible jurors reported to understand what a mitigating circumstance is, nearly 75 percent of the eligible jurors had difficulty understanding that non-enumerated mitigating circumstances also may be considered in deciding whether or not to impose a death sentence.¹¹⁹ An overwhelming 79.7 percent of the eligible jurors also had difficulty understanding the level of proof required for mitigating circumstances, erroneously believing that a “beyond a reasonable doubt” standard applied.¹²⁰

Despite these findings and the Jury Reform Commission’s recommendations, no substantial revisions to the pattern capital jury instructions appear to have been undertaken. Without clear and comprehensible capital sentencing instructions, the State of Tennessee risks jurors misconstruing the law and imposing a sentence that does not accurately reflect the jury’s determination of the proper sentence.

The Tennessee Bar Association has taken steps to evaluate the extent to which jurors understand capital jury instructions through the TBA Jury Reform Commission. Despite this, the State of Tennessee has failed to undertake substantial revisions to the criminal pattern jury instructions. Consequently, the State of Tennessee is only in partial compliance with Recommendation #1.

The Tennessee Death Penalty Assessment Team therefore recommends that the State of Tennessee redraft its capital jury instructions with the objective of preventing common juror misconceptions that have been identified.

B. Recommendation #2

Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

This recommendation is supported by a myriad of studies finding that jurors provided with written court instructions pose fewer questions during deliberations, express less confusion about the instructions, use less time trying to decipher the meaning of the

¹¹⁷ Michael Blankenship & James Luginbuhl, *Shelby County Juror Comprehension Survey 4, 9* (1997) (on file with author). The survey was comprised of various scenarios that, in part, examined jurors understanding of the requisite burden of proof and need for unanimity in finding aggravating and mitigating circumstances, the process of weighing mitigating against aggravating circumstances, and jurors’ understanding of non-statutory aggravating circumstances. *Id.* at 2-3.

¹¹⁸ *Id.* at 11.

¹¹⁹ *Id.* at 10-11. At the time, however, neither Tennessee law nor the instructions provided to the Shelby County eligible jurors stated that the jurors could consider any evidence related to the defendant’s character or background as mitigation.

¹²⁰ *Id.* at 10.

instructions, and spend less time inappropriately applying the law.¹²¹ Written instructions, therefore, result in more efficient and worthwhile deliberations.¹²²

Under the Tennessee Rules of Criminal Procedure (the Rules), the court is obligated to provide oral and written instructions on the law.¹²³ The written instructions must accompany the jury when it retires to deliberate.¹²⁴ Although the Rules state that the instructions must be “reduced to writing before being given to the jury,” it is unclear whether the Rules require that jurors receive written copies of the instructions while being orally instructed by the court.¹²⁵

Accordingly, the State of Tennessee is only in partial compliance with Recommendation #2.

C. Recommendation #3

Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors’ questions about applicable law.

Research indicates that capital jurors commonly have difficulty understanding jury instructions.¹²⁶ Such difficulty can be attributed to a number of factors, including, but not limited to: the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.¹²⁷ Accordingly, judges should respond meaningfully to jurors’ requests for clarification to not only ensure juror comprehension of the applicable law, but, more importantly, to

¹²¹ The Honorable B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1259 (1993); Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 177-78 (2000) (noting that 69 percent of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

¹²² *Dann, supra* note 121, at 1259; *Young, supra* note 121, at 162-63.

¹²³ TENN. R. CRIM. P. 30(c).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing jurors’ comprehension of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996) (“Thus, a failure to comprehend, remember, or properly apply the legal standards described in the instructions can substantially influence jury verdicts.”); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries’ understanding or misunderstanding of jury instructions).

¹²⁷ See James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (1995) (discussing jurors’ understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

ensure the jury imposes a just and proper sentence. In 1999, the Tennessee Bar Association's Jury Reform Commission highlighted this problem in its first report and recommended establishing a long-term committee or working group to rewrite the pattern jury instructions.¹²⁸ To the best of our knowledge, this recommendation has yet to be implemented.

Research on Tennessee jurors' understanding of jury instructions reinforces the importance of rewriting the existing pattern jury instructions. For example, in 1997, a survey of potential Shelby County jurors eligible to serve on a capital case found that the majority considered Tennessee's capital sentencing instructions to be "somewhat difficult or very difficult to understand."¹²⁹ An overwhelming 80 percent of the eligible jurors in Shelby County had difficulty understanding the level of proof required for mitigating circumstances, erroneously believing that a "beyond a reasonable doubt" standard applied.¹³⁰ The instructions provided to the potential jurors during the survey, however, provided no guidance as to the level of proof required for mitigating circumstances.¹³¹

The Shelby County survey also revealed that jurors had difficulty understanding the concept of mitigation.¹³² The instructions provided stated that the jurors could consider "any mitigating circumstances which shall include but not be limited to the following [enumerated mitigating circumstances]."¹³³ Still, nearly 75 percent of the eligible jurors surveyed in Shelby County thought that only the enumerated mitigating circumstances could be considered in their decision to impose the death penalty.¹³⁴

Other studies also have highlighted the difficulty capital jurors have in understanding the concept of mitigation evidence.¹³⁵ Specifically, the Capital Jury Project, a research program focused on the decision-making process of capital jurors, found a startling amount of misunderstanding among Tennessee jurors.¹³⁶ In fact, 41.3 percent of interviewed capital jurors failed to understand that they could consider any mitigating

¹²⁸ REPORT OF THE TENNESSEE BAR ASSOCIATION COMMISSION ON JURY REFORM 41-44 (May 1999).

¹²⁹ Michael Blankenship & James Luginbuhl, Shelby County Juror Comprehension Survey 10-11 (1997) (on file with author).

¹³⁰ *Id.* at 10.

¹³¹ See Shelby County Juror Questionnaire 4-8 (1993) (on file with author). *But see also* TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c) (indicating that for capital offenses committed on or after July 1, 1995 the "defendant does not have the burden of proving a mitigating circumstance").

¹³² Michael Blankenship & James Luginbuhl, Shelby County Juror Comprehension Survey 10-11 (1997) (on file with author).

¹³³ Shelby County Juror Questionnaire 4-8 (1993) (on file with author). It should be noted, however, that the instructions did not state that the eligible jurors could consider any favorable aspect of the defendant's character or record in mitigation, but simply delineated eight specific mitigating circumstances. *Id.*

¹³⁴ Michael Blankenship & James Luginbuhl, Shelby County Juror Comprehension Survey 10-11 (1997) (on file with author).

¹³⁵ Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1076-77 (2001); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003).

¹³⁶ William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003).

evidence in their deliberations.¹³⁷ The great majority of capital jurors—71.7 percent to be exact—failed to understand that unanimity was not required in finding mitigation established.¹³⁸ Tennessee capital jurors also had difficulty in understanding the applicable burden of proof for mitigating and aggravating circumstances. Forty-six point seven percent erroneously believed that mitigation had to be proven beyond a reasonable doubt, while 20.5 percent erroneously believed that aggravation need not be proven beyond a reasonable doubt.¹³⁹ Strikingly, 58.3 percent of capital jurors believed that the death penalty was mandated upon their finding that the defendant’s conduct was “heinous, vile, or depraved,” and 39.6 percent believed the death penalty was mandated upon their finding that the defendant would pose a future danger to society.¹⁴⁰

Unfortunately, despite a pressing need to clarify confusion among capital jurors, we have been unable to determine whether Tennessee trial courts, as a whole, are exercising their discretion to respond meaningfully to juror questions in practice.¹⁴¹ We are, therefore, unable to ascertain whether the State of Tennessee is in compliance with Recommendation #3.

D. Recommendation #4

Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant’s request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the State to clarify jurors’ understanding of alternative sentences.

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant’s request.

Alternative Punishments

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 73.

¹⁴¹ “A trial judge has the authority to give supplemental instructions when the jury poses a question that indicates the jurors are confused regarding a question of law.” *State v. Dulsworth*, 781 S.W.2d 277, 288 n. 6 (Tenn. Crim. App. 1989). *Accord* *State v. Moore*, 751 S.W.2d 464, 467 (Tenn. Crim. App. 1988); *State v. McAfee*, 737 S.W.2d 304, 307 n. 2 (Tenn. Crim. App. 1987). *See also* *U.S. v. Duncan*, 850 F.2d 1104, 1115 (6th Cir. 1988) (“A question from a deliberating jury often represents a pivotal moment in a criminal trial. Particularly in a close case like this, a trial judge has a ‘duty of special care’ when responding to a request for ‘further light on a vital issue’ from the foreperson of a confused jury . . . ‘When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.’”) *State v. Moss*, 1996 WL 238692, *5 (Tenn. Crim. App. 1996).

Under section 39-13-204 of the T.C.A., a defendant convicted of a capital offense may be sentenced to life imprisonment, life imprisonment without the possibility of parole,¹⁴² or death.¹⁴³ The *Tennessee Criminal Pattern Jury Instructions* explains the specific circumstances under which the jury may impose these three sentencing options and defines “life imprisonment without parole” and “life imprisonment.”¹⁴⁴ Specifically, Pattern Jury Instruction 7.04(a), which applies to offenses committed on or after November 1, 1989 but prior to July 1, 1995, informs jurors that a defendant sentenced to life imprisonment “shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of such sentence.”¹⁴⁵ Pattern Jury Instruction 7.04(c), which applies to offenses committed on or after July 1, 1995, states that the defendant must serve at least fifty-one years before becoming eligible for parole.¹⁴⁶

In accordance with the T.C.A., both pattern jury instructions, 7.04(a) and 7.04(c), provide that a defendant sentenced to life imprisonment without the possibility of parole “shall never be eligible for release on parole.”¹⁴⁷ Because Tennessee jury instructions provide information about alternate sentences, the State of Tennessee is in compliance with this portion of Recommendation #4.

Parole Practices

While studies consistently have shown that capital jurors underestimate the total number of years defendants convicted of first-degree murder, but not sentenced to death, spend in prison,¹⁴⁸ Tennessee law does not, to the best of our knowledge, allow parole officials or other knowledgeable witnesses to testify about parole practices to clarify jurors’ understanding of alternative sentences, nor are judges required to instruct the jury on actual parole practices. Indeed, the Tennessee Supreme Court has stated that “[n]either

¹⁴² Life imprisonment without the possibility of parole is only available to defendants who committed a capital offense on or after July 1, 1993. *See supra* note 15.

¹⁴³ TENN. CODE ANN. § 39-13-204(a) (2006).

¹⁴⁴ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c).

¹⁴⁵ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a).

¹⁴⁶ *Id.* Although section 39-13-204 of the T.C.A. mandates that a jury be instructed that a defendant receiving a sentence of imprisonment for life will not be eligible for parole until s/he has served at least twenty-five years of the sentence (*see* TENN. CODE ANN. § 39-13-204(e)(2) (2006); *State v. Nesbit*, 978 S.W.2d at 891 (citations omitted)), section 40-35-501(i) of the T.C.A., along with Pattern Jury Instruction 7.04(c), state that a juror must be instructed that a defendant sentenced to life imprisonment is not eligible for parole until s/he has served at least fifty-one years in prison. TENN. CODE ANN. § 40-35-501(i) (2006). While section 40-35-501(i), enacted July 1, 1995, is in conflict with Tennessee’s sentencing statute, section 39-13-204(e)(2), the Tennessee Attorney General has opined that where in conflict, section 39-13-204 has been repealed by section 40-35-501. TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(c) n. 1; Tenn. Att’y Gen. Opin. 97-098.

¹⁴⁷ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c); TENN. CODE ANN. § 39-13-204(e)(2) (2006).

¹⁴⁸ *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 645-46 (1999); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 80, 82 (2003); William J. Bowers, *The Capital Jury: Is It Titled Toward Death*, 79 JUDICATURE 220, 222 (1996).

the Tennessee Constitution nor the Federal Constitution prohibits or requires informing a capital sentencing jury of relevant and accurate sentencing information.”¹⁴⁹ In order to enable capital jurors to make informed sentencing decisions, the State of Tennessee should permit parole testimony when necessary to clarify a jury’s understanding of these alternative sentences. Because it does not, the State of Tennessee is not in compliance with this portion of Recommendation #4.

Based on the foregoing, the State of Tennessee is in partial compliance with Recommendation #4.

E. Recommendation #5

Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.

Tennessee law does not require an instruction stating that the jury may impose a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty. A review of Tennessee case law also did not reveal any instances in which this instruction was provided by the courts.

The State of Tennessee, therefore, fails to comply with Recommendation #5.

F. Recommendation #6

Trial courts should instruct jurors that residual doubt about the defendant’s guilt is a mitigating factor. Further, jurisdictions should implement provision of Model Penal Code Section 210.6(1)(f), under which residual doubt concerning the defendant’s guilt would, by law, require a sentence less than death.

The Tennessee Supreme Court has held that a defendant may introduce evidence “establish[ing] residual doubt as a nonstatutory mitigating circumstance.”¹⁵⁰ Therefore, when established by the evidence, trial courts are obligated to instruct jurors that residual doubt about the defendant’s guilt is a mitigating factor.¹⁵¹ However, when a court fails to provide such an instruction, the Tennessee Supreme Court has held that error to be harmless so long as the court instructs the jurors to consider “any aspect of the circumstances of the offense favorable to the defendant [and] supported by the

¹⁴⁹ State v. Smith, 857 S.W.2d 1, 11 (Tenn. 1993). The trial court did not respond to the jury’s questions addressing (1) the definition of a life sentence, (2) the definition of consecutive and current life terms, and (3) the defendant’s parole eligibility. *Id.* at 10.

¹⁵⁰ State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001) (citing State v. Teague, 897 S.W.2d 248, 256 (Tenn. 1995)).

¹⁵¹ See State v. Thomas, 158 S.W.3d 361, 403 (Tenn. 2005) (“Thus, where the issue of residual doubt is raised by the evidence, a jury instruction is appropriate.”).

evidence.”¹⁵² This embrace of the harmless error rule significantly diminishes the power and utility of the Tennessee Supreme Court’s earlier decision requiring trial courts to instruct jurors that residual doubt about the defendant’s guilt is a mitigating factor when such an instruction is supported by the evidence.

Tennessee has no state law requiring the imposition of a sentence less than death in cases in which residual doubt concerning the defendant’s guilt is present.

Accordingly, the State of Tennessee is only in partial compliance with Recommendation #6.

G. Recommendation #7

In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.

The State of Tennessee requires jurors to weigh the aggravators against the mitigators when determining whether a death sentence is appropriate.¹⁵³ The State of Tennessee, however, does not require that the jury be instructed on the appropriate method of weighing the evidence in favor or against a death sentence.

Interestingly, in a survey of Shelby County jurors, 41.5 percent of those eligible to serve on a capital jury, considered it proper to count the number of aggravating and mitigating circumstances, and to impose a sentence of death when there were a greater number of aggravating factors than mitigating factors.¹⁵⁴ To ensure that all defendants are accorded fair sentencing hearings, the State of Tennessee should adopt capital pattern jury instructions clarifying that the death penalty should not be imposed merely because the number of aggravating circumstances found exceeds the number of mitigating circumstances.

Because such an instruction is discretionary, the State of Tennessee is not in compliance with Recommendation #7.

¹⁵² *Id.* at 403-04.

¹⁵³ At the onset of the instructions, the capital pattern jury instructions state: “In arriving at this [punishment], you are authorized to weigh and consider any of the statutory aggravating circumstances proved beyond a reasonable doubt, and any mitigating circumstances which may have been raised by the evidence...” TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 7.04(a), (c). Further in the instructions, the jurors are directed to determine whether the statutory aggravating circumstances “outweigh any mitigating circumstances beyond a reasonable doubt.” *Id.* The jury must determine that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt to impose death. *Id.*

¹⁵⁴ Michael Blankenship & James Luginbuhl, Shelby County Juror Comprehension Survey 11 (1997) (on file with author).

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even when these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case, but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION

A. *Selection of Judges*

Tennessee's judicial selection process reflects a blend of two systems. The Governor appoints all Tennessee Supreme Court Justices and Court of Appeals judges from a list of nominees submitted by the Judicial Selection Commission.¹ Trial court judges, however, are selected in partisan elections. To serve an additional term, all Tennessee state court judges are subject to retention elections or general re-election.²

1. The Tennessee Supreme Court and the Court of Criminal Appeals

All Tennessee Supreme Court Justices and Court of Criminal Appeals judges are appointed by the Governor from a list of candidates compiled by the Judicial Selection Commission (JSC).³ The JSC is composed of seventeen members⁴ selected by the Speaker of the State House of Representatives and the Speaker of the State Senate.⁵ The appointees must reflect the diversity of the State's population, including its dominant ethnic minority and gender populations,⁶ as well as Tennessee's three grand divisions.⁷

When a vacancy arises on the Tennessee Supreme Court, the JSC must hold a meeting as soon as practical in Nashville to devise a list of judicial nominees.⁸ Similarly, when a vacancy arises on the Tennessee Court of Criminal Appeals, the JSC must hold a meeting as soon as practical in the grand division of the vacancy to consider possible judicial nominees.⁹ The public must be notified of the JSC meeting and may propose nominees or object to any suggested nominees.¹⁰ After the initial public hearing, the JSC may hold as many public or private meetings as it deems necessary.¹¹

¹ TENN. CODE ANN. § 17-4-112 (2006).

² TENN. CODE ANN. § 17-1-103 (2006).

³ TENN. CODE ANN. § 17-4-112 (2006).

⁴ *Id.*

⁵ TENN. CODE ANN. § 17-4-102(b) (2006). The Speaker of the State House of Representatives and the Speaker of the State Senate each appoint eight members and jointly appoint the remaining one member, in part from lists submitted by the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers. TENN. CODE ANN. § 17-4-102(a), (b) (2006). Any vacancy that arises on the JSC before the expiration of a term will be filled in the same manner as the original appointment, for the remainder of the unexpired term. TENN. CODE ANN. § 17-4-107 (2006).

⁶ TENN. CODE ANN. § 17-4-102(b)(3), (d) (2006). JSC members must be state residents and lawyers in good standing with the Tennessee Supreme Court. TENN. CODE ANN. § 17-4-103 (2006). Each member serves a staggered term of six years and while eligible for reappointment, cannot serve more than two terms. TENN. CODE ANN. §§ 17-4-105, -106(a)-(c) (2006). Most salaried state or federal office holders are disqualified from service. TENN. CODE ANN. § 17-4-104 (2005).

⁷ TENN. CODE ANN. § 17-4-102(e). The State of Tennessee is divided geographically and legally into three grand divisions: Eastern, Middle, and Western. TENN. CODE ANN. § 4-1-201(2006).

⁸ TENN. CODE ANN. § 17-4-109(a)(2) (2006).

⁹ TENN. CODE ANN. § 17-4-109(a)(1) (2006).

¹⁰ TENN. CODE ANN. § 17-4-109(b), (c) (2006).

¹¹ TENN. CODE ANN. § 17-4-109(d) (2006).

Additionally, after the public hearing, the JSC must conduct an independent investigation to determine the nominees' qualifications and encourage qualified nominees to accept their nomination and agree to appointment.¹² The JSC must provide the Governor with a list of three nominees whom it deems "best qualified and available" within sixty days of receiving notice of the judicial vacancy.¹³

The Governor may appoint one of the three individuals nominated by the JSC, or may require the JSC to submit another panel of three nominees.¹⁴ If the Governor rejects the first panel of nominees, s/he must explain in writing his/her reasons for doing so and select one of the nominees from the second panel.¹⁵ The initial term of the judicial nominee appointed to either the Tennessee Supreme Court or the Court of Criminal Appeals expires on the August 31 after the next regular August election occurring more than thirty days after the vacancy.¹⁶

Any appellate judge who wishes to serve an additional term must file a written declaration of candidacy with the election commission and be retained and elected by Tennessee voters.¹⁷ After filing the declaration, the judge's name will appear on the ballot without any partisan designation at the next general election.¹⁸ If a majority votes to elect and retain the judge, s/he will serve a term of eight years.¹⁹ However, if a majority votes not to retain the judge, the Governor will fill the vacancy by choosing one of three nominees submitted by the JSC.²⁰ If an incumbent appellate judge— whether appointed or elected— fails to file a declaration of candidacy or withdraws as a candidate, the Governor will fill the vacancy by selecting a nominee submitted by the JSC.²¹

2. Tennessee Trial Courts

Unlike the appellate courts, Tennessee trial judges are selected in partisan elections.²² In the April preceding a general election, judicial candidates must file a nominating petition that includes the candidate's signature and at least the signature of twenty-five registered voters.²³ Judges are elected by the district to which they are assigned and serve eight-

¹² *Id.*

¹³ TENN. CODE ANN. § 14-4-109(e) (2006).

¹⁴ TENN. CODE ANN. § 17-4-112(a) (2006).

¹⁵ *Id.*

¹⁶ TENN. CODE ANN. § 17-4-112(b) (2006). This means that appointed judges serve until there is an August election. The appointed judge can stand for retention at that time under the process outlined in Tenn. Code Ann. § 17-4-114 (2006).

¹⁷ TENN. CODE ANN. §§ 17-4-114(a), (b); 17-4-115(a), (b) (2006).

¹⁸ TENN. CODE ANN. §§ 17-4-114(b)(1) (2006).

¹⁹ TENN. CONST. art. VI, § 3; TENN. CODE ANN. § 16-3-101(d) (2006).

²⁰ TENN. CODE ANN. §§ 17-4-114(d)(2); 17-4-115(d)(2) (2006).

²¹ TENN. CODE ANN. § 17-4-116(a) (stating that the appointment is subject to the action of the electorate at the next regular election); *see* TENN. CODE ANN. § 17-4-109 (2006) (setting forth the manner in which the Judicial Selection Commission selects the nominees in this circumstance).

²² TENN. CODE ANN. § 16-2-506 (2006).

²³ TENN. CODE ANN. § 2-5-101(a)(2), (b)(1) (2006). Candidates must file a nominating petition with the administrator of elections of the county election commission in the county in which the candidate resides and the counties in which the candidate seeks election. TENN. CODE ANN. § 2-5-104(a) (2006).

year terms.²⁴ However, if a judicial vacancy occurs in the trial court prior to the expiration of a judge's term, the Governor will fill the vacancy by appointing one of three nominees submitted by the JSC, as previously discussed.²⁵

3. The Judicial Evaluation Commission

a. Purpose and Composition

Tennessee's Judicial Evaluation Commission (JEC) was established by the Tennessee Supreme Court to assist the public in evaluating the performance of incumbent appellate judges.²⁶ After completing its evaluation, the JEC will choose either to endorse or reject the appellate judge's retention.²⁷

The JEC consists of twelve members. Each member serves a staggered six-year term²⁸ and cannot serve more than two terms.²⁹ The Judicial Council³⁰ appoints six of the members, which must include four state court judges and two non-lawyers.³¹ The Speaker of the State Senate and the Speaker of the State House of Representatives appoint the remaining six members, based in part on the recommendations of the Tennessee Trial Lawyers Association, District Attorneys General Conference, the Tennessee Bar Association, and the Tennessee Association of Criminal Defense Lawyers.³² Both lists of nominees and appointees must be developed with a "conscious intention of selecting a body which reflects a diverse mixture with respect to race and gender."³³ In fact, the appointing authorities and nominating groups for the JEC must endeavor to appoint and nominate individuals that will "approximate the population of the [S]tate with respect to race and gender."³⁴

²⁴ TENN. CONST. art. VI, § 4.

²⁵ TENN. CODE ANN. § 17-4-118(a) (2006).

²⁶ TENN. CODE ANN. § 17-4-201(a)(1) (2006).

²⁷ *Id.* The JEC will not evaluate or recommend retention of any judge whose term ends due to death, resignation or removal. The JEC is not to include within the final report an evaluation or recommendation of retention for any appellate judge whose term ends due to death, resignation or removal or who fails to timely file a declaration of candidacy under Tenn. Code Ann. §§ 17-4-114(a) or 17-4-115(a), unless the judge is a candidate for another office subject to evaluation. *Id.*

²⁸ *See* TENN. CODE ANN. § 17-4-201(b)(8) (2006).

²⁹ TENN. CODE ANN. § 17-4-201(b)(9) (2006).

³⁰ The Judicial Council is an advisory body that receives, considers, and takes action on suggestions concerning the administration of justice. *See* TENN. CODE ANN. § 16-21-101 *et. seq.* (2006). The General Assembly, judges, public officials, attorneys and others may submit suggestions to the Judicial Council. The members of the council, including judges, legislators, attorneys, clerks, and lay members also may recommend changes in rules or laws. *Id.*

³¹ TENN. CODE ANN. § 17-4-201(b)(1), (2) (2006).

³² TENN. CODE ANN. § 17-4-201(b)(3), (4) (2006). The Speaker of the State Senate appoints three members—one member from a list of three candidates provided by the Tennessee Trial Lawyers Association; one from a list of three candidates provided by the District Attorneys' General Conference; and one non-lawyer appointed independently. The Speaker of the State House of Representatives appoints the remaining three members— one member from a list of three candidates submitted by the Tennessee Bar Association; one from a list of three candidates submitted by the Tennessee Association of Criminal Defense Lawyers; and one non-lawyer appointed independently. *Id.*

³³ TENN. CODE ANN. § 17-4-201(b)(5) (2006).

³⁴ TENN. CODE ANN. § 17-4-201(b)(7) (2006).

b. The Application of the Judicial Evaluation Program

The judicial evaluation program encompasses all appellate judges.³⁵ If a judge has held office for at least one year prior to the deadline for filing a declaration of candidacy, the JEC will base its evaluation on the judge's service on the appellate bench, evaluation surveys, personal information contained in a self-reporting form, and other comments and documents received from reliable sources.³⁶ If the judge has held office for less than a year, however, the JEC will base its evaluation on personal information contained in the self-reporting form, the judge's application to the JSC, and other comments and documents received from reliable sources.³⁷ Each JEC member has access to this information, but must protect its confidentiality as well as the anonymity of survey respondents.³⁸

While the entire JEC need not be present to conduct a judicial evaluation, all JEC members must approve of the evaluation.³⁹ The JEC must provide incumbent appellate judges with a draft of its evaluation and with a reasonable opportunity to comment or respond before the deadline for filing a declaration of candidacy.⁴⁰ The final report of the judicial evaluations must be made available for public inspection on the first Thursday in March before the regular August election, and published in a daily newspaper in Knoxville, Chattanooga, Nashville, Jackson and Memphis on the first Sunday in July before the regular August election.⁴¹

B. *Conduct of Judges and Judicial Candidates During Judicial Elections and Campaigns*

1. Requisite Conduct of Judicial Candidates During Campaigns

The Tennessee Code of Judicial Conduct (Code) establishes a set of standards for the ethical conduct of judicial candidates.⁴² Canon 5 of the Code broadly provides that "A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity" and requires all judicial candidates, including incumbent judges, to maintain a certain standard of conduct during their campaigns.⁴³ Canon 5A(1) specifically prohibits any judicial candidate from:

- (1) Acting as a leader or holding any office in a political organization;
- (2) Publicly endorsing or publicly opposing another candidate for public office;

³⁵ TENN. CODE ANN. § 17-4-201(e) (2006).

³⁶ TENN. CODE ANN. § 17-4-201(a)(2) (2006).

³⁷ *Id.*

³⁸ TENN. CODE ANN. § 17-4-201(a)(3) (2006).

³⁹ TENN. CODE ANN. § 17-4-201(b)(6) (2006).

⁴⁰ TENN. CODE ANN. § 17-4-201(a)(4)(A), (B) (2006).

⁴¹ TENN. CODE ANN. § 17-4-201(c)(1). The final report may not exceed 600 words. *Id.*

⁴² TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT CANON 5.

⁴³ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT CANON 5.

- (3) Making speeches on behalf of a political organization;
- (4) Soliciting funds for or paying an assessment to a political organization or political candidate, or making contributions to a political candidate; and
- (5) Making contributions to a political candidate.⁴⁴

Moreover, Canon 5(A)(3)(d) provides that a candidate for judicial office must not:

- (1) Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; or
- (2) Make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or
- (3) Knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or an opponent.⁴⁵

In addition, Canon 5(A)(3) mandates that all judicial candidates, including incumbent judges:

- (1) Maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary;
- (2) Prohibit employees and officials who serve at the pleasure of the candidate, and discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the sections of this Canon; and
- (3) Not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the sections of this Canon.⁴⁶

The Code allows judicial candidates to reply, in accordance with Canon 5(A)(3)(d), to any personal attacks or attacks on their records.⁴⁷ The Code also permits judicial candidates to purchase tickets for political gatherings and attend such gatherings, identify him/herself as a member of a political party, and contribute to a political organization or a political candidate.⁴⁸ Judicial candidates, however, are prohibited from personally soliciting or accepting campaign funds and must abide by Tennessee campaign-finance laws.⁴⁹

⁴⁴ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(A)(1).

⁴⁵ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d).

⁴⁶ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(A)(3)(a)-(c).

⁴⁷ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(A)(3)(e).

⁴⁸ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(C)(1).

⁴⁹ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5(C)(2). A judicial candidate is permitted to personally solicit publicly stated support and establish committees to conduct campaigns. *Id.* These committees can “solicit and accept campaign contributions, manage the expenditure of funds for the candidate’s campaign, and may also obtain public statements of support for his or her candidacy.” *Id.*

2. Requisite Conduct of Judges

The Tennessee Code of Judicial Conduct includes a number of standards of conduct to which active judges are required to adhere. This discussion, however, will focus on the standards of conduct pertaining to three issues: (1) judicial impartiality; (2) public commentary on cases; and (3) the conduct of prosecutors and defense attorneys.

a. Judicial Impartiality

Judges “should participate in establishing, maintaining, and enforcing high standards of conduct,” and are required to “personally observe those standards so that the integrity and independence of the judiciary will be preserved.”⁵⁰ Specifically, judges are required to be “faithful to the law” and “not be swayed by partisan interests, public clamor, or fear of criticism.”⁵¹ Judges also are required to perform their judicial duties “without bias or prejudice.”⁵² Any judge who “manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”⁵³ A judge must disqualify him/herself if the judge’s “impartiality might reasonably be questioned” in a proceeding.⁵⁴

b. Public Commentary on Cases

Judges must refrain from making any public comment that “might reasonably be expected to affect [a court proceeding’s] outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing” while a proceeding is pending or impending,⁵⁵ including during the appellate process and until final disposition.⁵⁶

c. Conduct of Prosecutors and Defense Attorneys

The Code provides that a judge must require “lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others.”⁵⁷ The judge also must require that lawyers act in a “patient, dignified, and courteous” manner to litigants.⁵⁸

A judge should act appropriately when s/he “receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional

⁵⁰ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 1(A).

⁵¹ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(2).

⁵² TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(5).

⁵³ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(5) cmt.

⁵⁴ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(E)(1).

⁵⁵ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(9).

⁵⁶ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(9) cmt.

⁵⁷ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(6).

⁵⁸ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(B)(4).

Conduct.”⁵⁹ Appropriate action includes “direct communication with the . . . lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.”⁶⁰ A judge is obligated to report the violation to the appropriate authority if an attorney’s violation of the Rules of Professional Conduct is known to the judge and raises a “substantial question” as to the attorney’s “honesty, trustworthiness or fitness” as a lawyer.⁶¹

3. Complaints and Disciplinary Action Against Judicial Candidates

Tennessee's Court of the Judiciary was created to investigate and, when warranted, remedy complaints against judges.⁶² The Court’s purview includes complaints regarding a judge’s physical, mental, and/or moral fitness; the manner by which a judge performs his/her duties; any actions by a judge that may reflect unfavorably upon the judiciary, bring the judiciary into disrepute, or adversely affect the administration of justice; and the conduct of judicial candidates.⁶³

The Court of the Judiciary is composed of sixteen members: ten judges who are appointed by the Tennessee Supreme Court,⁶⁴ three attorneys, and three lay members, all of whom serve four-year terms.⁶⁵ The Court of the Judiciary selects its own presiding judge who then divides the remaining members into a hearing panel and an investigative panel.⁶⁶ The Court of the Judiciary also appoints an attorney to act as disciplinary counsel, who screens complaints and conducts an investigation when there is a “substantial probability” of a judicial violation.⁶⁷

⁵⁹ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(D)(2).

⁶⁰ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt.

⁶¹ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3(D)(2).

⁶² TENN. CODE ANN. § 17-5-301(a) (2006).

⁶³ TENN. CODE ANN. §§ 17-5-101, 17-5-302, 17-5-303 (2006). Specifically, the offenses addressed by the Court of the Judiciary include: (1) willful misconduct related to the official duties of a judge; (2) willful or persistent failure to perform the duties of a judge; (3) a violation of the Code of Judicial Conduct; (4) commission of any act that constitutes a violation of the Tennessee Rules of Professional Conduct and as is applicable to judges; (5) a persistent pattern of intemperate, irresponsible, or injudicious conduct; (6) a persistent pattern of discourtesy to litigants, witnesses, jurors, court personnel or lawyers; (7) a persistent pattern of delay in disposing of pending litigation; and (8) any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice. TENN. CODE ANN. § 17-5-302 (2006). Additionally, the Court of the Judiciary can, upon its own motion or the filing of a complaint by an individual, investigate and take action when a judge is “suffering from any disability, physical or mental, which is or is likely to become permanent and which would substantially interfere with the prompt, orderly and efficient performance of judicial duty.” TENN. CODE ANN. § 17-5-303(a) (2006).

⁶⁴ TENN. CODE ANN. § 17-5-201(a) (2006). The Tennessee Supreme Court must appoint as members: three judges from either the Tennessee Court of Appeals or the Court of Criminal Appeals, three trial judges each of whom represent a grand division, one general sessions or juvenile court judge; and one municipal court judge. The Board of Governors of the Tennessee Bar Association must appoint as members one practicing attorney from each of the grand divisions. The Governor, the Speaker of the State Senate, and the Speaker of the House of Representatives, each appoint a layperson as a member.

⁶⁵ TENN. CODE ANN. § 17-5-201(a), (d) (2006).

⁶⁶ TENN. CODE ANN. § 17-5-201(b), (e) (2006).

⁶⁷ TENN. CODE ANN. §§ 17-5-301(d), (e); 17-5-304(a) (2006). See TENN. CODE ANN. § 17-5-301(e)(1)-(8) (2006) for the specific responsibilities of disciplinary counsel.

If there is probable cause that a judge is guilty of the alleged charges, that judge must be provided notice of the charges and offered an opportunity to respond to the charges.⁶⁸ The Court of the Judiciary will conduct a formal hearing, unless the judge concedes to the charges in exchange for a stated sanction.⁶⁹ At the conclusion of the hearing, the Court may suspend the judge without impairment of compensation; issue a private reprimand or censure, or a public reprimand or censure; enter a deferred discipline agreement; impose limitations on the performance of judicial duties, including issuing a cease and desist order; or enter a judgment recommending removal from office.⁷⁰ The Court of the Judiciary is not empowered to review or change a judicial decision, and filing a complaint with the Court of the Judiciary will not allow a party to side-step the formal recusal process for a judge.⁷¹ An appeal of a decision by the Court of the Judiciary may be made to the Tennessee Supreme Court.⁷²

All matters before the Court of the Judiciary are confidential, except in cases where a formal hearing has been conducted or when a judge has been sanctioned publicly.⁷³

⁶⁸ TENN. CODE ANN. § 17-5-307(a)-(c) (2006).

⁶⁹ TENN. CODE ANN. §§ 17-5-307(g)(1), 17-5-308(b) (2006).

⁷⁰ TENN. CODE ANN. § 17-5-301(f) (2006). *See also* TENN. CODE ANN. § 17-5-301(i)(1)-(10) (outlining the factors the Court of the Judiciary may consider in deciding the type of discipline to impose).

⁷¹ *See* TENN. CODE ANN. § 17-5-301 (2006).

⁷² TENN. CODE ANN. § 17-5-310 (2006).

⁷³ TENN. CT. OF THE JUDICIARY R. OF PRACTICE AND PROC. 8.

II. ANALYSIS

A. Recommendation #1

States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

In 1994, the Tennessee Legislature revised the State’s judicial selection process by adopting the “Tennessee Plan,” a series of statutes designed to depoliticize the courts and “insulate the judges from political influence and pressure.”⁷⁴ This scheme mandates that the Governor appoint all state appellate court judges from a list of nominees compiled by the Judicial Election Commission (JEC),⁷⁵ but still allows district court judges to be elected through partisan elections.⁷⁶ In switching to a gubernatorial-based appointment system for appellate judges, the State of Tennessee, however, did not fully insulate its judicial selection process from political pressures. The State also left its judiciary vulnerable to political interference by maintaining general partisan elections for trial court judges and mandating retention elections for appellate judges.

Judicial elections operate in tension with a core principle of the judiciary—namely that “[a]n independent and honorable judiciary is indispensable to justice in our society.”⁷⁷ To serve at all, trial court judges—who generally hold primary responsibility in death penalty cases—must participate in general elections, and to serve an additional term, all state court judges must either participate in a retention election or general re-election. Elections, whether they are partisan or non-partisan, raise significant questions about both the fairness of judicial selection and the independence of judges.⁷⁸

One reason judicial elections are considered a threat to the judiciary’s independence is that elections undoubtedly correspond with campaigning. Judicial campaigns may foster the impression that a judge’s constituents come before the law; an American Bar Association survey revealed that three quarters of Americans consider judicial campaigning to compromise a judge’s impartiality.⁷⁹ Canon 2 of the Tennessee Code of Judicial Conduct specifically mandates that a judge not only “avoid impropriety,” but also the “appearance of impropriety.”⁸⁰

⁷⁴ TENN. CODE ANN. § 17-4-101(a) (2006).

⁷⁵ TENN. CODE ANN. § 17-4-112(a) (2006). Any vacancy that arises on the JSC before the expiration of a term will be filled in the same manner as the original appointment, for the remainder of the unexpired term. TENN. CODE ANN. § 17-4-107 (2006).

⁷⁶ TENN. CONST. art. VI, § 4.

⁷⁷ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 1A.

⁷⁸ See Mark E. Behrens and Cary Silverman 11, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, CORNELL J. OF L. AND PUBLIC POLICY 273, 277 (2002).

⁷⁹ See Ted A. Schmidt, Arizona Attorney, *Fair Courts Under Fire, A Special Section on Judges and Judicial Independence, Part I: Merit Selection of Judges Under Attack Without Merit*, at 13 (Feb. 2006).

⁸⁰ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 2.

Another threat to the judiciary's independence is Tennessee's legislatively mandated judicial evaluation program for appellate judges. The Judicial Evaluation Commission (JEC) is charged with administering the program and bases its evaluation on the following criteria: (1) integrity, (2) knowledge and understanding of the law, (3) ability to communicate, (4) preparation and attentiveness, (5) service to the profession and the public, and (6) effectiveness in working with other judges and court personnel.⁸¹ Tennessee's judicial evaluation program, which was created to "assist the public in evaluating the performance of incumbent appellate judges," may in some ways conflict with the goal of fostering judicial independence.⁸² Although the JEC attempts to safeguard the process by delineating criteria by which to review judges, some of the performance standards appear not to be strictly defined. For example, criteria such as "knowledge and understanding of the law" may allow the JEC to review actual decisions by a judge and "integrity" purportedly could be enlarged to encompass a judge's personal views on the death penalty. Regardless of the safeguards, the practice of allowing voters to decide whether to retain a judge can compromise the judiciary's independence, as judges may be forced to consider the impact of a decision on his/her retention election.

Alarming, politics have been infused into Tennessee's retention elections. In 1996, the Tennessee Conservative Union and the Republican Party of Tennessee funded a campaign against then-Supreme Court Justice Penny White, assailing her decision to join an opinion affirming the Court of Criminal Appeal's opinion to set aside a death sentence on the basis that the defendant, Richard Odom, had been denied his constitutional right to present mitigation evidence.⁸³ Justice White was characterized as part of a group of "liberal Democrat judges" committed to obstructing the operation of the death penalty,⁸⁴ and "a vote against White [was deemed to be] a 'vote for capital punishment.'"⁸⁵ One advertisement against her retention even urged voters to "send a message to the murderers, the rapists and the left-wing judiciary."⁸⁶ Voters chose not to retain Justice White by a 55 percent to 45 percent margin.⁸⁷ Forgotten in the campaign to oust Justice White was the fact that all five Supreme Court Justices had voted to overturn Odom's death sentence because his attorney had been denied the right to present mitigating

⁸¹ TENN. SUP. CT. R. 27, § 3, 3.01.

⁸² TENN. CODE ANN. § 17-4-201(a)(1) (2006); *see also* American Judicature Society, Tennessee: Current Methods of Judicial Selection, at http://www.ajs.org/js/TN_methods.htm (last visited Dec. 26, 2006).

⁸³ *See* Paul D. Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 110 (1998).

⁸⁴ Michael Finn, *Shearer Asks Defeat of White Because of Liberal Decisions*, CHATTANOOGA FREE PRESS, June 20, 1996.

⁸⁵ Richard Locker, *Judge Vote Caught in Glare of Death Penalty, Politics*, COMMERCIAL APPEAL, July 26, 1996, at 1A.

⁸⁶ Paula Wade, *Anti-White Faction Turning up the Heat; Embattled Judge Defends Death Penalty Record*, COMMERCIAL APPEAL, July 30, 1996, at 1B.

⁸⁷ Tom Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated in "Yes-No" Vote: Massive Opposition to Death Penalty Vote Overcomes Support*, KNOXVILLE NEWS-SENTINEL, Aug. 2, 1996, at A1. White's appellate court record did not support that charge. According to University of Tennessee College of Law Professor Neil Cohen, while a judge on the Court of Criminal Appeals, White authored 129 opinions, 110 of which upheld the convictions of criminals. Paula Wade, *Memphis Murder Key in Campaign to Remove Judge*, COMMERCIAL APPEAL, June 20, 1996, at 1B.

evidence.⁸⁸ Commenting on Justice White's loss, then-Governor Don Sundquist stated: "Should a judge look over his shoulder about whether they're going to be thrown out of the office? I hope so."⁸⁹

In Tennessee, judges' decisions in capital cases have on more than one occasion become fodder for critics. In addition to the example of Justice White, a slew of news editorials from 1996 through 1998 attacked Justice Adolpho Birch for his votes in capital cases,⁹⁰ and an effort—albeit an unsuccessful one—was made to prevent his retention on the Tennessee Supreme Court.⁹¹ Interestingly, evidence also indicates a correlation between the outcomes of decisions in capital cases and judicial elections.⁹² One Tennessee newspaper report even intimated that during the 1998 judicial retention elections, the Tennessee Supreme Court delayed deciding capital cases until after the election.⁹³

The structure of the judicial appointment process in Tennessee also has left the judiciary open to political influence. Under the Tennessee Plan, the Governor must appoint a judicial candidate from a list of three nominees submitted by the Judicial Selection Commission (JSC). Significantly, the Governor need not base his/her appointment on the candidate's merit, and the State of Tennessee has no guidelines to which the Governor must adhere in selecting a judicial appointee. In fact, after Justice White lost her seat on the Supreme Court, a spokesperson for then-Governor Sundquist publicly announced that the Governor planned to appoint a Justice who would vote to uphold the death penalty.⁹⁴

Political considerations also may seep into the judicial selection process through the JSC. The composition of the JSC hinges upon the Speaker of the State House of Representatives and the Speaker of the State Senate, who are each entrusted with individually appointing eight members and jointly appointing the remaining one

⁸⁸ Sandra Roberts, *Justice Goes Awry in Tennessee*, The Masthead (2000), available at http://findarticles.com/p/articles/mi_qa3771/is_200001/ai_n8900826.

⁸⁹ Paula Wade, *White's defeat poses legal dilemma, How is a replacement judge picked?*, COMMERCIAL APPEAL, Aug. 3, 1996, at 1A.

⁹⁰ Lee Anderson, *The "No" Birch Voters Were Right*, CHATTANOOGA NEWS-FREE PRESS, Sept. 29, 1998, at A4.

⁹¹ Michael Silence, *Group Trying to Oust Birch from Bench Pleads Its Case in Knox*, KNOXVILLE NEWS-SENTINEL, July 29, 1998, at A4.

⁹² See Daniel J. Foley, *Death by Election?: A UT Professor Says Voters Have Changed the Way the Supreme Court Decides Death Penalty Cases*, 37 Tenn. B. J. 12, 20-23 (Dec. 2001) (asserting that since 1996 retention elections the Tennessee Supreme Court is more likely to uphold the conviction and sentence in capital cases); Daniel J. Foley, *A Move To The Right; State Supreme Court Taking Conservative Stand in Criminal Cases*, KNOXVILLE NEWS-SENTINEL, June 28, 1998, at F1 (same); Daniel J. Foley, *Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift after the 1990 Election*, 64 Tenn. L. Rev. 155, 157-58, 169-75 (1996) (reporting on voting patterns of Supreme Court justices from May 1989 through January 1996; noting that justices elected in 1990 (E. Riley Anderson, Martha Craig Daughtrey and Lyle Reid) voted to overturn capital convictions at a higher rate than justices they replaced; that Justices Daughtrey and Reid first voted to affirm death sentences only after Daughtrey was being considered for a federal judgeship).

⁹³ See Richard Locker, *Birch's Foes Eye Timing of Rulings in Death Cases*, COMMERCIAL APPEAL, September 23, 1998, at B1.

⁹⁴ Michael Finn, *Pro-Death-Penalty Attitude Seen in Vote against Justice White*, CHATTANOOGA FREE PRESS, Sept. 5, 1996, at B1.

member.⁹⁵ Such an appointment process risks creating a JSC divided along partisan lines or dominated by one political party.

Clearly, Tennessee's judicial system is not immune to political pressure. While the State has examined the fairness of its judicial selection process in the past, trends indicate an erosion of the judiciary's independence. Significantly, despite a stream of attacks on judges' decisions in capital cases, the State has failed to undertake a public education effort on the importance of an independent judiciary. Accordingly, the State of Tennessee is only in partial compliance with Recommendation #1.

B. Recommendation #2

A judge who has made any promise— public or private— regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.

The Tennessee Code of Judicial Conduct (Code) prohibits judicial candidates and judges from making any statements that may impact any future decision. Canon 5 of the Code specifically prohibits a candidate from making pledges or promises of conduct in office other than the faithful and impartial performance of his/her duties and from committing to issues likely to come before the court.⁹⁶ The accompanying commentary to Canon 5 also indicates that disqualification may be required when a judge is involved in a case that implicates an issue on which s/he previously announced his/her views.⁹⁷ Similarly, Canon 3 states that a judge must refrain from making any public comment that “might reasonably be expected to affect [a court proceeding's] outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing” while a proceeding is pending or impending.⁹⁸

Numerous judicial candidates in Tennessee have publicly spoken about their record in capital cases or their personal philosophies on the death penalty.⁹⁹ For example, during his 1998 judicial retention campaign, Supreme Court Justice Riley Anderson used recorded telephone messages in which he mentioned that in the great majority of capital cases he voted to affirm the sentence.¹⁰⁰ He also sent campaign literature, including as reasons to vote for him:

⁹⁵ TENN. CODE ANN. § 17-4-102(b) (2006).

⁹⁶ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5A(3)(d)(i), (ii).

⁹⁷ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5A(3)(d) cmt. (“the judge’s impartiality might reasonably be questioned.”)

⁹⁸ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3B(9).

⁹⁹ In *Republican Party of Minnesota v. White*, the United States Supreme Court ruled that Minnesota’s judicial canon of conduct, which prohibited judicial candidates from announcing his/her views on disputed legal or political issues, “both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our first Amendment freedoms’— speech about the qualifications of candidates for public office.” 536 U.S. 765, 774 (2002).

¹⁰⁰ Rebecca Ferrar, *Anderson Outspends High-Court Colleagues; Campaign Costs of \$90,000 Disclosed*, KNOXVILLE NEWS-SENTINEL, Aug. 4, 1998, at A4.

Reducing Death Row Appeals– It takes too long to appeal death penalty cases. That’s why Justice Riley Anderson worked to move these cases through the courts faster by limiting the number of appeals in capital punishment cases. Riley Anderson is committed to improving the system to make sure justice is served fairly, swiftly and efficiently. Ruling to Uphold the Death Penalty– Justice Riley Anderson has ruled 78 times to carry out the death penalty. . . .¹⁰¹

Similarly, during his 1998 retention election, Justice Adolpho Birch and his supporters mentioned that as an appellate court judge he had voted to uphold a death sentence in twenty-one of the thirty cases in which the issue was before him.¹⁰² Before being appointed to the bench, Supreme Court Justice Janice Holder was asked by then-Governor Sundquist “in general philosophical terms, whether she would have reservations about enforcement of the death penalty” and she answered that she would not.¹⁰³

While the Code does permit candidates to express their views on disputed legal and political issues,¹⁰⁴ some of these comments come precipitously close to amounting to pre-judgments in prospective capital cases and press upon the boundaries of appropriate judicial conduct. At the very least, they create the perception that these judicial candidates will be more likely to uphold the death penalty, regardless of whether it is warranted.

In at least one capital case, *Alley v. State*, the Tennessee Court of Criminal Appeals recused a judge after the post-conviction petitioner alleged that the judge was personally biased against him.¹⁰⁵ One of the judge’s comments was: “[A]s I said when I spoke to the Rotary Club some few months ago, the best way to give them bed space– I can give them fifty-seven beds tomorrow, if they’ll just execute some of these people that are already in line for it.”¹⁰⁶ The court concluded that recusal was appropriate “in order to avoid the public appearance of partiality.”¹⁰⁷

Based on our information, it is unclear whether the State of Tennessee has taken sufficient steps to preclude judges who make promises regarding their prospective decisions on capital cases that amount to prejudgment from presiding over or reviewing capital cases. We are, therefore, unable to assess whether the State of Tennessee is in compliance with this Recommendation.

¹⁰¹ *Id.*

¹⁰² Michael Finn, *Justice Birch “Uncomfortable” about Ouster Bid*, CHATTANOOGA FREE PRESS, July 22, 1998, at C2.

¹⁰³ Tom Humphrey, *Judge Picked to Replace White; Janice Holder to Fill State Supreme Court Vacancy*, KNOXVILLE NEWS-SENTINEL, Dec. 10, 1996 (“*Judge Picked*”), at A1.

¹⁰⁴ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 5A(3)(d) cmt.

¹⁰⁵ *Alley v. State*, 882 S.W.2d 810, (Tenn. Crim. App. 1994).

¹⁰⁶ *Id.* at 818.

¹⁰⁷ *Id.* at 823.

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

- a. **Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights for all defendants.**
- b. **Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.**
- c. **Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.**

Political assaults on judges like those discussed in Recommendation #1 may not only affect the way judges decide death penalty cases, they also may affect the public’s perception of the judiciary’s proper role. The negative image created by these attacks is exacerbated by the inability of the judiciary to speak in its own defense. It is therefore imperative that bar associations and community leaders publicly defend judges from assaults that undermine the independence of the judiciary.

In response to the 1996 campaign against former Supreme Court Justice Penny White for her decision on a capital case, public defenders and trial lawyers joined together to speak in her defense.¹⁰⁸ Individual lawyers held press conferences and wrote articles and letters on the judicial process,¹⁰⁹ and retired Court of Criminal Appeals Judge William Russell became a vocal supporter of Justice White. However, these efforts arrived late in the campaign and could not reverse the damage inflicted by White’s opponents.¹¹⁰ Justice White became the first and only Tennessee appellate court judge to lose a retention election.¹¹¹ Similarly, from 1996 through 1998, news editorials criticized Justice Adolpho Birch for his votes in capital cases.¹¹² Although an effort also was made

¹⁰⁸ Tom Humphrey, *Public Defenders Backing Justice White; ET Dissenter Doubts Propriety*, KNOXVILLE NEWS-SENTINEL, July 25, 1996, at A1.

¹⁰⁹ Paula Wade, *Friends, Foes Vie for the Last Word on Retaining White*, COMMERCIAL APPEAL, July 31, 1996, at 7A (containing comments from lawyers who supported White and comments from non-lawyers who did not); Gary R. Wade, *Court Complexities; Cumbersome Process Involving Death-Penalty Law Provides Backdrop for Current Controversy*, KNOXVILLE NEWS-SENTINEL, July 21, 1996, at F1 (commentary by Tennessee Court of Criminal Appeals Judge); Tom Y. Davies and Jerry J. Philips, *White’s Court Action Fully Within Law, and Letters Offer Support, Criticism for Justice Penny White*, KNOXVILLE NEWS-SENTINEL, July 28, 1996, at F4 (letter to editor by two UT law professors).

¹¹⁰ Tom Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated in “Yes-No” Vote: Massive Opposition to Death Penalty Vote Overcomes Support*, KNOXVILLE NEWS-SENTINEL, Aug. 2, 1996, at A1.

¹¹¹ *Id.*

¹¹² Lee Anderson, *The “No” -- Birch Voters Were Right*, CHATTANOOGA NEWS-FREE PRESS, Sept. 29, 1998, at A4.

to prevent his retention on the Tennessee Supreme Court, it proved unsuccessful.¹¹³ The Napier-Looby Bar Association (a Nashville-based African-American association) and the Ben Jones Bar Association (a Memphis-based African-American association) spoke in favor of Justice Birch, the only African-American on the Tennessee Supreme Court.¹¹⁴

When the campaign against Justice White launched, the Tennessee Bar Association (TBA) did not have an official policy on responding to the criticism of judges.¹¹⁵ Its Executive Committee, however, did publish an editorial defending the judicial process.¹¹⁶ Two years later, in 1998, the TBA formed a blue-ribbon committee on judicial independence to counter the growing attacks on the judiciary by special interest groups,¹¹⁷ and during the 1998 retention election, the TBA conducted a public service campaign to educate voters on the factors they should consider when selecting judicial candidates.¹¹⁸ Specifically, the TBA sponsored a radio advertising campaign and prepared information kits that were available online and by request.¹¹⁹ The information kits included a brochure on Tennessee's judicial performance and evaluation program, the Judicial Evaluation Commission's report on Tennessee's appellate judges, and guidelines on the factors to be considered in evaluating judicial candidates.¹²⁰ Today, the blue-ribbon committee continues to collaborate with other civic groups, such as the Tennessee Farm Bureau and the League of Women Voters of Tennessee, to raise public awareness about the importance of judicial independence.¹²¹ The TBA also has formed a committee to respond to the unfair criticism of sitting judges who, because of ethical constraints, cannot defend themselves.¹²²

It is unequivocal that in Tennessee a judicial candidate's view on the death penalty has served as a determining factor in the judicial selection process. In 1996, then-Governor Don Sundquist, when casting his vote not to retain Justice White, stated: "[A] judge's view on the death penalty is a litmus test 'to the extent that it is the law of the land.'" ¹²³ Sundquist favored "an entire 'pro-death penalty' Supreme Court," ¹²⁴ and stated that he intended "to ask nominees their views on the death penalty and appoint someone 'with a demonstrated record in this area.'" ¹²⁵

¹¹³ Michael Silence, *Group Trying to Oust Birch from Bench Pleads Its Case in Knox*, KNOXVILLE NEWS-SENTINEL, July 29, 1998, at A4.

¹¹⁴ Rebecca Ferrar, *Nashville Law Group Backs Birch Campaign*, KNOXVILLE NEWS-SENTINEL, July 24, 1998, at A4.

¹¹⁵ One published response was an editorial written by the Executive Committee of the Tennessee Bar Association. *TBA Defends Judicial Process*, CHATTANOOGA FREE PRESS, June 30, 1996, at A7.

¹¹⁶ *Id.*

¹¹⁷ See American Judicature Society, *Judicial Selection in the States: Tennessee, History of Judicial Selection Reform*, at http://www.ajs.org/js/TN_history.htm (last visited Sept. 23, 2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Rebecca Ferrar, *White Gets Thumbs-Down From Sundquist*, KNOXVILLE NEWS-SENTINEL, July 27, 1996, at A1.

¹²⁴ *Id.*

¹²⁵ *Id.*

This example, be it an anomaly or not, illustrates the need for bar associations and community leaders to continue public education efforts on the role of the judiciary and to object to allowing the purported views of a judicial candidate to play a role in the judicial selection process. While the Tennessee Bar Association and other community leaders have taken steps to protect the judiciary from baseless attacks, it is imperative that Bar Associations and community leaders strengthen these efforts.

Accordingly, the State of Tennessee is in partial compliance with this Recommendation.

D. Recommendation #4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Recommendation #5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

The Tennessee Code of Judicial Conduct advises judges to “take appropriate action” when they receive information “indicating a substantial likelihood” that an attorney has committed a violation of the Rules of Professional Conduct.¹²⁶ Appropriate action may include “direct communication with the . . . lawyer who has committed the violation . . . and reporting the violation to the appropriate authority.”¹²⁷ The Code mandates that a judge report the violation to the appropriate authority if s/he has knowledge that the attorney’s violation of the Rules of Professional Conduct raises a “substantial question” as to the attorney’s “honesty, trustworthiness or fitness” as a practitioner.¹²⁸

Tennessee case law also authorizes a judicial response to prosecutorial misconduct. In *State v. Middlebrooks*, the Tennessee Supreme Court urged trial judges to address any prosecutorial misconduct, noting that they held a “a better position to view the conduct, assess its impact, and choose the appropriate action to ensure a fair trial.”¹²⁹ The Court also suggested a number of sanctions to deter prosecutorial misconduct, especially when flagrant, including contempt citations, fines, and recommendations for disciplinary action to the Board of Professional Responsibility.¹³⁰

Unfortunately, we were unable to ascertain the specific measures taken by individual judges in Tennessee to remedy the harm caused by ineffective defense counsel or

¹²⁶ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3D(2).

¹²⁷ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3D(2) cmt.

¹²⁸ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3D(2).

¹²⁹ *State v. Middlebrooks*, 995 S.W.2d 550, 561 (Tenn. 1999).

¹³⁰ *Id.*

prosecutorial misconduct. We are, therefore, unable to assess whether the State of Tennessee is in compliance with these Recommendations.

E. Recommendation #6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Neither the Tennessee Code Annotated nor the Tennessee Code of Judicial Conduct explicitly requires judges to ensure that capital defendants are provided with full discovery. However, Canon 3 of the Tennessee Code of Judicial Conduct does require judges to be “faithful to the law” and perform their duties impartially, which includes enforcing existing discovery laws.¹³¹

Under Rule 16 of the Tennessee Rules of Criminal Procedure (Rule 16), judges must enforce disclosure of certain information and materials within the possession or control of the prosecutor or defendant.¹³² Significantly, at any time, if good cause is shown, the judge may deny, restrict, or defer discovery; if good cause is shown, the judge also has the discretion to grant any other appropriate relief, which presumably includes enlarging the scope of discovery.¹³³ Rule 16 permits a party to show good cause through a written statement, inspected *ex parte* by the court.¹³⁴ If the court grants relief following the *ex parte* submission, it must place the written statement under seal in the court records.¹³⁵ This practice may allow crucial evidence to be withheld from the defense or State, without either party being afforded a fair opportunity to rebut the reason set forth by the other for restricting discovery. If a party fails to comply with Rule 16, the judge may compel discovery, specifying its terms or conditions; prohibit the introduction of the undisclosed evidence; or enter any other order it “deems just under the circumstances.”¹³⁶

We were unable to obtain sufficient information to assess whether Tennessee judges, as a whole, are ensuring that defendants are provided with full discovery in capital cases. Consequently, we are unable to determine whether the State of Tennessee meets the requirements of this Recommendation.

¹³¹ TENN. SUP. CT. R. 10, TENN. CODE OF JUD. CONDUCT Canon 3, 3(B)(2).

¹³² TENN. R. CRIM. P. 16.

¹³³ TENN. R. CRIM. P. 16(d)(1).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ TENN. R. CRIM. P. 16(d)(2).

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the U.S. Supreme Court held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in the death penalty's implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that society identify the various ways in which race infects the administration of the death penalty and that we devise solutions to eliminate discriminatory practices.

¹ 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States Supreme Court's decision in *McCleskey v. Kemp*.² Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.³ The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.⁴

In 1994, seven years after *McCleskey*, the Tennessee Supreme Court established the Commission on Racial and Ethnic Fairness (Commission) to examine the State's judicial system and recommend revisions in court rules, procedures and administration to "ensure equality of treatment for all persons free from racial or ethnic bias."⁵ Four years later, in 1998, the Tennessee Supreme Court established a separate committee to delineate specific steps that the State should take to implement the Commission's recommendations.⁶

A. Tennessee Supreme Court's Commission on Racial and Ethnic Fairness

The Tennessee Supreme Court established the Commission on Racial and Ethnic Fairness to identify, examine, and make recommendations to ameliorate any identified racial or ethnic biases within the judicial system.⁷ The Commission, which was composed of judges, lawyers, other members of the legal community, and laypersons, conducted a two-year review of the State's judicial system.⁸

Throughout the two-year study, the Commission held public hearings, solicited public comments, and surveyed attorneys, district attorneys, judges, jurors, court personnel, and public defenders.⁹ The surveys specifically asked respondents to indicate any racial or

² *Id.*

³ *Id.* at 291-92.

⁴ *Id.* at 297.

⁵ FINAL REPORT OF THE TENNESSEE COMMISSION ON RACIAL AND ETHNIC FAIRNESS TO THE SUPREME COURT OF TENNESSEE 14 (1997) [hereinafter RACIAL AND ETHNIC FAIRNESS REPORT], available at <http://www.tncourts.gov/geninfo/publications/racethn4.pdf> (last visited Feb. 19, 2007).

⁶ IMPLEMENTING FAIRNESS, THE REPORT OF THE COMMITTEE TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL AND ETHNIC FAIRNESS COMMISSION AND THE GENDER FAIRNESS COMMISSION 4 (2000) [hereinafter IMPLEMENTING FAIRNESS REPORT], available at <http://www.tsc.state.tn.us/geninfo/Publications/raceGenFair.pdf> (last visited Feb. 19, 2007).

⁷ RACIAL AND ETHNIC FAIRNESS REPORT, *supra* note 5, at 14.

⁸ *Id.* at 14-15.

⁹ *Id.* at 29-35. The questionnaires returned a response rate of 86 percent for district attorneys and assistant district attorneys, 72 percent for public defenders and assistant public defenders, and 43% for attorneys licensed by the Tennessee Board of Professional Responsibility. *Id.* at 34-35. The Racial and

ethnic bias they observed or experienced toward “minority” groups¹⁰ or whites (characterized by the Commission as the “majority” group), or to indicate that they had not observed bias toward either group.¹¹ According to the survey:

- (1) 23 percent of attorneys, 6 percent of court personnel, and 13 percent of judges stated that prosecutors are more likely to file charges against a minority defendant;¹²
- (2) 25 percent of attorneys, 6 percent of court personnel, and 9 percent of judges stated that prosecutors are more likely to file charges when a victim is of the majority race;¹³
- (3) 16 percent of attorneys, 5 percent of court personnel, and 13 percent of judges stated that prosecutors are more likely to make favorable plea offers when a defendant is of the majority race;¹⁴
- (4) 10 percent of attorneys, 5 percent of court personnel, and 8 percent of judges stated that prosecutors are more likely to make favorable plea offers when a victim is of a minority race;¹⁵
- (5) 21 percent of attorneys and 5 percent of court personnel stated that judges are more likely to impose severe sanctions on a defendant who threatened or committed acts of violence if the defendant is of a minority race;¹⁶ and
- (6) 18 percent of attorneys, 5 percent of court personnel, and 4 percent of judges stated that judges are more likely to impose severe sanctions on a defendant who threatened or committed acts of violence against a victim who is of the majority race.¹⁷

The Commission concluded that when race or ethnicity is given preference, favor is given to the “majority” race or ethnicity.¹⁸

Ethnic Fairness Report does not specify to how many judges the questionnaire was sent, but does state that thirty-eight judges responded. *Id.* at 35.

¹⁰ *Id.* at 33. In the survey, the term “minority” was used to “refer to African-Americans/Blacks, Asians, Hispanics, Native Americans, and other persons identified as a racial or ethnic minority (including religious minority).” *Id.* at 32. However, the Commission’s Report uses the term “minority” to refer to both racial minorities as defined above and ethnic minorities, meaning persons with an affiliation based on common national, religious, tribal, linguistic, or cultural origins and backgrounds. *Id.*

¹¹ *Id.* at 33.

¹² *Id.* at 45. Three percent of attorneys observed that prosecutors are more likely to file charges against a majority race defendant. *Id.* The Commission’s report did not reflect the percentage of judges and court personnel who responded stating that if racial and ethnic discrimination is shown in the judicial process, it is shown to be against majority defendants. *See id.*

¹³ *Id.* at 45. Two percent of attorneys and four percent of judges observed that prosecutors are more likely to file charges when the victim is of a minority race. *Id.*

¹⁴ *Id.* at 45-46. Two percent of attorneys observed that prosecutors are more likely to make a favorable plea offer when the defendant is of a minority race. *Id.* at 45. The Commission’s report did not state the percentage of judges and court personnel who responded to this question. *Id.*

¹⁵ *Id.* at 46. Eight percent of attorneys and four percent of judges observed that prosecutors are more likely to make a favorable plea offer when the victim is of the majority race. *Id.* at 46.

¹⁶ *Id.* at 47-48.

¹⁷ *Id.* at 48.

¹⁸ *Id.* at 44.

In its final report in 1997, the Commission also concluded that while no “explicit manifestations of racial bias abound [in the Tennessee judicial system] . . . , institutionalized bias is relentlessly at work.”¹⁹ To reduce the effects of this bias, the Commission made forty recommendations, directed at three areas of the State’s judicial system: (1) the education and training of lawyers and judges; (2) the court environment; and (3) court policy and procedure.²⁰ The Commission’s recommendations included, but were not limited to:

- (1) The Administrative Office of the Courts should maintain reports showing minority representation of judicial personnel and judges;
- (2) Judicial appointing authorities should prioritize increasing the number of minorities in judicial appointments and the Tennessee Legislature should review the composition of the Judicial Selection Commission to ensure compliance with statutory requirements of diversity;²¹
- (3) Judicial candidates should be screened and disqualified upon evidence of racial and ethnic bias prior to appointment;
- (4) Jury lists should represent the racial and ethnic make-up of the areas they serve; and
- (5) Courts, district attorneys, and public defenders should assure that all defendants receive the same quality of treatment and representation.²²

B. Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and the Gender Fairness Commission in 2000

In 1998, the Tennessee Supreme Court created the “Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission” (Committee).²³ The Tennessee Supreme Court charged the Committee with reviewing the Commission’s 1997 recommendations and establishing specific means to implement these recommendations.²⁴ The Committee was composed of judges, lawyers, and other members of the legal community and laypersons from across the State, including several members of the Commission on Racial and Ethnic Fairness, who were then subdivided into five fact-finding subcommittees: (1) Education and Training; (2) Court Environment; (3) Court Policy and Procedure; (4) Judicial Nomination, Selection, and Evaluation; and (5) Data Collection.²⁵ The Committee released its final report in 2000 in which it detailed the subcommittees’ recommendations.²⁶

¹⁹ *Id.* at 5.

²⁰ *Id.* at 18-24.

²¹ *Id.* at 76-77.

²² *Id.* at 20-24.

²³ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 4. The Tennessee Supreme Court also charged the Committee with establishing a means of implementing the recommendations of the Gender Fairness Commission, who, like the Commission on Racial and Ethnic Fairness, had submitted a final report to the Tennessee Supreme Court in 1997. *Id.* at 3.

²⁴ *Id.* at 4.

²⁵ *Id.* at 5.

²⁶ *Id.*

In order to implement the Commission's recommendation that all defendants receive equality of treatment and representation, the Court Policy and Procedure Subcommittee recommended that "serious consideration" be given by the Tennessee Supreme Court to the "Petition of the Indigent Defense Commission for the Adoption of a Revised Supreme Court Rule 13."²⁷ In January 2001, the Tennessee Supreme Court amended Rule 13 and adopted the Indigent Defense Commission's proposal, which specified appointment, qualification, and compensation standards for counsel in capital and non-capital cases.²⁸ The Court Policy and Procedure Subcommittee also recommended that the Tennessee Supreme Court ensure the availability of competent interpreters to criminal defendants.²⁹ In 2005, the Tennessee Supreme Court adopted a "Code of Professional Responsibility for Interpreters in Tennessee Courts," which delineated qualification, impartiality, confidentiality, and professional conduct requirements for court interpreters.³⁰

Similarly, the Court Environment Subcommittee recommended that the Tennessee Supreme Court adopt an "anti-bias" rule in the Code of Professional Responsibility to state that "a lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, a bias or prejudice based upon race, sex, religion, national origin . . . may violate [the Code] if such actions are prejudicial to the administration of justice."³¹ Subsequently, the Court amended Tennessee Supreme Court Rule 8 to state that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice," adding to the accompanying comment that racially or ethnically biased words or conduct may rise to the level of professional misconduct.³²

In addition, the Committee proposed that:

- (1) The Administrative Office of the Courts collect, analyze, and disseminate data regarding racial, ethnic, and gender demographics and create a standing committee on racial and ethnic bias to monitor implementation of the Committee's recommendations;³³
- (2) The State of Tennessee require courts to ensure that jury lists represent the racial and ethnic makeup of the areas they serve and include parents of school children and public housing residents in jury lists;³⁴

²⁷ *Id.* at 23.

²⁸ TENN. SUP. CT. R. 13 (2006); Tennessee Supreme Court Order adopting Petition of the Indigent Defense Commission for the Adoption of a Revised Supreme Court Rule 13, *available at* http://72.14.203.104/search?q=cache:nU_2KXRZ4V0J:tsaoc.tsc.state.tn.us/OPINIONS/TSC/RULES/2001/Rul13amd.ord+M2000+00372&hl=en&gl=us&ct=clnk&cd=1 (last visited Feb. 19, 2007).

²⁹ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 26-27.

³⁰ TENN. SUP. CT. R. 41, 42.

³¹ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 30.

³² TENN. SUP. CT. R. 8.4(d), 8.4 cmt. 2.

³³ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 14, 16.

³⁴ *Id.* at 21-22. Currently, the jury commission in each county selects and summons prospective jurors, usually deriving lists of prospective jurors from tax records, voter registration records, drivers license records, vehicle registration records, and telephone books. *See, e.g.*, TENN. CODE ANN. § 22-2-302(a)(1) (2006); Government in Shelby County, Jury Commission, *available at* http://www.shelbycountyttn.gov/FirstPortal/dotShowDoc/Government/CountyServices/AdminandFinance/Jury_Index.htm (last visited Feb. 19, 2007).

- (3) The State of Tennessee decrease the number of peremptory challenges permitted in a felony trial to diminish the possibility that such challenges can be used on the basis of racial, ethnic, or gender bias;³⁵ and
- (4) The Tennessee Supreme Court promulgate a rule to prohibit discrimination in court procedures and hiring and bar associations keep a log of minorities who are available and qualified for appointment as a judge.³⁶

As of February 2007, the State of Tennessee has failed to implement any of these four proposals.

C. Collection of Data on Race and Ethnicity in First-Degree Murder Convictions

The State of Tennessee requires trial judges to complete a “trial judge report” in cases in which the defendant is convicted of first-degree murder.³⁷ These reports include information on the race of the victim and defendant, the circumstances of the crime, all aggravating and mitigating factors, whether the evidence proved the defendant’s intent to kill, as well as the trial judge’s impressions of the trial.³⁸ The trial judge report must also detail what percentage of the trial county’s population is of the defendant’s race and the number of actual jurors who are of the defendant’s race.³⁹

In practice, however, a number of trial judge reports are incomplete or missing altogether.⁴⁰

³⁵ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 22. However, the number of peremptory challenges remains unchanged since the General Assembly passed the initial rule permitting 15 peremptory challenges in 1995. See TENN. CODE ANN. § 44-18-118 (1995); see also TENN. R. CRIM. P. 24(e).

³⁶ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 48-49.

³⁷ TENN. SUP. CT. R. 12, § 1.

³⁸ TENN. SUP. CT. R. 12, § 1 n.1-4.

³⁹ *Id.*

⁴⁰ See, e.g., Michael Blankenship & Kristie R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases*, 31 U. MEM. L. REV. 823, 854, 856 (2001) (noting that Rule 12 reports are available in only 20 percent of cases in which the defendant was sentenced to life in prison from 1977 to 1998); John Shiffman, *Missing Files Raise Doubts About Death Sentences*, TENNESSEAN, July 22, 2001, at A1 (stating that one of every five death penalty convictions is missing from a database created by the Tennessee Supreme Court “to ensure the fairness of death sentences”).

II. ANALYSIS

A. Recommendation #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

The State of Tennessee has undertaken at least two initiatives that seek to investigate and evaluate the impact of and/or strive to eliminate racial discrimination in its criminal justice system: (1) the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness and (2) the Tennessee Supreme Court's Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission.

In 1994, the Tennessee Supreme Court created the Commission on Racial and Ethnic Fairness (Commission) to "provide a fair and balanced assessment of how issues of race and ethnicity affect Tennessee's system of justice and how the system addresses those issues."⁴¹ In 1997, after a two-year review of the judicial system, the Commission issued its final report in which it made forty-six recommendations to help "ensure that justice is truly equal and fairly administered."⁴² The recommendations focused on three aspects of the judicial system: (1) education and training of law students, lawyers, and judges; (2) the court environment; and (3) court policy and procedure.⁴³

The Commission gathered data by holding public meetings in Memphis, Nashville, and Chattanooga; soliciting information from law schools, bar associations, the Administrative Office of the Courts; and surveying court personnel, judges, and prosecutors on their perceptions of racial and ethnic fairness in the judicial system.⁴⁴ The Commission's findings included, but were not limited to:

- (1) In criminal proceedings, when race or ethnicity is given preference (i.e., when prosecutors are less likely to file charges, but more likely to make a favorable plea offer, and when judges are less likely to impose a severe sanction), favor is given to the "majority" race or ethnicity;⁴⁵

⁴¹ RACIAL AND ETHNIC FAIRNESS REPORT, *supra* note 5, at 15.

⁴² *Id.* at 16.

⁴³ *Id.* at 17-24.

⁴⁴ *Id.* at 29-32.

⁴⁵ *Id.* at 45-49. However, there are several reasons why responses to the questionnaire on the *perception* of bias in the criminal justice system found in the Commission's Report do not reflect the factual reality regarding the correlation of race and the likelihood of receiving a death sentence in a capital case: only 43% of attorneys to whom the survey was sent responded to the questionnaire; responses may have been reflective of the characteristics of individuals most likely to respond to a questionnaire concerning racial and ethnic bias in the judicial system; and survey respondents were actors in a variety of civil and criminal court proceedings, thus some respondents may have never participated in a death penalty proceeding. *Id.* at 35 (identifying that 43 percent of the attorneys surveyed returned their questionnaires).

- (2) In 1997, only five percent of the total number of judges serving in the trial and appellate courts in Tennessee were African-American;⁴⁶
- (3) The racial composition of the district attorneys general offices in Davidson and Shelby counties, where most of the State's African-American lawyers reside, were not representative of the populations they serve;⁴⁷ and
- (4) Tennessee law school employed a low number of minority professors.⁴⁸

In 1998, the Tennessee Supreme Court created the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission (Committee) to plan, oversee, and monitor the implementation of the Commission's recommendations.⁴⁹ In 2000, the Committee released its report to the Tennessee Supreme Court, delineating specific proposals for each of the Commission's findings and general recommendations.⁵⁰ The Committee's recommendations included, but were not limited to:

- (1) The Tennessee Supreme Court and the Tennessee General Assembly should fund an entity to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee and follow through with the recommendations made by the Commission;⁵¹
- (2) The Tennessee Supreme Court should promulgate a rule to prohibit discrimination in court procedures and hiring and bar associations should keep a log of minorities available and qualified for appointment as a judge to forward to the court;⁵² and
- (3) The State should reduce the number of peremptory challenges permitted in criminal cases as such challenges may be based on racial or ethnic bias.⁵³

Although some of the proposals contained within the Committee's report have been implemented,⁵⁴ the number of implemented proposals is unclear. As of February 2007, no state entity appears to have been created to continue the study of how race and ethnicity affect the administration of justice and to implement the Commission's recommendations. The number of peremptory challenges allowed in criminal cases also

⁴⁶ *Id.* at 74.

⁴⁷ *Id.* at 67. As of 1997, the District Attorney's General Office Davidson County had no African-American prosecutors and the Shelby County prosecutor employed only four African-American attorneys. *Id.*

⁴⁸ *Id.* at 54. From 1995-1996, there were three full-time minority professors at the University of Tennessee's law school, one full-time and three part-time minority professors teaching at the University of Memphis' law school, and four either full-time or part-time faculty teaching at Vanderbilt University's law school. *Id.*

⁴⁹ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 4.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 14.

⁵² *Id.* at 48-49.

⁵³ *Id.* at 22.

⁵⁴ *See supra* note 28 and accompanying text.

remains unchanged at fifteen.⁵⁵ Significantly, the State has not improved the percentage of minority judges serving on its trial and appellate courts.⁵⁶

While the State of Tennessee has previously examined the impact of racial discrimination and made recommendations that strive to eliminate its impact, many of these recommendations appear not to have been implemented. The State's prior efforts also were limited to three specific aspects of the judicial system—(1) education and training of law students, lawyers and judges; (2) court environment; and (3) court policy and procedure—and failed to examine the impact of racial discrimination in the criminal justice system as a whole. The State of Tennessee, therefore, is only in partial compliance with Recommendation #1.

In light of this, the Tennessee Death Penalty Assessment Team recommends that the State of Tennessee (1) reexamine the impact of racial discrimination in its criminal justice system; (2) thoroughly investigate the impact of racial discrimination in capital sentencing; and (3) develop new strategies to eliminate racial discrimination.

B. Recommendation #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

To the best of our knowledge, the State of Tennessee is not currently collecting or maintaining data on the race of defendants and victims, the circumstances of the crime, on all aggravating and mitigating circumstances, and the nature and strength of the evidence for all potential capital cases at all stages of the proceedings.

The State of Tennessee does require trial judges to complete a “trial judge report” in cases in which the defendant is convicted of first-degree murder.⁵⁷ These reports include information on the race of the victim and defendant, the circumstances of the crime, all aggravating and mitigating factors, whether the evidence proved the defendant's intent to kill, as well as the trial judge's impressions of the trial.⁵⁸ The trial judge report must also detail the percentage of the population of the county from which the jury was selected is

⁵⁵ TENN. CODE ANN. § 40-18-118 (1995) (permitting fifteen peremptory challenges by the State and also by the defense in a capital case); *see also* TENN. R. CRIM. P. 24(e).

⁵⁶ Interview with Pamela Taylor, Human Resources Director, Administrative Office of the Courts at the Tennessee Supreme Court in Nashville, Tennessee (Dec. 21, 2006). In 1997, the Racial and Ethnic Fairness Commission found that only 5 percent of the total number of judges serving on the trial and appellate benches in Tennessee were African-American. RACIAL AND ETHNIC FAIRNESS REPORT, *supra* note 5, at 74. In 2006, the Administrative Office of the Courts reported that 4.9 percent, or nine out of 181 judgeships, were held by African-Americans, and no judgeships were held by other racial minorities. *Id.*

⁵⁷ TENN. SUP. CT. R. 12, § 1.

⁵⁸ TENN. SUP. CT. R. 12, § 1 n.1-4.

the same race as the defendant and the number of jurors that are of the defendant's race.⁵⁹

However, estimates suggest that only 20% of trial judge reports have been filed for cases in which the defendant was convicted of first-degree murder, but did not receive a death sentence.⁶⁰ *The Tennessean* newspaper reported in 2001 that three in five trial judge reports on first-degree murder convictions were missing, one in five reports on death sentences were missing, and “hundreds of cases included in the database have holes and are missing important details about the crime, defendant and victim.”⁶¹

The Tennessee Department of Corrections also maintains an updated list of all inmates on death row, which includes the race of the inmate.⁶² Similarly, the Tennessee Bureau of Investigation's annual report “Crime in Tennessee” details information about the number of murders reported annually, including the race of arrestees and victims.⁶³ These profiles, however, contain no information on the circumstances of the alleged crimes, aggravating or mitigating factors, and the nature and strength of the evidence for all potential and actual capital cases.

Based on this information, the State of Tennessee is only in partial compliance with Recommendation #2.

C. Recommendation #3

Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.

To the best of our knowledge, the State of Tennessee is not currently collecting and reviewing all studies already undertaken to determine the impact of racial discrimination on the death penalty nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases.⁶⁴ The State of Tennessee, therefore, is not in compliance with Recommendation #3.

⁵⁹ *Id.*

⁶⁰ Blankenship & Blevins, *supra* note 40, at 856.

⁶¹ Shiffman, *supra* note 40.

⁶² See Tennessee Department of Corrections, Death Row List, available at <http://tennessee.gov/correction/deathrowlist.htm> (last visited Feb. 19, 2007).

⁶³ See TENNESSEE BUREAU OF INVESTIGATION, CRIME IN TENNESSEE 2005, available at http://www.tbi.state.tn.us/Info%20Systems%20Div/TIBRS_unit/Publications/Crime%20in%20TN%202005%20Complete.pdf (last visited Feb. 19, 2007).

⁶⁴ The Racial and Ethnic Fairness Commission did not analyze the outcomes of capital cases to determine whether race or ethnicity played a role in the administration of the death penalty. IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 62. A subsequent report on racial bias in the administration of the death penalty conducted by *The Tennessean* newspaper and published by the University of Memphis Law Review have not encouraged further action by the State of Tennessee to collect data by race for any aspect of the death

D. Recommendation #4

Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

In 1997, the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness (Commission) concluded in its final report that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] . . . , institutionalized bias is relentlessly at work."⁶⁵ In response, the Commission specified over forty recommendations to eliminate racial bias in the judicial system.⁶⁶ However, the Commission also concluded that "[m]any of the problems the Commission identified do not lend themselves to resolution by rule or regulation," and that "[u]ltimately, fairness will depend upon the desire of participants in the process to be fair."⁶⁷

None of the State's efforts, including those of the Commission and the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission (Committee), have studied the administration of the death penalty or recommended any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in death penalty proceedings.

However, former Tennessee Supreme Court Chief Justice Birch voiced concerns that racial bias may be permeating the death penalty process in Tennessee. In *State v. Chalmers*, Justice Birch noted that "numerous studies have indicated that racial bias may play a significant role in determining which defendants receive the death penalty."⁶⁸ The Chief Justice cited the Baldus study,⁶⁹ as well as a nationwide review of the death penalty conducted by the United States General Accounting Office,⁷⁰ as support for his assertion that the Tennessee Supreme Court could not be assured that capital cases in Tennessee have remained free from racial bias.⁷¹

penalty. See John Shiffman, *1 in 4 Blacks Condemned by All-White Juries*, TENNESSEAN, July 27, 2001, at A1 (reporting that of 52 individuals sentenced to death by a jury since 1977 in Tennessee, 15 black men were sentenced by all white juries.); Blankenship & Blevins, *supra* note 40, at 851 (finding evidence that specific aggravating factors were found significantly more often for white defendants or defendants with white victims and that defendants receive more aggravators when members of their own race were not on the jury).

⁶⁵ RACIAL AND ETHNIC FAIRNESS REPORT, *supra* note 5, at 5.

⁶⁶ *Id.* at 17-24.

⁶⁷ *Id.* at 81.

⁶⁸ *State v. Chalmers*, 28 S.W.3d 913, 922 (Tenn. 2000) (Birch, J., concurring in part and dissenting in part).

⁶⁹ See *supra* note 3 and accompanying text (on Baldus study).

⁷⁰ See *Chalmers*, 28 S.W.3d at 921. The United States General Accounting Office's review of more than two dozen death sentencing studies found that "in 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty." *Id.* (citing UNITED STATES GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990), *reprinted in* 136 Cong. Rec. S6889-90 (daily ed. May 24, 1990)).

⁷¹ *Id.* at 922-23.

A recent study that reviewed capital sentencing in Tennessee from 1981 to 2000 and was conducted as part of this ABA Tennessee Death Penalty Assessment Report has given credence to Justice Birch's concerns. The study, conducted by Glenn Pierce, Michael Radelet, and Raymond Paternoster, concluded that "those who kill whites are more likely to be sentenced to death than those who kill blacks."⁷² In addition to the race of victims and suspects in homicide cases, the study took account of legally relevant factors that are legitimately related to the imposition of the death penalty, namely two prevalent aggravating factors in death penalty sentencing: (1) whether the crime took the life of more than one victim; and (2) whether the homicide involved accompanying felonies, such as rape or robbery.⁷³ The study found that individuals who killed whites were 4.75 times more likely to receive the death penalty than those who killed blacks in the absence of these aggravating factors.⁷⁴ When at least one of these aggravating factors were present, individuals who killed whites were 3.15 times more likely to be sentenced to death than individuals who killed blacks.⁷⁵

In addition to these figures, in 2001, *The Tennessean* reported that fifteen of the fifty-two black inmates sentenced to death row in Tennessee since 1977, had been sentenced by all-white juries, which raises concerns about possible racial bias in jury selection and/or jury deliberations.⁷⁶ These issues have not been examined.

Because the State has failed to address any racial bias or any patterns of racial discrimination in the administration of the death penalty, the State of Tennessee is not in compliance with Recommendation #4.

The Tennessee Death Penalty Assessment Team therefore recommends that the State of Tennessee conduct a comprehensive examination of the death penalty process to identify any patterns of unacceptable disparities, whether they are racial, socio-economic, geographic, or otherwise, and develop remedial and preventative strategies to address any such discrimination.

E. Recommendation #5

⁷² Glenn Pierce, Michael Radelet and Raymond Paternoster, *Race and Death Sentencing in Tennessee, 1981-2000*, in AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH SENTENCING SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT (2007).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* The study also found that the race of victim's effect in determining who is sentenced to death was much larger from 1981-1990 than from 1991-2000. *Id.* For example, in cases with neither aggravating factor present, those suspected of killing whites were 5.4 times more likely to receive a death sentence than those suspected of killing blacks from 1981-1990. However, from 1990-2000, those suspected of killing whites were only twice as likely to receive a death sentence than those suspected of killing blacks. *Id.* This shift is likely due to a jury's option to sentence a defendant in a death penalty case to life in prison without the possibility of parole, a measure which was adopted by the State of Tennessee in 1993. See H.B. 1532, 1993 Leg., 98th Sess. (Tenn. 1993); see also TENN. ANN. CODE § 39-13-202(c)(2) (2006).

⁷⁶ Shiffman, *supra* note 64.

Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

The State of Tennessee has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim.⁷⁷ Therefore, the State of Tennessee is not in compliance with Recommendation #5.

F. Recommendation #6

Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.

In 1997, the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness Commission made a number of recommendations to incorporate training on racial and ethnic diversity into the criminal justice system. Those recommendations included that:

- (1) State and local law enforcement officials receive mandatory diversity training for officers and support staff;⁷⁸
- (2) Local bar associations should develop handbooks for judges, attorneys, and court personnel with information on improving their interaction and communication with persons of diverse racial and ethnic backgrounds in courtroom and judicial settings;⁷⁹ and
- (3) The Tennessee Supreme Court should require that continuing legal education for lawyers and judges include racial and ethnic diversity training within its ethics and professional requirements.⁸⁰

Today, the Tennessee Peace Officers Standard and Training Commission (POST Commission) mandates that all law enforcement candidates complete a course consisting of at least 400 hours of training, including twenty-five hours of instruction on interpersonal communication, three hours on "Professional and Ethical Conduct," fifty

⁷⁷ However, in 1989, The State of Tennessee adopted the "Criminal Sentencing Reform Act of 1989" which prohibits "all considerations respecting race, gender, creed, religion, national origin and social status of the individual" in criminal sentencing. TENN. CODE ANN. § 40-35-102(4) (amended 1994).

⁷⁸ RACIAL AND ETHNIC FAIRNESS REPORT, *supra* note 5, at 64.

⁷⁹ *Id.* at 19-20.

⁸⁰ *Id.* at 20.

hours on criminal law and constitutional procedure, and thirty hours on human relations, including the “sociology of ethnic and racial groups.”⁸¹

Along with the requirements for individual officers, a number of law enforcement certification bodies recommend or require that law enforcement agencies adopt policies on racial sensitivity. For example, the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)⁸² requires certified police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments to establish a written directive that at a minimum prohibits bias-based profiling and requires training on how to avoid biased-based profiling. CALEA, however, only pertains to certified police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments and not to similar bodies that have not obtained certification.

Lawyers in Tennessee must receive three hours of educational instruction on ethics and professionalism.⁸³ Defense attorneys in capital cases must receive at least six hours of specialized training in capital defense and complete a minimum of six hours of training in capital defense every two years thereafter.⁸⁴ However, racial and ethnic diversity training is not required as a part of these obligations.⁸⁵ The Tennessee District Attorneys General Conference, which annually conducts training for all Tennessee district attorneys, received a grant to conduct a four-day training conference for capital prosecutions in 2007.⁸⁶ A portion of this training will handle ethical considerations in the prosecution of a death case, which may include concerns about racial discrimination in the administration of the death penalty.⁸⁷

⁸¹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N chs. 1110-2-.01(1), 1110-7-.01(1). The Tennessee POST Commission may waive this requirement under limited circumstances, such as a candidate’s prior experience as an officer in good standing. *See* RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N ch. 1110-9.

⁸² Thirty-five police departments, sheriff’s departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, Agency Search, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Jan. 22, 2007) (use second search function, designating “U.S.” and “Tennessee” as search criteria); *see also* CALEA Online, About CALEA, at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Feb. 5, 2007) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs’ Association (NSA); and Police Executive Research Forum (PERF)).

⁸³ TENN. SUP. CT. R. 21, § 3.01.

⁸⁴ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

⁸⁵ Telephone Interview by Sarah Turberville, with Donna Voors, Communications Coordinator, Tennessee Commission on Continuing Legal Education and Specialization in Nashville, Tenn. (Jan. 19, 2007).

⁸⁶ Telephone Interview by Sarah Turberville, with Mary Tom Hudgens, Director of Education, Tennessee District Attorneys General Conference in Nashville, Tenn. (Jan. 16, 2007).

⁸⁷ *Id.*

State court judges in Tennessee must meet identical continuing legal education and ethics and professionalism training required of all lawyers in Tennessee.⁸⁸ Additionally, the Tennessee Code of Judicial Conduct prohibits judges from manifesting bias or prejudice by words or conduct in the performance of their judicial duties.⁸⁹ Judges may not participate in any extra-judicial activities that may cast doubt on the judge's capacity to act impartially, including making remarks or jokes demeaning to individuals on the basis of race or national origin, nor may judges hold membership in any organization that practices invidious discrimination on the basis of race or national origin.⁹⁰ If a judge willfully violates any of these provisions, s/he may be brought before the Tennessee Court of the Judiciary where it may impose sanctions on the offending judge, ranging from a private reprimand to removal from office.⁹¹

Although law enforcement personnel in Tennessee may receive some training on racial and ethnic diversity, educational programs stressing that race should not be a factor in any aspect of death penalty administration are not required for judges, prosecutors, or defense attorneys.⁹²

Based on this information, the State of Tennessee is only in partial compliance with Recommendation #6.

G. Recommendation #7

Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.

The State of Tennessee does not require defense counsel to participate in training to identify and develop racial discrimination claims in capital cases or identify biased jurors during *voir dire*. The State of Tennessee, therefore, is not in compliance with Recommendation #7.

It should be noted, however, that the State of Tennessee requires specialized training for any attorney who represents a defendant in a capital case. Tennessee Supreme Court Rule 13 requires that all defense counsel in capital cases have at least six hours of specialized training in capital defense, and complete a minimum of six hours of training in capital defense every two years thereafter.⁹³ In an effort to assist attorneys in meeting this requirement, the Tennessee Association of Criminal Defense Lawyers sponsors an

⁸⁸ Telephone Interview by Sarah Turberville, with Donna Voors, Communications Coordinator, Tennessee Commission on Continuing Legal Education and Specialization in Nashville, Tenn. (Jan. 19, 2007).

⁸⁹ TENN. SUP. CT. R. 10; TENN. CODE OF JUD. CONDUCT CANON 3(B)(5).

⁹⁰ TENN. SUP. CT. R. 10; TENN. CODE OF JUD. CONDUCT CANON 4(A) cmt.; TENN. CODE OF JUD. CONDUCT, CANON 2(C) cmt.

⁹¹ TENN. SUP. CT. R. 10; TENN. CODE ANN. § 17-5-304(c), (f) (2006).

⁹² See *infra* notes 93-95 and accompanying text of Recommendation #7 on training for defense counsel on identification of racial discrimination during a capital case.

⁹³ TENN. SUP. CT. R. 13, § 3(c)(3), (d)(2).

annual two-day capital defender training program called “The Fight for Life.”⁹⁴ This training in some years has included information on the role of race in death penalty litigation, including identification of biased jurors during *voir dire*.⁹⁵

H. Recommendation #8

Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

The Tennessee Criminal Pattern Jury Instructions direct the jury that it “can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence” upon the verdict.⁹⁶ Although consideration of racial factors in the jury’s decision-making process should be prohibited by this pattern jury instruction, there is no pattern jury instruction or case law in Tennessee requiring judges to explicitly inform jurors that it is improper to consider any racial factors in their decision-making and that they should report any evidence of racial discrimination in jury deliberations. The State of Tennessee, therefore, is only in partial compliance with Recommendation #8.

I. Recommendation #9

Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors.

The Code of Judicial Conduct requires that a judge must disqualify him/herself in a proceeding in which “the judge has personal bias or prejudice concerning a party or a party’s lawyer. . .”⁹⁷ However, the number of judges who have actually disqualified themselves due to racial bias or prejudice in Tennessee is unknown. Consequently, we cannot assess whether the State of Tennessee is in compliance with Recommendation #9.

It is noteworthy that in 2000, the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and Gender Fairness Commission (Committee) proposed that the Court of the Judiciary keep a record of all judicial complaints made on the basis of racial or ethnic bias and report such complaints to the Administrative Office of the Courts (AOC). The Committee further proposed that the AOC, in turn, be statutorily required to publish these statistics in the AOC Annual Report.⁹⁸ To date,

⁹⁴ See Tennessee Association of Criminal Defense Lawyers, 2007 CLE Calendar, *available at* <http://www.tacdl.com/clesche.htm> (last visited Jan. 11, 2007).

⁹⁵ Telephone Interview by Sarah Turberville, with Barbara Short, Executive Director of Tennessee Association of Criminal Defense Lawyers in Nashville, Tenn. (Jan. 12, 2007).

⁹⁶ TENN. CRIMINAL PATTERN JURY INSTRUCTIONS § 43.04.

⁹⁷ TENN. SUP. CT. R. 10; TENN. CODE JUD. CONDUCT CANON 3(E)(1)(a).

⁹⁸ IMPLEMENTING FAIRNESS REPORT, *supra* note 6, at 51.

however, neither the AOC nor the Court of the Judiciary has implemented this proposal.⁹⁹

J. Recommendation #10

States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.

The State of Tennessee does not make any exceptions to the general procedural rules for claims of racial discrimination in the imposition of the death penalty. For example, claims challenging the State's use of peremptory challenges on the basis of race¹⁰⁰ and claims challenging the racial composition of the jury pool¹⁰¹ are procedurally barred unless raised at trial and on direct appeal.¹⁰² In an initial petition for post-conviction relief, a petitioner may overcome these bars if:

- (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial, if either the federal or state constitution requires retroactive application of that right;¹⁰³ or
- (2) The failure to present the issue was the result of state action in violation of the federal or state constitution.¹⁰⁴

If the petitioner fails to raise racial discrimination in his/her initial petition for post-conviction relief, s/he is procedurally barred from raising it anytime thereafter,¹⁰⁵ unless:

- (1) The claim in the petition is based upon a final ruling of an appellate court establishing a new constitutional right that was not recognized as existing at the time of trial, if retroactive application is required;¹⁰⁶
- (2) The claim is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense for which s/he was convicted;¹⁰⁷ or

⁹⁹ Telephone Interview by Sarah Turberville, with Libby Sykes, Director, Administrative Office of the Court at the Tennessee Supreme Court in Nashville, Tenn. (Jan. 18, 2007).

¹⁰⁰ See *Batson v. Kentucky*, 476 U.S. 79, 89-90 (1986).

¹⁰¹ See *State v. Bell*, 745 S.W.2d 858, 860 (Tenn. 1988) (citing *Taylor v. Louisiana*, 419 U.S. 533, 528 (1975)).

¹⁰² TENN. CODE ANN. § 40-30-106(g) (2006).

¹⁰³ TENN. CODE ANN. § 40-30-106(g)(1) (2006). Additionally, if the issue was “previously determined,” i.e. a full and fair hearing occurred where the petitioner was afforded the opportunity to call witnesses and otherwise present evidence, the petitioner is barred from again raising the issue in his/her petition for post-conviction relief. TENN. CODE ANN. § 40-30-106(f), (h) (2006).

¹⁰⁴ TENN. CODE ANN. § 40-30-106(g)(2) (2006).

¹⁰⁵ TENN. CODE ANN. § 40-30-102(a) (2006).

¹⁰⁶ TENN. CODE ANN. §§ 40-30-102(b)(1), 40-30-117(a)(1) (2006).

¹⁰⁷ TENN. CODE ANN. §§ 40-30-102(b)(2), 40-30-117(a)(2) (2006).

- (3) The petitioner seeks relief from a sentence that was enhanced because of a previous conviction that has since been held invalid.¹⁰⁸
- (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.¹⁰⁹

Accordingly, the State of Tennessee fails to comply with Recommendation #10.

¹⁰⁸ TENN. CODE ANN. §§ 40-30-102(b)(3), 40-30-117(a)(3) (2006).

¹⁰⁹ TENN. CODE ANN. § 40-30-117(a)(4) (2006).

CHAPTER THIRTEEN

MENTAL RETARDATION, MENTAL ILLNESS, AND THE DEATH PENALTY

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of eighteen. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his[/her] conduct or to conform his[/her] conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his[/her] conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. 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.

I. FACTUAL DISCUSSION

A. *Mental Retardation*

In 1990, the Tennessee General Assembly adopted section 39-13-203 of the Tennessee Code Annotated (T.C.A.), prohibiting the imposition of the death penalty on an offender who was mentally retarded at the time of the offense.¹ Section 39-13-203 allows a mentally retarded defendant to raise his/her mental retardation as a bar to execution, so long as the defendant was prosecuted after the law's adoption in 1990.² However, in 2001, the Tennessee Supreme Court extended the application of section 39-13-203 to individuals who had been convicted and sentenced prior to its enactment.³

1. Definition of Mental Retardation

Section 39-13-203(a) of the T.C.A. defines “mental retardation” as: “significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of seventy (70) or below;” and “deficits in adaptive behavior;” that “must have been manifested during the developmental period, or by eighteen (18) years of age.”⁴

The Tennessee Supreme Court has interpreted section 39-13-203(a) as imposing a strict IQ maximum of seventy, meaning that an offender with an IQ in the low to mid-seventies will not be found mentally retarded.⁵ The Tennessee Court of Criminal Appeals has found that courts are not required to consider a potential rate of error in determining a defendant's IQ score.⁶

The T.C.A. does not provide a definition of “adaptive behavior.” The Tennessee Supreme Court has held that, in the absence of any legislative definition, “adaptive behavior” should be construed in its “ordinary sense.”⁷ The Court found that, in its ordinary sense, adaptive behavior means “the inability of an individual to behave so as to adapt to [his/her] surrounding circumstances.”⁸

Additionally, the Tennessee Court of Criminal Appeals has determined that the “developmental period” does not extend past the age of eighteen.⁹

¹ H.B. 2107, 1990 Leg., 96th Sess. (Tenn. 1990).

² TENN. CODE ANN. § 39-13-203(b) (2006); *Van Tran v. State*, 66 S.W.3d 790, 798 (Tenn. 2001).

³ *See Van Tran*, 66 S.W.3d at 811; *see also* *Howell v. State*, 151 S.W.3d 450, 463-64 (Tenn. 2004) (setting forth the requisite procedure and burden of proof for a petitioner seeking to re-open a post-conviction petition on the basis that s/he was mentally retarded at time of the offense).

⁴ TENN. CODE ANN. § 39-13-203(a) (2006).

⁵ *Howell v. State*, 151 S.W.3d 450, 457-58 (Tenn. 2004).

⁶ *Black v. State*, 2005 WL 2662577, 17-18 (Tenn. Crim. App. 2005) (unpublished opinion) (application for appeal to Tennessee Supreme Court denied Feb. 21, 2006).

⁷ *State v. Smith*, 893 S.W.2d 908, 918 (Tenn. 1994).

⁸ *Id.*

⁹ *State v. Strode*, 2006 WL 1626919, *11 (Tenn. Crim. App. 2006) (unpublished opinion).

2. Procedures for Raising and Considering Mental Retardation Claims

a. Pretrial and Trial Determinations of Mental Retardation

The T.C.A. does not explicitly provide the mechanism by which a criminal defendant may raise the issue of mental retardation as a bar to execution before or during trial. However, the Tennessee Supreme Court has stated that it prefers the defendant “to raise the issue by a written pretrial motion to allow the State time to marshal its evidence and to assure the trial court’s determination is the result of a fair and thorough presentation of all evidence relevant to this issue.”¹⁰ Despite the Court’s preference, a capital defendant also may raise the issue of his/her mental retardation at trial in the form of a motion to strike the death penalty.¹¹

Once the defendant raises the issue of mental retardation as a bar to execution— regardless of whether the issue is raised pre-trial or at trial— the State may request a mental examination of the defendant.¹² Following the examination, the trial court will hold an evidentiary hearing to determine whether the defendant is mentally retarded.¹³ At the hearing, the defense and State may produce witnesses, such as caregivers and clinical psychologists who have tested the defendant’s IQ and can testify as to the defendant’s IQ, adaptive behavior, and when the mental retardation manifested.¹⁴ Based on this evidence, the trial court must determine whether the defendant has proven, by a preponderance of the evidence, that s/he was mentally retarded at the time of the offense.¹⁵

If the trial court determines that the defendant was mentally retarded at the time of the offense, the State may seek an interlocutory appeal to challenge this finding.¹⁶ If a defendant found to be mentally retarded is subsequently convicted of first-degree murder, s/he will be sentenced to life imprisonment or life imprisonment without the possibility of parole.¹⁷

Conversely, if the court determines that the defendant was not mentally retarded at the time of the offense, neither the defendant nor the State may seek an interlocutory

¹⁰ *Smith*, 893 S.W.2d at 916 n. 2. In *Smith*, the defendant orally raised the issue of mental retardation on the day that the defendant’s case was set in the trial court and a hearing on the issue was held the following day. *Id.*

¹¹ *State v. Strode*, 2006 WL 1626919, *1 (Tenn. Crim. App. Oct. 19, 2005) (unpublished opinion).

¹² *Id.*

¹³ *Id.*

¹⁴ *See State v. Black*, 2005 WL 2662577, at *13 (Tenn. Crim. App. Oct. 19, 2005) (unpublished opinion) (application for permission to appeal denied by Tenn. Sup. Ct., Feb. 21, 2006); *Smith*, 893 S.W.2d at 916.

¹⁵ TENN. CODE ANN. § 39-13-203(c) (2006); *see also State v. Strode*, 2006 WL 1626919, *1-*8 (describing process by which the trial court determines whether the defendant was mentally retarded at the time of the offense). Mental retardation is not required to be proven by the State or found by a jury. *Howell v. State*, 151 S.W.3d 450, 467 (Tenn. 2004).

¹⁶ TENN. CODE ANN. § 39-13-203(f) (2006).

¹⁷ TENN. CODE ANN. § 29-13-203(d) (2006). The Tennessee Supreme Court has determined that mental retardation is not an element of the offense of murder; instead, it only reduces the maximum possible sentence from death to life imprisonment. *See Howell*, 151 S.W.3d at 467.

appeal.¹⁸ However, both parties may have a basis for direct appeal to the Tennessee Court of Criminal Appeals on this issue,¹⁹ and the defendant is entitled to offer evidence of diminished capacity as a mitigating circumstance during the penalty phase of the trial.²⁰

b. Post-Conviction Determinations of Mental Retardation

A death-row inmate may raise the issue of mental retardation as a bar to execution during post-conviction proceedings,²¹ or, if the inmate was convicted and sentenced to death prior to the enactment of section 39-13-203, s/he may seek to raise the issue of mental retardation by *reopening* post-conviction proceedings.²²

i. Initial Post-Conviction Petitions

A death-row inmate may raise the issue of his/her mental retardation in an initial post-conviction petition,²³ which generally must be filed within one year following the date of the Supreme Court's decision on direct appeal.²⁴ However, post-conviction relief will be barred if the issue has been previously determined²⁵ or waived.²⁶ Consequently, if a petitioner had the opportunity to raise the issue of mental retardation at trial or on direct appeal, but failed to do so, s/he will be barred from raising a claim of mental retardation in his/her post-conviction petition.

ii. Reopening of Post-Conviction Proceedings

¹⁸ TENN. CODE ANN. § 39-13-203(f) (2006). *See, e.g.,* State v. Taylor, 2006 WL 2563433, *13 (Tenn. Crim. App. Aug. 25, 2006) (unpublished opinion) (reviewing the defendant's claim that the trial court erred in failing to find the defendant mentally retarded and finding the issue moot because the defendant was not sentenced to death, but to three life sentences).

¹⁹ TENN. CODE ANN. § 39-13-203(f) (2006).

²⁰ TENN. CODE ANN. § 29-13-203(e) (2006); *see also* Howell v. State, 151 S.W.3d 450, 466 (Tenn. 2004) ("Diminished mental capacity is among the mitigating factors that may be weighed against aggravating factors by the jury").

²¹ *See generally* TENN. CODE ANN. § 40-30-103 (2003).

²² *See Van Tran*, 66 S.W.3d at 811.

²³ *See Howell*, 151 S.W.3d at 463.

²⁴ TENN. CODE ANN. § 40-30-102(a) (2006); *see also Howell*, 151 S.W.3d at 460 (citing Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002)) (establishing requirement that petitioner put forth a "colorable claim" that his/her conviction or sentence warrants post-conviction relief).

²⁵ TENN. CODE ANN. § 40-30-106(f) (2006). "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence." TENN. CODE ANN. § 40-30-106(h) (2006).

²⁶ TENN. CODE ANN. § 40-30-106(g)(1), (2) (2006). "A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless: (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or (2) The failure to present the ground was the result of state action in violation of the federal or state constitution." *Id.*

If a death-row inmate was convicted and sentenced to death prior to the enactment of section 39-13-203, s/he may seek to raise the issue of mental retardation by *reopening* post-conviction proceedings.²⁷ In 2001, the Tennessee Supreme Court extended the application of section 39-13-203 to petitioners who had concluded their post-conviction relief prior to 1990.²⁸ However, under section 40-30-102 of the T.C.A, a death-row inmate has only one year from the establishment of the new rule to reopen post-conviction proceedings.²⁹

In order to reopen a post-conviction petition, a death-row inmate must assert a “colorable claim”³⁰ that s/he was mentally retarded at the time of the offense.³¹ If the court determines conclusively that the petitioner has not asserted a colorable claim upon reviewing the trial record, petition, and the State’s response to the post-conviction petition, it will dismiss the petition without a hearing.³² However, if a petitioner makes a colorable claim that s/he was mentally retarded at the time of the offense in a motion to re-open post-conviction relief, the court will order an evidentiary hearing to determine if the petitioner was mentally retarded.³³ At the hearing, the petitioner must show by a preponderance of the evidence that s/he was mentally retarded at the time of the offense.³⁴

During the hearing, the petitioner may produce expert and lay witnesses, psychological examination reports, IQ scores, and any other admissible, relevant information pertaining

²⁷ See *Van Tran*, 66 S.W.3d at 811. In 2002, the United States Supreme Court ruled that the U.S. Constitution prohibited the execution of mentally retarded offenders and required retroactive application of this rule to cases on collateral review. See *Atkins v. Virginia* 536 U.S. 304 (2002); *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003).

²⁸ *Van Tran* held that the execution of mentally retarded offenders violates the federal and State Constitutions and requires retroactive application of section 39-13-203 for cases on collateral review. *Van Tran*, 66 S.W.3d at 812.

²⁹ TENN. CODE ANN. § 40-30-102(b)(1) (2006). The statute of limitations applicable to petitions to re-open post-conviction relief means that it is unlikely any death-row inmate may currently re-open their petition based on *Van Tran*. *Id.*

³⁰ A “colorable claim” is “a claim that, if taken as true, in light of circumstances most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Act.” *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002).

³¹ See *Van Tran*, 66 S.W.3d at 799-812; *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004) (requiring that a petitioner put forth a “colorable claim” that the defendant was mentally retarded at the time of the offense to reopen a post-conviction petition). Prior to *Howell*, an inmate seeking to re-open post-conviction relief had to satisfy the more stringent standard of “clear and convincing” evidence, rather than a “colorable claim,” that s/he was mentally retarded at the time of the offense to merit an evidentiary hearing. TENN. ANN. CODE § 40-30-117(a)(1)-(4) (2006). If the petitioner is filing an initial petition for post-conviction relief, s/he must also assert a colorable claim for relief. See *Burnett*, 92 S.W.3d at 406.

³² See *Burnett*, 92 S.W.3d at 406-07 (citing TENN. CODE ANN. § 40-30-209(a) (2006)).

³³ *Id.* at 406-07.

³⁴ See *Howell*, 151 S.W.3d at 463-64. The *Howell* Court reasoned that “applying a ‘clear and convincing’ burden of proof to petitioners who are now for the first time, in either an initial petition for post-conviction relief or in a motion to reopen post-conviction proceedings, able to raise a claim of mental retardation to avoid capital punishment violates due process rights of the post-conviction petitioners.” *Id.* at 464.

to the claim of mental retardation.³⁵ The State, in turn, may produce rebuttal witnesses and evidence to disprove the petitioner's claim.³⁶ On the basis of this evidence, the court must determine whether the petitioner has established mental retardation as defined in section 39-13-203(a) of the T.C.A.³⁷ If the court determines that the petitioner was mentally retarded at the time of the offense, it may set aside the death sentence.³⁸

B. Mental Conditions Other Than Mental Retardation

A capital defendant may introduce evidence regarding his/her mental condition for an insanity defense.³⁹

1. Insanity

In 1995, the Tennessee General Assembly reclassified insanity as an affirmative defense to prosecution.⁴⁰ Under the T.C.A., an individual is insane if:

[A]t the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts.⁴¹

Moreover, "mental disease or defect does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct."⁴²

a. Pre-Trial Proceedings

If a defendant intends to rely upon an insanity defense, the defendant must provide written notice of this intent to the State and file a copy of the notice with the court clerk

³⁵ See, e.g., *Black v. State*, 2005 WL 2662577, *2 (Tenn. Crim. App. Oct. 19, 2005) (unpublished opinion, application for appeal denied by Tenn. Sup. Ct. Feb. 21, 2006).

³⁶ See, e.g., *Black*, 2005 WL 2662577 at *6-*11.

³⁷ See *Van Tran*, 66 S.W.3d at 792; *Howell*, 151 S.W.3d at 467.

³⁸ TENN. CODE ANN. § 39-13-203(d) (2006) (stating that the jury shall affix a sentence of life imprisonment or life imprisonment without parole if the defendant is mentally retarded and convicted of first degree murder); TENN. CODE ANN. § 39-13-206(e) (2006) (permitting Tennessee appellate courts to modify a death sentence upon review); TENN. CODE ANN. § 40-30-111 (2006) (permitting a court to vacate and set-aside a judgment if it is found that there was a denial or infringement of the rights of the prisoner which rendered the judgment void or voidable.).

³⁹ TENN. CODE ANN. § 39-11-501(a) (2006). In cases in which the offense took place prior to July 1, 1995, the law provided that insanity was a defense, not an *affirmative* defense. TENN. CODE ANN. § 39-11-501(1991).

⁴⁰ See H.B. 1766, 99th Gen. Assem., Reg. Sess. (Tenn. 1995). Prior to 1995, insanity was "simply a 'defense' and not an 'affirmative defense' as provided in the current version." *State v. Holder*, 15 S.W.3d 805, 910 (Tenn. Crim. App. 1999). There is a special verdict in Tennessee of not guilty by reason of insanity, but there is no special plea of not guilty by reason of insanity. TENN. CODE ANN. § 40-18-117 (2006); see also DAVID LOUIS RAYBIN, TENNESSEE PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 22.12 (10th Ed. 2006).

⁴¹ TENN. CODE ANN. § 39-11-501(a) (2006).

⁴² TENN. CODE ANN. § 39-11-501(b) (2006).

at least ten days before trial.⁴³ If the defendant fails to notify the State and file a copy of the notice with the court clerk, s/he may not raise the defense.⁴⁴ However, the court may permit the notice of intent to rely on an insanity defense to be filed late or grant additional time for the parties to prepare for trial if cause is shown.⁴⁵

Once the defendant provides notice of his/her intention to rely on an insanity defense, the defendant, if requested to do so by the State, must submit to an examination by a psychiatrist or other expert.⁴⁶ If the defendant fails to submit to a court-ordered evaluation, the court may exclude expert testimony produced by the defendant addressing his/her mental condition.⁴⁷

b. Trial Proceedings

During the trial, the defendant must prove by clear and convincing evidence that s/he was insane at the time of the offense.⁴⁸ To establish insanity, the defendant may introduce mental health expert testimony as well as lay witness testimony regarding the defendant's insanity or mental condition at the time of the offense.⁴⁹ The State, in turn, may introduce its own expert and lay witness testimony to refute the defense experts' conclusions.⁵⁰ The State also may introduce statements made by the defendant during his/her mental examination to impeach or rebut evidence concerning the defendant's mental state.⁵¹

Although both parties' experts may testify as to whether the defendant suffered a mental disease or defect at the time of the offense and whether the defendant could appreciate

⁴³ TENN. R. CRIM. P. 12.2(a)(1); TENN. CODE ANN. § 39-11-204(c)(1), (2) (2006).

⁴⁴ TENN. R. CRIM. P. 12.2(a)(3); TENN. CODE ANN. § 39-11-204(c)(2) (2006).

⁴⁵ TENN. R. CRIM. P. 12.2(a)(2); TENN. CODE ANN. § 39-11-204(c)(3) (2006).

⁴⁶ TENN. R. CRIM. P. 12.2(c)(1). Moreover, the court may order the defendant to submit to a mental examination by an expert designated by the State at any stage of a felony criminal proceeding including pre-trial, trial, sentencing, or post-conviction. TENN. CODE ANN. § 33-7-301(a)(2) (2006).

⁴⁷ TENN. R. CRIM. P. 12.2(d).

⁴⁸ TENN. CODE ANN. § 39-11-501(a); *see also* State v. Holder, 15 S.W.3d 905, 910-11 (Tenn. 1999) (stating that the defendant was required to establish insanity by clear and convincing evidence, which "means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.") (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n. 2 (Tenn. 1992)). The current law places a different and higher standard of proof on the defendant than the pre-1995 version. Prior to 1995, a defendant could mount an insanity defense "if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law." *Holder*, 15 S.W.3d at 910 (citing TENN. CODE ANN. § 39-11-501 (1991)). Under the prior law, if the evidence raised a reasonable doubt as to the defendant's sanity, the burden was then on the State to prove sanity beyond a reasonable doubt. *Id.*

⁴⁹ *See, e.g.,* State v. Martin, 950 S.W.2d 20, 25 (Tenn. 1997) (finding that the defendant's examination by the State does not violate defendant's right against self-incrimination and that prohibiting defense counsel from attending the State's mental examination does not violate the defendant's right to counsel); *Holder*, 15 S.W.3d at 912 ("In determining the issue of insanity, the trier of fact may consider both lay and expert testimony and may discount expert testimony which it finds to be in conflict with the facts of the case.")

⁵⁰ *See Martin*, 950 S.W.2d at 22.

⁵¹ *Id.* at 24.

the wrongfulness of his/her actions,⁵² neither expert witness may testify as to whether the defendant meets the legal definition of “insanity.”⁵³ This ultimate issue is reserved for the trier of fact alone.⁵⁴

All presentations of evidence for an insanity defense are before the judge and jury.⁵⁵ If the judge finds that there is sufficient evidence to submit the issue of insanity to the jury, s/he will instruct the jury that it may return a verdict of not guilty by reason of insanity.⁵⁶ The trial judge must instruct the jury that if it finds the defendant not guilty by reason of insanity, the defendant will nonetheless be detained between thirty and sixty days for mental evaluation, diagnosis, and possible involuntary commitment.⁵⁷

c. Post-Trial Actions Regarding an Individual Found Not Guilty by Reason of Insanity

When an individual is found not guilty by reason of insanity, the court must order the individual to be detained for diagnosis and evaluation by a hospital or treatment center for at least thirty, but no more than sixty days.⁵⁸ The individual cannot be released from the hospital or treatment center until the court specifically authorizes this release, or until s/he has been detained for sixty days.⁵⁹ Following diagnosis and evaluation, if the treatment facility provides certification that the individual may be involuntarily committed, the State must file a complaint with the criminal court for the individual to be judicially committed.⁶⁰ If the treatment facility does not provide such certification, the State must file a complaint requesting that the court order the person to participate in outpatient treatment.⁶¹ The court must then conduct a hearing to determine whether the person may be judicially committed to inpatient treatment, and/or ordered to participate in outpatient treatment.⁶²

If requested in writing by an attorney, guardian, or next of kin, an involuntarily committed individual is entitled to an evaluation at six-month intervals to determine if s/he is no longer mentally ill or a threat to society.⁶³ If the chief officer of the hospital

⁵² See *State v. Perry*, 13 S.W.3d 724, 740-42 (Tenn. Crim. App. 1999).

⁵³ TENN. CODE ANN. § 39-11-501(c) (2006).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ TENN. CODE ANN. § 33-7-303(a) (2006).

⁵⁷ *Id.*; see also W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE § 23:10 (2007).

⁵⁸ TENN. CODE ANN. § 33-7-303(a) (2006).

⁵⁹ TENN. CODE ANN. § 33-7-303(b)(2) (2006).

⁶⁰ TENN. CODE ANN. § 33-7-303(b)(1) (2006). Sections 33-6-501 to 510 of the Tennessee Code provide the standards and mechanisms by which a person may be involuntarily admitted to inpatient treatment by judicial order. TENN. ANN. CODE §§ 33-6-501 to 510 (2006).

⁶¹ TENN. CODE ANN. § 33-7-303(b)(1) (2006).

⁶² TENN. CODE ANN. § 33-7-303(b)(6) (2006).

⁶³ TENN. CODE ANN. §§ 33-6-703 to 708 (2006).

determines that the individual is no longer mentally ill or a threat, the release is subject to judicial approval.⁶⁴

C. Presentation of Mental Condition at Sentencing

1. Presentation of Expert Testimony on Defendant's Mental Condition at Sentencing

A capital defendant may offer expert testimony on the defendant's mental condition as mitigation during the sentencing phase of a capital trial.⁶⁵ The Tennessee Supreme Court has determined that if a capital defendant intends to introduce such expert testimony as mitigation evidence during the sentencing hearing, the defendant must provide pretrial written notice of this intent no later than the date set forth by the Court.⁶⁶ Once the defendant provides pretrial notice, the defendant must, if requested by the State, submit to be examined by a State-selected psychiatrist or another mental health professional appointed by the court.⁶⁷ The defendant is not entitled to have counsel present at the mental examination by the State.⁶⁸

The report of any psychiatric examination initiated by the State or the defendant must be filed under seal with the court prior to jury selection.⁶⁹ The results of any examination by the State or defense expert will be released to the defendant prior to trial.⁷⁰ However, the results of any examination will be released to the State only in the event that a guilty verdict is returned and only if the capital defendant confirms his/her intent to offer expert mental condition evidence during the sentencing phase.⁷¹ The State's expert cannot discuss his/her examination with anyone until the results of the examination are released by the court to the State following the guilt phase of the trial.⁷² Any examination reports will be immediately released to the State if the defendant files a notice confirming his/her intent to offer expert mental condition testimony.⁷³

⁶⁴ TENN. CODE ANN. § 33-6-708 (2006). If an individual is involuntarily committed and confinement continues longer than the applicable prison sentence, s/he may continue to be confined only as long as s/he is mentally ill or remains a threat to society. *See Foucha v. Louisiana*, 504 U.S. 71, 85 (1992).

⁶⁵ *See State v. Reid*, 981 S.W.2d 166, 172 (Tenn. 1998) (“Serious difficulties for the defendant, the prosecution, and the judicial system would result if notice of a capital defendant’s intent to present expert mitigation proof is deferred until the conclusion of the guilt phase of the trial”).

⁶⁶ *Id.* at 174.

⁶⁷ *Id.*

⁶⁸ *Id.* at 172 (citing *State v. Martin*, 950 S.W.2d 20, 26 (Tenn. 1997)).

⁶⁹ *Id.* at 174.

⁷⁰ *Id.* The Tennessee Supreme Court noted that the interests of judicial economy are served by releasing the expert reports to the defense prior to trial, while judicial economy would be impaired by release of mental condition expert reports to the State. *Id.* at 173. For example, the Court stated that delaying release of the report(s) to the State would prevent inadvertent or intentional introduction of examination results in violation of the defendant’s Fifth Amendment right against compelled self-incrimination, while pretrial release of the results to the defense would allow the defense sufficient time to decide whether to introduce expert mental condition evidence as mitigation, or to withdraw a previous filed notice of intent to introduce mitigation during the sentencing phase. *Id.*

⁷¹ *Id.* at 174.

⁷² *Id.*

⁷³ *Id.*

The defendant may, at any time, withdraw his/her notice of intent to offer expert mental condition testimony.⁷⁴ If withdrawal occurs, neither the results of any examinations nor the facts contained therein may be admissible against the defendant.⁷⁵

2. Evidence Presented on Mental Condition during the Penalty Phase

A defendant may produce any evidence the court deems relevant to punishment at the sentencing hearing, including the nature and circumstances of the crime; the defendant's character, background history, and physical condition; and any evidence tending to establish or rebut the statutory aggravating or mitigating circumstances.⁷⁶ Such evidence is admissible regardless of its admissibility under the rules of evidence, provided that the defendant is afforded a fair opportunity to rebut any hearsay statements admitted.⁷⁷

D. Mental Condition Evidence to Negate Mens Rea

A defendant may introduce evidence regarding his/her mental condition when his/her state of mind at the time of the offense does not conform to the exact requirements of an insanity defense. When the defendant is charged with an offense requiring the requisite culpability level to commit the crime, such as a premeditated first-degree murder, the defendant is entitled to introduce psychiatric evidence to prove that s/he did not have the state of mind to commit the offense charged.⁷⁸ The Tennessee Supreme Court has held that this evidence is not offered as proof of “diminished capacity,” but may be “relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried.”⁷⁹

If a defendant intends to introduce expert testimony relating to his/her mental condition so as to negate intent, the defendant must provide notice of this intent to the State.⁸⁰ If the defendant fails to give notice of intent to introduce expert mental condition testimony, then the court may exclude the testimony of the defendant's mental condition expert.⁸¹

When the defendant gives notice of his/her intention to offer expert testimony as to his/her mental condition, the defendant must submit to an examination by a court-appointed psychiatrist or other expert if requested to do so by the State.⁸² If the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ TENN. CODE ANN. §§ 39-13-204(i), (j) (2006).

⁷⁷ TENN. CODE ANN. § 39-13-204(c) (2006).

⁷⁸ *See State v. Hall*, 958 S.W.2d 679, 690 n.9 (Tenn. 1997) (citing MODEL PENAL CODE § 4.02 cmt (Official Draft 1962)); *see also Holder*, 15 S.W.3d at 913 (holding that a defendant may not be convicted of first degree premeditated murder if, as the result of a mental disease or defect, s/he lacked the capacity to form premeditation).

⁷⁹ *Hall*, 958 S.W.2d at 690.

⁸⁰ TENN. R. CRIM. P. 12.2(b)(1).

⁸¹ TENN. R. CRIM. P. 12.2(d).

⁸² TENN. R. CRIM. P. 12.2(c)(1). The court also may order the defendant to submit to a mental examination by an expert designated by the State when the defendant gives notice of intent to rely on an

defendant does not submit to a court-ordered evaluation, then the court may exclude testimony produced by the defendant's mental condition expert.⁸³

E. Competency for Post-Conviction Proceedings

1. Tolling of Post-Conviction Statute of Limitations and Competency to Proceed with Post-Conviction Proceedings

Within one year of final judgment at trial, or if an appeal is sought, within one year of final action of the highest court, a death-row inmate may file a petition to determine whether the inmate is competent to proceed with post-conviction relief.⁸⁴ A petitioner also may file a post-conviction petition in which s/he seeks to have the statute of limitations tolled.⁸⁵ In order to toll the statute of limitations, the petitioner must show that s/he was mentally incompetent prior to its expiration.⁸⁶ Although the Post-Conviction Act of 1995 expressly prohibits the tolling of the statute of limitations for post-conviction proceedings,⁸⁷ the Tennessee Supreme Court has held that due process requires tolling during the period of mental incompetence if a petitioner is denied the reasonable opportunity to assert a claim in a meaningful time and manner.⁸⁸

In order to prove incompetence, either to toll the statute of limitations or for a determination of present incompetency, the petitioner must show that s/he "is unable either to manage his[her] personal affairs or to understand his[her] legal rights and liabilities;"⁸⁹ evidence of the petitioner's mental illness does not equate to mental incompetence.⁹⁰ The petitioner must submit pleadings including affidavits, depositions, and other credible evidence to support the assertion that s/he is incompetent.⁹¹ Upon the

insanity defense or present expert evidence of his/her mental condition for any other purpose. TENN. CODE ANN. § 33-7-301(a)(2) (2006).

⁸³ TENN. R. CRIM. P. 12.2(d).

⁸⁴ TENN. CODE ANN. § 40-30-102(a) (2006).

⁸⁵ See *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001).

⁸⁶ *Id.* ("Even if a petitioner satisfies the *prima facie* showing, at the hearing the petitioner bears the burden of proving by clear and convincing evidence that the statute of limitations should be tolled for incompetence, and that as a result of the tolling, the petition is timely").

⁸⁷ TENN. CODE ANN. § 40-30-102(a) (2006).

⁸⁸ See *Seals v. State*, 23 S.W.3d 272, 279 (Tenn. 2000) (permitting the court to toll the statute of limitations when necessary to comport with due process). In *Seals*, the petitioner had previously filed timely petitions for post-conviction relief and after the expiration of the statute of limitations, a "next friend" sought to have the statute of limitations tolled alleging that Seals had been mentally incompetent since before his guilty plea. *Id.* at 274.

⁸⁹ *Nix*, 40 S.W.3d at 463. The Tennessee Supreme Court held that post-conviction proceedings require a lower level of competency than that required at trial because competency to proceed on post-conviction is neither a constitutional nor a statutory right, and primary decision-making responsibility lies with counsel, not the petitioner at the post-conviction stage. See *Reid v. State*, 197 S.W.3d 694, 702 (Tenn. 2006).

⁹⁰ See *Nix*, 40 S.W.3d at 463.

⁹¹ *Id.* at 464; *Reid*, 197 S.W.3d at 705. A *prima facie* showing may be satisfied by attaching to the petition affidavits, depositions, and medical reports that contains *specific factual allegations* showing petitioner's incompetence; mere conclusions and assertions as to petitioner's incompetence will result in dismissal of the action. See *Nix*, 40 S.W.3d at 464; *Reid*, 197 S.W.3d at 703.

finding of incompetency during the limitations period, the statute of limitations will be tolled, if necessary.⁹²

If the petitioner makes a *prima facie* showing of incompetence, the court will hold a hearing, wherein the petitioner must prove by clear and convincing evidence that s/he is incompetent to proceed with post-conviction relief.⁹³ If the court finds that the petitioner is incompetent to proceed with post-conviction proceedings, the court “should appoint, if necessary, a ‘next friend’ or guardian ad litem to pursue the action on behalf of the petitioner.”⁹⁴ A finding of incompetence will not stay the post-conviction proceedings and the “next friend,” or guardian *ad litem*, if appointed, will appear in court on behalf of the petitioner to pursue post-conviction proceedings while the petitioner remains the real party in interest.⁹⁵ At any point during the post-conviction proceedings, the court may, *sua sponte*, order the defendant to submit to a mental evaluation if it is believed that the defendant is not competent to assist counsel in preparation for or otherwise participate in the post-conviction proceedings.⁹⁶

2. Competency to Withdraw Petition for Post-Conviction Relief

A death-row inmate is presumed competent to withdraw his/her post-conviction petition.⁹⁷ Before the death-row inmate may withdraw the petition, the trial court must address the petitioner personally in open court to ascertain whether the petitioner:

- (1) Does not desire to proceed with any post-conviction proceedings;
- (2) Understands the significance and consequences of withdrawing the post-conviction petition;
- (3) Is knowingly, intelligently, and voluntarily, without coercion, withdrawing the petition; and
- (4) Is competent to decide whether to withdraw the post-conviction petition.⁹⁸

If the court finds that a genuine issue regarding the petitioner’s competency exists, the court must appoint one or two mental health professionals to evaluate the petitioner.⁹⁹ If a genuine issue about the petitioner’s competency still exists following the mental health

⁹² See *Nix*, 40 S.W.3d at 464.

⁹³ *Id.*; *Reid*, 197 S.W.3d at 702.

⁹⁴ *Reid*, 197 S.W.3d at 706; see also *Holton v. State*, 201 S.W.3d 626, 635 (Tenn. 2006) (requiring a “next friend” to make a *prima facie* showing of inmate’s mental incompetence, identical to that required to toll the statute of limitations, if the inmate has not signed the petition or verified the allegations of his/her incompetence under oath).

⁹⁵ See *Reid*, 197 S.W.3d at 706.

⁹⁶ TENN. CODE ANN. § 33-7-301(a)(4) (2006).

⁹⁷ TENN. SUP. CT. R. 28 § 11(B)(2).

⁹⁸ TENN. SUP. CT. R. 28 § 11(A).

⁹⁹ TENN. SUP. CT. R. 28 § 11(B)(2). The appointment of mental health experts must be made from lists submitted by the State and counsel for the petitioner. *Id.* The mental health professionals must file written evaluations with the trial court regarding the petitioner’s competency within ten days of appointment unless good cause is shown for later filing. *Id.* The State and counsel for the petitioner must receive a copy of the evaluation(s). *Id.*

evaluations, the court must order a hearing to determine the petitioner's competency.¹⁰⁰ After the hearing, the court must file written findings of fact regarding the competency determination and issue an order granting or denying withdrawal of the post-conviction petition.¹⁰¹ In order for a court to permit the petitioner to withdraw his/her post-conviction petition, it must find that:

[T]he petitioner possesses the present capacity to appreciate the petitioner's position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether petitioner is suffering from a mental disease, disorder, or defect which may substantially affect the petitioner's capacity.¹⁰²

If the court determines that the petitioner is competent to withdraw the petition, then it will order the withdrawal of post-conviction proceedings.¹⁰³ Conversely, if the petitioner is found incompetent to withdraw the petition, post-conviction proceedings will continue. An order granting or dismissing the petition to withdraw post-conviction proceedings may be appealed as of right.¹⁰⁴ On appeal, the issue of competency will be reviewed as an issue of fact and the post-conviction court's finding will be presumed correct, unless the evidence in the record preponderates against it.¹⁰⁵ Even if post-conviction counsel has been dismissed by the court, counsel may nonetheless have standing to appeal whether the petitioner is competent to withdraw the petition.¹⁰⁶

F. Competency to Be Executed

¹⁰⁰ TENN. SUP. CT. R. 28 § 11(B)(3). At the hearing, the trial court must permit introduction of testimony, exhibits and evidence to determine petitioner's competency. *Id.*

¹⁰¹ *Id.*

¹⁰² TENN. SUP. CT. R. 28 § (11)(B)(1).

¹⁰³ TENN. SUP. CT. R. 28 § 11(A). An order by the post-conviction court granting or dismissing the petition to withdraw becomes final thirty days after its entry. *Id.*

¹⁰⁴ TENN. SUP. CT. R. 28 § 11(C). Rule 3 of the Tennessee Rules of Appellate Procedure reads, in relevant part, "[t]he defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding." TENN. R. APP. P. 3(B).

¹⁰⁵ TENN. SUP. CT. R. 28 § 11(C). For example, in *State v. Reid*, counsel on direct appeal for the petitioner filed a motion for stay of execution asserting that the petitioner was not competent to waive his post-conviction petition. *State v. Reid*, No. M1999-00803-SC-DDT-DD (Tenn. Apr. 22, 2003), available at <http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/reidPD/04222003/REID4-22-03orderdenyingstay.pdf> (last visited Nov. 6, 2006). In the order denying a stay of execution, the Tennessee Supreme Court found that the petitioner had "clearly indicated that he has no desire to pursue any post-conviction remedies. The reasons given for this choice--that he has lost confidence in the judicial system, and that he has been convicted of seven "egregious" homicides--are certainly not irrational." The Tennessee Supreme Court also found a mental health professional's letter attached to counsel's motion for a stay of execution without merit, stating that "neither the motion nor the letter present any truly new factual assertions that call into doubt Mr. Reid's present capacity to understand his legal position and options or to make a rational choice among these options...unless an adequate showing is made, the inmate 'is entitled to be free from being dragged about for mental examinations, hearings, and the like, in processes that he has not invoked, even if purportedly for his benefit.'" *Id.* (citing *West v. Bell*, 242 F.3d 338, 342 (6th Cir. 2001)).

¹⁰⁶ TENN. SUP. CT. R. 28 § 11(C).

The Tennessee Supreme Court prohibits the execution of an inmate who is incompetent.¹⁰⁷ In *Van Tran v. State*, the Tennessee Supreme Court adopted the “cognitive test” for determining competency to be executed, meaning that if an inmate lacks the mental capacity to understand the fact of the impending execution and the reason for it, s/he is not competent to be executed.¹⁰⁸

1. Filing Requirements

A death-row inmate may not challenge his/her competency to be executed until s/he has exhausted all state and federal remedies for testing the validity and constitutionality of the inmate’s conviction and sentence and the Tennessee Supreme Court has set an execution date upon motion of the Attorney General.¹⁰⁹ The inmate has ten days from the date of the Attorney General’s motion to set an execution date to file a response in which s/he may raise the issue of competency to be executed.¹¹⁰ If the defendant files a response raising the issue, then upon the setting of an execution date the Tennessee Supreme Court will remand the issue of competency to be executed to the trial court where the inmate was originally tried and sentenced.¹¹¹

Within three days of the Tennessee Supreme Court’s order to remand, the inmate must file a petition in the trial court asking that the execution be stayed due to present mental incompetence.¹¹² As soon as possible, and no less than three days after the inmate’s motion in the trial court, the Tennessee Attorney General must file a response.¹¹³ The trial court then has four days to decide if a hearing on the inmate’s competency is warranted.¹¹⁴

2. Required Threshold Showing and Hearing to Determine a Death-Row Inmate’s Competency to Be Executed

The burden is on the inmate to demonstrate that s/he is presently incompetent to be executed.¹¹⁵ This burden can be met by submitting affidavits, depositions, and medical reports from psychiatrists, psychologists or other mental health professionals.¹¹⁶ If the

¹⁰⁷ *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)).

¹⁰⁸ *Id.* at 266.

¹⁰⁹ *Id.* at 267.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 267-68. The inmate’s petition must be supported by affidavits, records or other evidence supporting the factual allegations of mental incompetence, information pertaining to any previous proceedings on the inmate’s competency, and information relating to mental health professionals available and willing to evaluate the inmate should the trial court determine that a hearing is required. *Id.*

¹¹³ *Id.* at 268. The State’s response must include information relating to mental health professionals available and willing to evaluate the inmate should the trial determine that a hearing is required. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 269.

¹¹⁶ *Id.* at 269. The Court notes that the evidence submitted in support of the request for a hearing cannot be “stale in the sense that it relates to the prisoner’s distant *past* competency or incompetency.” *Id.* Unsupported, conclusory assertions of a family member or an attorney representing the inmate will

inmate fails to satisfy the threshold showing for a hearing, the trial court must enter an order denying the petition, including detailed findings of fact and conclusions of law.¹¹⁷

If the trial court finds that the inmate has satisfied the threshold showing for a hearing on present incompetency, it must enter an order appointing at least one, and no more than two, mental health professionals from lists submitted by the parties to evaluate the inmate.¹¹⁸ The selected mental health professionals will evaluate the inmate and file written reports to the court within ten days of their appointment.¹¹⁹ The trial court alone will determine the issue of competency at a hearing that must be held within ten days of the written evaluation submissions.¹²⁰

There is a presumption of competency at the hearing, which the death-row inmate must overcome by a preponderance of the evidence.¹²¹ The hearing is adversarial in nature; the inmate must be given proper notice and afforded an opportunity to be heard, and s/he must be allowed to present all evidence material and relevant to the issue of competency, without regard to the rules of evidence.¹²² Within five days from the conclusion of the hearing, the trial judge must issue an order containing detailed findings of fact and conclusions of law, granting or denying the petition.¹²³

3. Appellate Review

The Tennessee Supreme Court automatically reviews the trial court's determination of an inmate's competency to be executed.¹²⁴ The record of the competency proceedings must be filed with the Tennessee Supreme Court within ten days of the trial court's order that either (1) denied a hearing on the grounds that the inmate has not made a threshold showing of incompetency; or (2) ruled upon a petition after a hearing was conducted.¹²⁵ The party challenging the trial court's finding has five days from the filing of the record to file a brief; the other party has five days from its opponent's filing to file its brief.¹²⁶ Oral argument ordinarily will not be granted to the parties and the Tennessee Supreme Court will expeditiously review the record and render a decision by summary order or opinion.¹²⁷

generally be insufficient. *Id.*; see also *Coe v. State*, 17 S.W.3d 193, 212 (Tenn. 2000) (finding that allegations that the prisoner is mentally ill are not sufficient to meet the threshold showing requirement).

¹¹⁷ *Van Tran*, 6 S.W.3d at 269.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 270. The Tennessee Supreme Court explicitly rejected an inmate's contention that a jury should decide whether the petitioner was competent to be executed. *Id.*

¹²¹ *Id.* at 270-71.

¹²² *Id.* at 271.

¹²³ *Id.* The Court instructs trial judges to set out the undisputed facts, assess the credibility of the witnesses and their opinions, and include findings as to the inmate's behavior during the hearing in the order. *Id.*

¹²⁴ *Id.* at 271-72.

¹²⁵ *Id.* at 272.

¹²⁶ *Id.*

¹²⁷ *Id.*

The trial court's finding on competency to be executed will be presumed to be correct unless the evidence in the record preponderates against it.¹²⁸ If a prisoner is found to be incompetent, the execution will be stayed.¹²⁹ If the inmate is found to be competent to be executed, subsequent incompetence claims will not be permitted unless the inmate, by motion and supporting affidavit of a mental health professional, convinces the Tennessee Supreme Court that there "has been a substantial change in the [inmate's] mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the [inmate's] competency to be executed."¹³⁰

If the inmate is found to be incompetent, the order staying the execution will direct the parties to file status reports with the Tennessee Supreme Court summarizing the inmate's mental condition every six months.¹³¹ If the reports indicate that the inmate has regained competency, the Court will remand the case to the trial court for a determination of competency. In that situation, the State will bear the burden of proving competency by a preponderance of the evidence.¹³²

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 273. The Tennessee Supreme Court recognized that there is need for legislation to clarify what is to be done with a death-row inmate who is found to be incompetent. *Id.* at 272. The T.C.A. provides the mechanism by which an inmate may be transferred from the Department of Corrections to a facility of the Department of Mental Health and Retardation, but these procedures may not apply to a death-row inmate whose execution has been stayed due to incompetency. *Id.*

II. ANALYSIS-MENTAL RETARDATION

A. Recommendation #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD).¹³³ Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.

The American Association on Intellectual and Developmental Disabilities (AAIDD)¹³⁴ defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”¹³⁵

Since 1990, the State of Tennessee has defined mental retardation as: (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of 70 or below and (2) deficits in adaptive behavior, (3) that manifest during the developmental period or by eighteen years of age.¹³⁶ Tennessee’s definition of mental retardation does not comport with that of the AAIDD because Tennessee sets a maximum IQ of 70 to define mental retardation and has adopted an overly restrictive definition of “adaptive behavior.”

Under the AAIDD definition of mental retardation, an individual must have an impairment in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not precise enough to identify the upper boundary of mental retardation and while experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, the definition also includes some individuals with IQ scores in the low to mid-70s.¹³⁷ The AAIDD states that “since the

¹³³ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) on Jan. 1, 2007. See http://www.aamr.org/About_AAMR/new_name.shtml.

¹³⁴ The American Association on Intellectual and Developmental Disabilities promotes progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities. See http://www.aamr.org/About_AAMR/mission_statement.shtml (last visited Jan. 22, 2007).

¹³⁵ American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Jan. 5, 2007).

¹³⁶ TENN. CODE. ANN. § 39-13-203(a) (2006).

¹³⁷ See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), available at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited July 31, 2006). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 7 n.18; see also American Association on Intellectual and Developmental Disabilities, Definition of Mental

standard error of measurement on most IQ tests is approximately 5, the ceiling may go up to 75.”¹³⁸ Thus, no state should impose an IQ maximum lower than 75.¹³⁹

Unlike the AAIDD definition of mental retardation, the State of Tennessee requires that a capital defendant exhibit an IQ of seventy or less in order to be found mentally retarded.¹⁴⁰ The Tennessee Supreme Court has explicitly rejected the claim that the Tennessee Code Annotated (T.C.A) should be interpreted to broadly exclude defendants from capital punishment whose IQ score *range* met seventy or below.¹⁴¹ Peculiarly, Tennessee adopts an IQ range for mental retardation that mirrors that of the AAIDD in a separate section of the T.C.A. and in various State publications. For example, the Tennessee Department of Mental Health and Developmental Disabilities uses an IQ score of seventy to seventy-five to define mental retardation in its training manual for law enforcement and procedural manual for judicial personnel,¹⁴² while the Mental Health Code of Tennessee contains no reference to a numerical IQ score in its definition of mental retardation.¹⁴³

Retardation, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Jan. 5, 2007). (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement,” thus potentially making the IQ ceiling for mental retardation rise to 75. However, “an IQ score is only one aspect in determining if a person has mental retardation.”); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) (“Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

¹³⁸ American Association on Intellectual and Developmental Disabilities, *The AAMR Definition of Mental Retardation*, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Jan. 5, 2007).

¹³⁹ This fact is reflected in *Atkins v. Virginia*, where the Court noted that “an IQ between 70 and 75” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002).

¹⁴⁰ TENN. CODE. ANN. § 39-13-203(a) (2006).

¹⁴¹ See *Howell v. State*, 151 S.W.3d 450, 457-58 (Tenn. 2004). The Court cited the clear and unambiguous language of section 39-13-203(a)(1) as prohibiting scores in a range above seventy to constitute mental retardation. *Id.* at 458.

¹⁴² SITA DIEHL, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES MANUAL, CRIMINAL JUSTICE RESPONSE TO PEOPLE WITH MENTAL ARRESTED OR INCARCERATED IN TENNESSEE 88 (2004), available at <http://www.state.tn.us/mental/cj/responsecurriculum.pdf> (last visited Nov. 20, 2006); see also MENTAL HEALTH IN TENNESSEE COURTS: A PROCEDURAL MANUAL FOR JUDGES, DEFENSE ATTORNEYS AND DISTRICT ATTORNEYS 13 (July 2006), (on file with author).

¹⁴³ See *Howell*, 151 S.W.3d at 458. The Tennessee Department of Mental Health and Developmental Disabilities defines mental retardation as “substantial limitations in functioning: [a]s shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use,

In addition to the requirement that a defendant exhibit an IQ score of seventy or less, the State of Tennessee's definition of mental retardation requires that a defendant exhibit "deficits in adaptive behavior."¹⁴⁴ In order to ensure that an individual is truly disabled and not simply a poor test-taker, the AAIDD definition of mental retardation includes adaptive behavior limitations, which produce real-world disabling effects on a person's life.¹⁴⁵ Under this definition, adaptive behavior is "expressed in conceptual, social, and practical adaptive skills" and focuses on broad categories of adaptive impairment, not service-related skill areas.¹⁴⁶

It is unclear how a capital defendant in Tennessee may demonstrate that s/he exhibits deficits in adaptive behavior. In 1994, the Tennessee Supreme Court held that, in the absence of any legislative definition, "adaptive behavior" should be construed in its "ordinary sense,"¹⁴⁷ meaning "the inability of an individual to behave so as to adapt to surrounding circumstances."¹⁴⁸ The Tennessee Court of Criminal Appeals has taken the Supreme Court's construction of adaptive behavior to mean that courts "must not become so entangled with the opinions of psychiatric experts that [they] lose sight of the nature of the criminal offense itself."¹⁴⁹ In determining whether an individual exhibits deficits in adaptive behavior, courts thus "cannot forget to examine the nature of the criminal conduct and the circumstances involved in that conduct."¹⁵⁰ In fact, the Court of Criminal Appeals has found that "the more complex the crime . . . the less likely that the person is mentally retarded."¹⁵¹

The AAIDD also requires that mental retardation be manifested during the developmental period, which generally is defined as up until the age of eighteen. This does not mean that an individual must have been IQ tested with scores in the mentally retarded range during the developmental period, but that there must have been manifestations of mental disability, which at an early age generally materialize as problems in the area of adaptive functioning.¹⁵² The age of onset requirement is used to distinguish mental retardation from other forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.¹⁵³ Like the AAIDD definition, the State of Tennessee requires that a defendant show that his/her mental retardation was manifested prior to the age of eighteen or during the developmental period,¹⁵⁴ which the Tennessee Court of Criminal

self-direction, health and safety, functional academics, leisure, and work; and [t]hat are manifested before eighteen (18) years of age." TENN. CODE ANN. § 33-1-101(17) (2006).

¹⁴⁴ TENN. CODE ANN. § 39-13-203(a)(2) (2006).

¹⁴⁵ Ellis, *supra* note 137.

¹⁴⁶ *Id.*

¹⁴⁷ *Smith*, 893 S.W.2d at 918.

¹⁴⁸ *Id.* at 918; *see also Van Tran*, 66 S.W.3d at 795 n.4 ("We refer to [the DSM IV] for the purpose of providing insight and background into mental retardation and not for the purpose of expanding upon or interpreting the statutory definition in Tennessee.").

¹⁴⁹ *Van Tran v. State*, 2006 WL 3327828, *25 (Tenn. Crim. App. Nov. 9, 2006) (unpublished opinion).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Ellis, *supra* note 137, at 9 n.27.

¹⁵³ *Id.* at 9.

¹⁵⁴ TENN. CODE ANN. § 39-13-203(a)(3) (2006).

Appeals has determined does not extend past the age of eighteen.¹⁵⁵ However, it is unclear how Tennessee courts determine whether mental retardation manifested before the age of eighteen if a defendant was not IQ tested as a juvenile.

Although the State of Tennessee requires that the mental retardation of a capital defendant have manifested prior to the age of eighteen, its definition of mental retardation does not comport with that of the AAIDD, or modern scientific understanding of mental retardation, as the State had adopted an overly restrictive definition of “adaptive behavior” and permits defendants with IQ scores above seventy to be sentenced to death. The State of Tennessee, therefore, is not in compliance with Recommendation #1.

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.

Apart from law enforcement personnel who transport involuntary committed individuals, the State of Tennessee is not required to provide training to other actors, such as police, judges, district attorneys, or defense counsel, on recognizing mental retardation in capital defendants or death-row inmates.

Tennessee law requires that the Department of Mental Health and Developmental Disabilities (Department) provide mental health crisis management training to law enforcement officers who transport individuals for involuntary commitment.¹⁵⁶ In order to fulfill this requirement, the Department instituted a training program covering a wide range of topics on the mental retardation and mental illness of criminal suspects and defendants.¹⁵⁷ The training also is offered on a voluntary basis to all police, correctional officers, probation officers, and other criminal justice personnel.¹⁵⁸

Local police officers in Tennessee are required to complete a Basic Law Enforcement Training Course under section 38-8-107(a) of the T.C.A.¹⁵⁹ In order to be certified as a law enforcement officer in the State of Tennessee, the Tennessee Peace Officers Standard and Training Commission (POST Commission) mandates that candidates complete a course consisting of at least 400 hours of training, including instruction on interviewing

¹⁵⁵ See *State v. Strode*, 2006 WL 1626919, *12 (Tenn. Crim. App. 2006) (unpublished opinion).

¹⁵⁶ TENN. ANN. CODE § 33-6-901(c) (2006).

¹⁵⁷ SITA DIEHL, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES MANUAL, CRIMINAL JUSTICE RESPONSE TO PEOPLE WITH MENTAL ARRESTED OR INCARCERATED IN TENNESSEE (hereinafter “TRAINING MANUAL”), at 26 (2004), available at <http://www.state.tn.us/mental/cj/responsecurriculum.pdf>.

¹⁵⁸ Telephone Interview by Sarah Turberville with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

¹⁵⁹ TENN. COMP. R. & REGS. R. 1110-4-.11 (Rules of Tennessee Peace Officer Standards and Training Commission; Approval of Law Enforcement Courses Conducted by Colleges and Universities for In-Service Credits), available at <http://tennessee.gov/sos/rules/1110/1110-04.pdf>.

witnesses and human relations.¹⁶⁰ The POST Commission rules do not specify that training on recognizing mental retardation in capital defendants and death-row inmates is a part of this course. While the Tennessee Law Enforcement Training Academy offers periodic specialized courses in “Interviews and Interrogations” and “Advanced Tactics for the Criminal Investigator,”¹⁶¹ no specific courses specifically related to the identification of mental retardation appear to be offered.

Additionally, although the State employs five capital case attorneys¹⁶² to assist trial judges in capital trials and post-conviction proceedings,¹⁶³ these attorneys are not required to receive any training to assist in recognizing mental retardation. There also is no requirement that capital defense attorneys receive special training to recognize mental retardation in their clients.¹⁶⁴

Because training in recognizing mental retardation is required only for law enforcement personnel who transport individuals for involuntary commitment, the State of Tennessee is not in compliance with Recommendation #2.

C. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

The State of Tennessee does not require attorneys who represent capital defendants to participate in any special training on recognizing mental retardation and understanding its impact. The State of Tennessee does, however, provide some resources, including

¹⁶⁰ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N Ch. 1110-2-.01(1); 1110-7-.01(1). The Tennessee POST Commission may waive this requirement under limited circumstances, such as a candidate’s prior experience as an officer in good standing. *See* RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N Ch. 1110-9.

¹⁶¹ Tenn. Dep’t of Commerce & Insurance, Tennessee Law Enforcement Training Academy, Calendar of Schools, *available at* <http://www.state.tn.us/commerce/let/tleta/calendar.html> (last visited Dec. 5, 2006).

¹⁶² One capital case attorney is appointed for each of the five Supreme Court Judicial Circuits. *See* John G. Morgan, Tennessee Comptroller, *Tennessee’s Death Penalty: Costs and Consequences* at 17 (2004).

¹⁶³ *Id.*

¹⁶⁴ According to Stephen Bush, Supervising Attorney for Special Litigation for the Shelby County Public Defender, there is no special training for capital defense attorneys to recognize mental retardation or mental illness in their clients, and/or to understand the impact that this mental retardation would have on the their client’s case. Telephone Interview by Sarah Turberville with Stephen Bush, Supervising Attorney for Special Litigation, Shelby County Public Defender in Memphis, Tennessee (Nov. 22, 2006).

investigative and expert services, to assist in the defense of a capital defendant who counsel believes may have mental retardation.

The Tennessee Supreme Court permits an indigent capital defendant to seek funding for expert or investigative services for trial, direct appeal, and post-conviction proceedings.¹⁶⁵ In any motion seeking funding for an expert or an investigator, the defendant must itemize:

- (1) The nature of the expert services requested and/or type of investigation to be conducted;
- (2) The name, address, qualifications, and licensure status of the person or entity proposed to provide the expert services and/or investigation;
- (3) A statement of the itemized costs of the expert services, including the hourly rate and the amount of any expected additional or incidental costs related to the services; or an itemized list of anticipated expenses for the investigation,
- (4) If applicable, the means, date, time, and location at which any expert services are to be provided; and
- (5) If applicable, the specific facts that suggest an investigation likely will result in admissible evidence.¹⁶⁶

If a motion satisfies these requirements, the court will grant an *ex parte* hearing to determine if “the requested services are necessary to ensure the protection of the defendant’s constitutional rights.” In other words, there must be a particularized need for the requested services and the hourly rate charged for the services must be reasonable in comparison to rates charged for similar services.¹⁶⁷ At trial and on appeal, a “particularized need” is demonstrated “when a defendant shows, by reference to particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant’s right to a fair trial.”¹⁶⁸ During post-conviction proceedings, a “particularized need” is demonstrated “when a petitioner shows, by reference to the particular facts and circumstances of the petitioner’s case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner is unable to establish a ground for post-conviction relief by other available evidence.”¹⁶⁹

If a capital defendant demonstrates a particularized need, the court may, in its discretion, grant prior authorization for expert and/or investigative services in a “reasonable amount.”¹⁷⁰ The Director of the Administrative Office of the Courts (AOC) must

¹⁶⁵ TENN. CODE ANN. § 40-14-207(b) (2006).

¹⁶⁶ TENN. SUP. CT. R. 13 § 5(b)(2), (3).

¹⁶⁷ TENN. SUP. CT. R. 13 § 5(b)(4), (c)(1).

¹⁶⁸ TENN. SUP. CT. R. 13 § 5(c)(2).

¹⁶⁹ TENN. SUP. CT. R. 13 § 5(c)(3).

¹⁷⁰ TENN. SUP. CT. R. 13 § 5(a)(1).

approve the court's order granting pre-authorization.¹⁷¹ If the Director denies the court's order, the Chief Justice of the Tennessee Supreme Court will review the claim and make a final determination as to whether prior approval for investigative and/or expert services will be granted.¹⁷² However, Tennessee law will not permit payment for hourly services over a statutory maximum amount, including: \$250 for Medical Services/Doctors; \$250 for Psychiatrists; \$150 for Psychologists; \$50 for Investigators for Guilt and Sentencing Phases; \$65 for Mitigation Specialists; and \$125 for Forensic Anthropologists.¹⁷³ In post-conviction proceedings, the court may not authorize more than a total of \$20,000 for all investigative services or a total of \$25,000 for all expert services, unless the defense demonstrates by clear and convincing evidence that extraordinary circumstances exist to permit funding in excess of these amounts.¹⁷⁴

Interestingly, while the State may offer the defendant flexibility in choosing an expert or investigator whose fees will be reimbursed by the court,¹⁷⁵ the defendant must make "every effort" to appoint an expert or investigator located within 150 miles of the court in which the case is pending.¹⁷⁶ Only upon a motion explaining unsuccessful efforts to obtain an investigator or expert within the 150-mile radius will the court authorize funding for an expert outside the 150-mile radius.¹⁷⁷ It should be noted that by limiting the available pool of investigators and experts, defense efforts to have a defendant's possible mental retardation properly evaluated and diagnosed may be hindered.

Unfortunately, we were unable to assess whether Tennessee courts are exercising their discretion to authorize compensation for necessary expert and investigative services, and whether the compensation, if such services are authorized, is sufficient to accurately evaluate the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation. Consequently, we are unable to determine whether the State of Tennessee is in compliance with Recommendation #3.

D. Recommendation #4

¹⁷¹ TENN. SUP. CT. R. 13 § 4(e)(4).

¹⁷² *Id.* These provisions of Tennessee Supreme Court Rule 13 appear to be in conflict with section 40-14-207(b), which states that "in capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, the court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary." TENN. CODE ANN. § 40-14-207(b) (2006).

¹⁷³ TENN. SUP. CT. R. 13 § 5(d)(1)(A)-(K).

¹⁷⁴ TENN. SUP. CT. R. 13 § 5(d)(6). The proceedings above do not apply to competency to be executed determinations. TENN. SUP. CT. R. 13 § 5(a)(1). At various points throughout a criminal proceeding, a court may appoint mental health experts to examine the defendant, however, because experts employed under these circumstances are not provided directly to defense counsel, they are not the type of resources contemplated by this Recommendation.

¹⁷⁵ TENN. SUP. CT. R. 13 § 5(a)(1). The Tennessee Supreme Court promulgated rules governing the payment of expert fees for indigent defendants pursuant to section 40-14-207 of the T.C.A.

¹⁷⁶ TENN. SUP. CT. R. 13 § 5(b)(1).

¹⁷⁷ *Id.*

For cases commencing after the United States Supreme Court’s decision in *Atkins v. Virginia*¹⁷⁸ or the State’s ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

The Tennessee Supreme Court allows, but does not require, that a defendant raise and adjudicate the issue of his/her mental retardation as a bar to execution prior to trial.¹⁷⁹ Accordingly, the State of Tennessee is in compliance with Recommendation #4.

E. Recommendation #5

The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

Section 39-13-203 of the T.C.A. requires a defendant to show, by a preponderance of the evidence, that s/he was mentally retarded at the time of the offense.¹⁸⁰ A defendant convicted prior to the enactment of section 39-13-203 also was allowed to show by a preponderance of the evidence that s/he was mentally retarded at the time of the offense.¹⁸¹ The State of Tennessee, therefore, is in compliance with Recommendation #5.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Tennessee Supreme Court has recognized that individuals with mental retardation are “less likely to withstand police coercion or pressure due to their limited communication skills, their disposition to answer questions so as to please the questioner rather than answer the question accurately, and their tendency to be submissive.”¹⁸² Nonetheless, the State of Tennessee has not adopted any laws, rules, or procedures requiring that special steps be taken to ensure that mentally retarded offenders are sufficiently protected during investigations and interrogations.

¹⁷⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁷⁹ *See State v. Smith*, 893 S.W.2d 908, 916 n.2 (Tenn. 1994).

¹⁸⁰ TENN. CODE ANN. § 39-13-203(c) (2006).

¹⁸¹ *See Howell*, 151 S.W.3d at 465.

¹⁸² *Van Tran*, 66 S.W.3d at 806-07.

Police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹⁸³ are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.¹⁸⁴ The CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.¹⁸⁵ Although written directives produced in an effort to comply with the CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to assess the extent to which law enforcement agencies across the State have adopted any such procedures.

Significantly, the Tennessee Bureau of Investigation (TBI), the State's primary criminal investigative agency, does not provide for the special treatment of mentally retarded individuals during custodial interrogations. The TBI's written policy on interrogation simply provides general safeguards on custodial interrogations by prohibiting a special agent from (1) "coerc[ing] a subject or inducing to a subject to participate in an interview;" (2) "mak[ing] assurances to the subject regarding what will transpire during any phase of the handling of the subject's case;" and (3) "taking any action of any type to force or induce a subject to make a statement or confession."¹⁸⁶ In contrast, the Tennessee Department of Mental Health and Developmental Disabilities' training manual, *Criminal Justice Response to People with Mental Illness Arrested or Incarcerated in Tennessee*, suggests that an arresting officer should "ask the suspect to explain each phrase of the rights statement in his or her own words" if the officer believes that the suspect does not understand the *Miranda* rights.¹⁸⁷

¹⁸³ Thirty-five police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). See CALEA Online, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Jan. 4, 2007) (use second search function, designating "U.S." and "Tennessee" as search criteria); see also CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

¹⁸⁴ COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1).

¹⁸⁵ *Id.* at 1-3 (Standard 1.2.3).

¹⁸⁶ TENNESSEE BUREAU OF INVESTIGATION WRITTEN POLICY 8-3-004 (revised June 28, 2004).

¹⁸⁷ SITA DIEHL, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES MANUAL, CRIMINAL JUSTICE RESPONSE TO PEOPLE WITH MENTAL ARRESTED OR INCARCERATED IN TENNESSEE 95 (2004), available at <http://www.state.tn.us/mental/cj/responsecurriculum.pdf>. (last visited Jan. 5, 2007).

Additionally, all police officers in Tennessee are statutorily mandated to complete a Basic Law Enforcement Training Course approved by the Tennessee Peace Officers Standard and Training Commission (POST Commission).¹⁸⁸ The POST Commission requires that candidates complete at least fifty hours of training in criminal and constitutional law and procedures, and twenty-five hours of training in interview techniques and interpersonal communications.¹⁸⁹ Although instruction on special procedures for mentally retarded suspects during police investigations and interrogations may be offered, the POST Commission rules do not specify that such instruction is mandatory.

Because it is unclear whether the State of Tennessee requires that special steps be taken to ensure that the *Miranda* rights of the mentally retarded are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we are unable to assess whether the State is in compliance with Recommendation #6.

G. Recommendation #7

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.

Courts can protect against “waivers” of rights, such as the right against compelled self-incrimination and the right to counsel, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant’s mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant’s mental disability.

Legal Test for Waiver of *Miranda* for Mentally Retarded Suspects

The Tennessee Supreme Court has held that the test for voluntariness of confessions under the Tennessee Constitution¹⁹⁰ is broader and more protective of individual rights than the test for voluntariness under the Fifth Amendment.¹⁹¹ The Tennessee Supreme Court has emphasized that the relinquishment of the right against self-incrimination must

¹⁸⁸ TENN. COMP. R. & REGS. R. 1110-4-.11 (Rules of Tennessee Peace Officer Standards and Training Commission; Approval of Law Enforcement Courses Conducted by Colleges and Universities for In-Service Credits), available at: <http://tennessee.gov/sos/rules/1110/1110-04.pdf>.

¹⁸⁹ RULES OF THE TENN. PEACE OFFICER STANDARDS AND TRAINING COMM’N Ch. 1110-7-.01(1)(b)(4), (7) (2003).

¹⁹⁰ ART. I § 9 of the Tennessee Constitution reads in relevant part “[t]hat in all criminal prosecutions, the accused...shall not be compelled to give evidence against himself.”

¹⁹¹ See *State v. Stephenson*, 878 S.W.2d 530, 544 (Tenn. 1994) (citing *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992)). The Fifth Amendment provides that “no person...shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. *Miranda v. Arizona* safeguards the right against compelled self-incrimination by requiring prior warnings, once a suspect is in custody and under interrogation, that the accused has a right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). *Miranda* requires that any waiver of these rights be made voluntarily, knowingly, and intelligently. *Id.*

be free from intimidation, coercion, or deception.¹⁹² Moreover, the waiver must be made with “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”¹⁹³

The Tennessee Supreme Court has held that mental impairments and mental retardation are factors to be considered in weighing whether or not a defendant made a knowing and intelligent waiver of his/her *Miranda* rights.¹⁹⁴ However, the Court notes that these factors must be considered as a part of the “totality of the circumstances,” which also include the “defendant’s age, background, level of functioning, reading and writing skills, prior experience with the criminal justice system, demeanor, responsiveness to questioning, possible malingering, and the manner, detail, and language in which the *Miranda* rights are explained.”¹⁹⁵ Mental retardation thus is not a *per se* bar to voluntary interrogations and confessions.¹⁹⁶

Legal Test for Waiver of Rights Guaranteed in a Criminal Proceeding

In order for a capital defendant to waive his/her rights, such as the right to counsel, Tennessee courts must, at a minimum, conduct some level of inquiry to determine whether the defendant is making a knowing and voluntary waiver.¹⁹⁷ If the defendant wishes to waive his/her right to counsel, the court must advise the defendant in open court of the right to counsel at every stage of the proceedings, and also determine whether the person has made a competent and intelligent waiver of the right by inquiring into “the background, experience and conduct of the person and such other matters as the court may deem appropriate.”¹⁹⁸ This line of inquiry may include questions about whether the

¹⁹² See *State v. Blackstock*, 19 S.W.3d 200, 208 (Tenn. 2000) (citing *State v. Stephenson*, 878 S.W.2d 530, 544-54 (Tenn. 1994) (rev’d on other grounds)).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The Court noted that there may be a level of deficiency so great it renders a defendant unable to make a knowing and intelligent waiver. *Id.*

¹⁹⁶ See *Van Tran*, 66 S.W.3d at 806.

¹⁹⁷ See *Farretta v. California*, 422 U.S. 806, 835 (1975) (holding that in order to represent himself, the accused must knowingly and intelligently forego those relinquished benefits). *State v. Carruthers* is the sole case in Tennessee in which a defendant was sentenced to death following a trial and sentencing in which he had represented himself. *State v. Carruthers*, 35 S.W.3d 516, 549-50 (Tenn. 2000). In *Carruthers*, the Tennessee Supreme Court found that the defendant had implicitly waived and forfeited his right to counsel by his uncooperativeness and threats toward the three sets of attorneys who had been appointed to his case. *Id.* at 549-51.

¹⁹⁸ TENN. CODE ANN. § 8-14-206(b) (2006); TENN. R. CRIM. P. 44(b). A knowing and intelligent waiver of the constitutional right to counsel must be the product of a thorough inquiry from the trial judge. See *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984) (citing *Van Moltke v. Gillies*, 322 U.S. 708, 723-24 (1948)) (finding that in light of the strong constitutional presumption against the waiver of the constitutional right to counsel “a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge’s responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter . . .”).

defendant suffers from any mental disability,¹⁹⁹ but it does not appear to require a determination as to whether a defendant's mental disability affects his/her ability to make a knowing and voluntary waiver of the right to counsel, apart from that which may have taken place to determine the defendant's competency to stand trial.²⁰⁰ Generally, if a court has determined that a defendant is competent to stand trial, such a finding will be a strong indicator that the defendant is competent to waive the right to counsel.²⁰¹

A defendant also may waive the right to present mitigating evidence during the penalty phase of a capital trial.²⁰² Because defense counsel face an ethical conflict between their professional and legal obligations when a defendant refuses the presentation of mitigating evidence, the Tennessee Supreme Court has set forth special safeguards to ensure that a defendant is making a knowing and intelligent waiver of this right.²⁰³ In addition to informing the defendant of his/her right to present mitigating evidence, the court must determine whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt and sentencing phases of the trial. The court also must inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances. Only after being assured that the defendant understands the importance of mitigation may the trial court accept the defendant's waiver.²⁰⁴ In at least one case, however, the Tennessee Supreme Court did not require that the trial court perform a separate competency determination from that which may have taken place pre-trial, nor was the trial court required to provide unequivocal or unambiguous instructions to the defendant who wished to waive the presentation of mitigating evidence.²⁰⁵

¹⁹⁹ See, e.g., *State v. Munsey*, 2004 WL 587642, *6 (Tenn. Crim. App. 2004) (unpublished opinion). In *Munsey*, a non-capital case, the trial court inquired about the mental health of the defendant who sought to waive his right to counsel. *Id.* The defendant stated that "he was 'mentally ill but not incompetent' and that he had been diagnosed with major depression, paranoid schizophrenia, and 'personality disorders.'" *Id.* After various other inquiries from the trial court relating to the defendant's case, background, and familiarity with the judicial process, and a continuance to allow a clinical psychologist hired by defense counsel to evaluate the defendant, the court permitted the defendant to proceed *pro se.* *Id.*

²⁰⁰ However, pursuant to the Tennessee Mental Health Code, the court, the defense, or the State may request and the court may issue an order for a mental evaluation of the defendant if there is reason to believe the defendant is not competent to stand trial or if there is a question about the defendant's mental capacity at the time of the offense. TENN. CODE ANN. § 33-7-301 (a)(1) (2006); see also *State v. Munsey*, 2004 WL 587642, *6 (Tenn. Crim. App. 2004) (unpublished opinion). In *Munsey*, a defendant waived his right to counsel after the trial court permitted a continuance of the proceedings so that the defendant could be evaluated by a clinical psychologist who had been hired by the defense. *Id.*

²⁰¹ See *State v. Hough*, 2002 WL 1483202, *5 (Tenn. Crim. App. 2002) (unpublished opinion) (citing *Godinez v. Moran*, 509 U.S. 389, 398 (1993)) (finding that "we reject the notion that competence to plead guilty or to waive counsel must be measured by a standard that is higher (or even different from) the [competency to stand trial] standard").

²⁰² See *Zagorski v. State*, 983 S.W.2d 654, 660 (Tenn. 1998).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ In *State v. Smith*, the Tennessee Supreme Court rejected the defendant's claim that he was not competent to waive his right to present mitigation. *State v. Smith*, 993 S.W.2d 6, 15-16 (Tenn. 1999). In *Smith*, the jury returned a death sentence at the defendant's third sentencing hearing (after the defendant's death sentence had twice been vacated and remanded by the Tennessee Supreme Court). *Id.* at 9-10. Although the trial court in *Smith* did not have the benefit of *Zagorski*, the Tennessee Supreme Court found

Regardless of whether a defendant can make a knowing and intelligent waiver of any rights in a criminal proceeding, Tennessee law prohibits him/her from waiving direct appeal.²⁰⁶ Outside the realm of official court proceedings, the Governor's power to grant clemency as guaranteed in the Tennessee Constitution is absolute and may be granted over the inmate's objection.²⁰⁷ Furthermore, in rare circumstances, the medical staff of the institution in which a death-row inmate is incarcerated may petition the Board of Probation and Parole for clemency if the inmate is not competent to do so on his/her own behalf.²⁰⁸

Based on this information, it appears that the State of Tennessee is in compliance with Recommendation #7.

the procedure utilized in *Smith* as "substantially similar" to that set out in *Zagorski*. *Id.* at 14. Despite advice from counsel against waiving mitigation on multiple occasions, the defendant insisted that the defense "rest the case and waive argument." *Id.* at 15. The trial court then "attempted to question [the defendant] to ensure that he understood his rights and the potential consequences of his decision," however the defendant would respond only through counsel. *Id.* The trial court stated to the defendant "if you cease putting on mitigating evidence and you instruct your counsel to not argue and they do both, they don't put on any other proof, and they do not argue in your benefit, in the court's opinion this jury will almost certainly return with a verdict of death by electrocution. And, I guess I've only seen perhaps twelve or thirteen death penalty cases tried and most of them did not result in a death penalty verdict. But, from those that I have seen in five or six death penalty verdicts, actually about half; but if your attorneys follow your instructions that will be the very likely result. Do you understand that, sir?" *Id.* Through his attorney, the defendant responded "yes." *Id.*

²⁰⁶ TENN. CODE ANN. § 39-13-206(a)(2) (2006). This section provides that within ninety days after judgment in which a defendant has been sentenced to death, the trial court will certify the record and the trial clerk transmit the trial record to the Court of Criminal Appeals. *Id.*

²⁰⁷ TENN. CONST. art. III, § 6; *see also* Carroll v. Raney, 953 S.W.2d 657, 659-60 (Tenn. 1997) ("The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the Legislature cannot, directly or indirectly, take it from his[/her] control, and vest it in others, or authorize or require it to be exercised by any other officer or authority.").

²⁰⁸ RULES OF THE TENNESSEE BOARD OF PAROLES 11-1-1-.15(1)(a)(2), (e). In these cases, "a complete medical report and a detailed statement of the emergency situation will accompany the Board's report to the Governor." *Id.*

III. ANALYSIS - MENTAL ILLNESS

A. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.

As is the case with mental retardation, apart from law enforcement personnel who transport involuntary committed individuals, the State of Tennessee is not required to provide training on recognizing mental illness in capital defendants or death-row inmates to other actors, such as police, judges, prosecutors, or defense counsel.²⁰⁹

However, in practice, a number of law enforcement agencies have chosen to provide training on the recognition of mental illness in defendants and incarcerated individuals.²¹⁰ According to a 2002 survey by the Tennessee Department of Mental Health and Developmental Disabilities (Department), sixty-eight of ninety-five county law enforcement agencies/jail systems in Tennessee reported conducting mental health training for correctional staff.²¹¹ Twenty-three jail systems/law enforcement agencies reported that their staff participated in one hour of training by the Tennessee Corrections Institute each year and eight reported that their staff participated in over ten hours of training each year.²¹² Topics of the mental health training varied, but the majority of the trainings included information on the diagnosis, symptoms, and behaviors of mental illness.²¹³ Also, some local police departments have created “Crisis Intervention Teams” (CIT), which are specially trained in mental illness and assist individuals with mental illness prior to and as they enter the criminal justice system.²¹⁴

²⁰⁹ See *supra* notes 156-164 and accompanying text.

²¹⁰ The CRIMINAL JUSTICE TASK FORCE REPORT ON MENTAL HEALTH & CRIMINAL JUSTICE IN TENNESSEE noted “It would be impossible to fully document the variations in the administration of justice in the 31 judicial districts of Tennessee.” Report from the Criminal Justice Task Force on Mental Health and Criminal Justice in Tennessee (2000), at 13, available at www.state.tn.us/mental/mhs/CJTFRptJan2001.pdf (last visited Nov. 21, 2006).

²¹¹ SITA DIEHL & ELIZABETH HILAND, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES SURVEY, A SURVEY OF COUNTY JAILS IN TENNESSEE: FOUR YEARS LATER, A DESCRIPTIVE STUDY OF SERVICES TO PEOPLE WITH MENTAL ILLNESS AND SUBSTANCE ABUSE PROBLEMS, (COUNTY JAIL SURVEY), at 19, February 2003, available at <http://tennessee.gov/mental/policy/surveymay2003.pdf>.

²¹² *Id.*

²¹³ Training topics included (1) diagnosis, symptoms, behaviors (60.3%); (2) procedures for crisis intervention (44.1%); (3) custodial and non-custodial options (26.5%); (4) community health services (38.2%); (5) statutory and legal issues (41.2%); and (6) values/ attitudes (44.1%). *Id.*

²¹⁴ Telephone Interview by Sarah Turberville with Major Sam Cochran, Crisis Intervention Team Coordinator, Memphis Police Department in Memphis, Tenn. (Nov. 18, 2006). CITs exist in Memphis, Tennessee and Johnson City, Tennessee. Telephone Interview with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

The Department of Mental Health and Developmental Disabilities also has established statewide offices for criminal justice/mental health liaisons to assist all actors within the criminal justice system in identifying mental illness in defendants and incarcerated individuals.²¹⁵ The Department also provides voluntary training on mental illness to other actors in the criminal justice system, such as judges, district attorneys, or defense counsel.²¹⁶

Because training in recognizing mental illness is required only for law enforcement personnel who transport individuals for involuntary commitment, the State of Tennessee is not in compliance with Recommendation #1.

B. Recommendation #2

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The State of Tennessee has not adopted any laws, rules, or procedures requiring that special steps be taken to ensure that mentally ill offenders are sufficiently protected during investigations and interrogations.

Police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)²¹⁷ are required to adopt a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.²¹⁸ Although written directives produced in an effort to comply with the CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally ill individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to

²¹⁵ Telephone Interview by Sarah Turberville with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006); *see also* Tennessee State Government Website, Criminal Justice and Mental Health in Tennessee, available at <http://www.state.tn.us/mental/cj/cj2.html> (last visited Jan. 4, 2007).

²¹⁶ Telephone Interview with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

²¹⁷ Thirty-five police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Tennessee have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Jan. 4, 2007) (use second search function, designating "U.S." and "Tennessee" as search criteria); *see also* CALEA Online, About CALEA, at <http://www.calea.org/newweb/AboutUs/Aboutus.htm> (last visited Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

²¹⁸ CALEA STANDARDS, *supra* note 184, at 1-3 (Standard 1.2.3).

assess the extent to which law enforcement agencies, CALEA certified or otherwise, have adopted any such procedures.

Significantly, as discussed in the Mental Retardation Analysis, the Tennessee Bureau of Investigation (TBI), the State's primary criminal investigative agency, does not provide for the special treatment of mentally ill individuals during custodial interrogations.²¹⁹ In contrast, the Tennessee Department of Mental Health and Developmental Disabilities' training manual, *Criminal Justice Response to People with Mental Illness Arrested or Incarcerated in Tennessee*, suggests that an arresting officer should "ask the suspect to explain each phrase of the rights statement in his or her own words" if the officer believes that the suspect does not understand the *Miranda* rights.²²⁰

It is important to note that in locales in which a Crisis Intervention Team (CIT) exists, the CIT may divert a mentally ill individual suspected of a misdemeanor or minor felony from police custody to a mental health facility for treatment.²²¹ However, if a mentally ill individual is suspected of a major felony or a capital offense, the individual will not be diverted to a mental health facility, and instead will remain in police custody.²²²

Because it is unclear whether the State of Tennessee requires that special steps be taken to ensure that the *Miranda* rights of a mentally ill individual are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we are unable to assess whether the State is in compliance with Recommendation #2.

C. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

²¹⁹ TBI Policy # 8-3-004 RE: Interview and Interrogation Policy, 6 June 2004.

²²⁰ SITA DIEHL, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES MANUAL, CRIMINAL JUSTICE RESPONSE TO PEOPLE WITH MENTAL ARRESTED OR INCARCERATED IN TENNESSEE 95 (2004), available at <http://www.state.tn.us/mental/cj/responsecurriculum.pdf>. (last visited Jan. 5, 2007).

²²¹ Telephone Interview by Sarah Turberville with Major Sam Cochran, Crisis Intervention Team Coordinator, Memphis Police Department in Memphis, Tenn. (Nov. 18, 2006).

²²² *Id.*; Telephone Interview by Sarah Turberville with Amanda Smart, Criminal Justice/Mental Liaison for Shelby County, Tenn. (Nov. 17, 2006).

The State of Tennessee does not require defense attorneys to receive training on mental illness.²²³ Still, the State has taken steps to assist defense attorneys representing defendants with mental illness. For example, the Department of Mental Health and Developmental Disabilities has issued a procedural manual on mental illness for defense attorneys, prosecutors, and judges. The manual encompasses a range of mental illness issues, including symptoms and types, legal standards, and processes for mental evaluations of a defendant.²²⁴ The manual also includes sample forms that all parties may use to facilitate mental health evaluations and legal processes related to mental illness.²²⁵

The State also provides resources, including expert and investigative services, to assist capital defense attorneys in diagnosing and proving a defendant's mental disabilities.²²⁶ If a defendant demonstrates a "particularized need" for investigative or expert services and that the fees for such services are reasonable, the court may, in its discretion, authorize funds for these services.²²⁷ In addition, the court will permit reimbursement without prior authorization for some administrative expenses if they are "reasonably necessary to the representation of the indigent party."²²⁸ For a detailed discussion on the mechanisms by which a defendant may seek to have the court authorize funds for a mental health evaluation and the amounts the court may authorize, see Recommendation #3 in the Mental Retardation Analysis.²²⁹

Although the State of Tennessee has made information on mental illness available to defense counsel, training is not required. Additionally, while the State of Tennessee provides resources to determine whether a capital defendant suffers from mental illness, it is uncertain whether the funding amounts are sufficient to accurately evaluate and diagnose mental illness in capital defendants. Consequently, we cannot assess whether the State of Tennessee is in compliance with Recommendation #3.

D. Recommendation #4

²²³ Telephone Interview by Sarah Turberville with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

²²⁴ MENTAL HEALTH IN TENNESSEE COURTS: A PROCEDURAL MANUAL FOR JUDGES, DEFENSE ATTORNEYS AND DISTRICT ATTORNEYS (July 2006), (on file with author). Criminal Justice/Mental Health Liaisons in each of the judicial districts in Tennessee distribute the procedural manual to all judges, prosecutors, and defense lawyers who request it, and the Tennessee Mental Health Department has distributed the manual at the Public Defender's Conference in October 2006 and the District Attorney's Conference. Telephone Interview by Sarah Turberville with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

²²⁵ MENTAL HEALTH IN TENNESSEE COURTS: A PROCEDURAL MANUAL FOR JUDGES, DEFENSE ATTORNEYS AND DISTRICT ATTORNEYS (July 2006), (on file with author).

²²⁶ See generally TENN. SUP. CT. R. 13 § 5.

²²⁷ TENN. SUP. CT. R. 13 § 5(b)(4), (c)(1).

²²⁸ TENN. SUP. CT. R. 13 § 4(a)(3).

²²⁹ See *supra* notes 165-177 and accompanying text.

Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State.

When the court approves funding for a mental health expert to evaluate an indigent defendant, as discussed in Recommendation #3,²³⁰ this expert should only serve the needs of the defendant. No provisions in the T.C.A. or the Tennessee Supreme Court rules explicitly state that this expert is required to assist the defense confidentially. However, because a motion to provide funding for expert services to the defense is made *ex parte* and the expert is required to only serve the defendant, it is likely that the evaluations and matters discussed remain confidential.²³¹

The court also may appoint an expert to evaluate a capital defendant or a death-row inmate in a variety of other instances in Tennessee. For example, counsel for the defense, the State, or the court, *sua sponte*, may have the defendant evaluated on an outpatient basis whenever there is a question about the defendant's competency to stand trial or a question about his/her mental capacity at the time of the offense.²³² This evaluation, by statute, must be performed by a community health center or licensed practitioner designated to serve the court by the Commissioner of the Mental Health and Developmental Disabilities (Commissioner).²³³ If neither can perform the evaluation, a state-run or state-supported hospital designated by the Commissioner to serve the court will evaluate the defendant.²³⁴ The criteria that the Commissioner uses in selecting a specific community center, licensed practitioner, or state-affiliated hospital, however, are unspecified. Similarly, if there is a question about a death-row inmate's competency to proceed with post-conviction relief, the court may order the defendant to be evaluated on an outpatient basis.²³⁵ Again, the criteria that the court uses to select an expert to complete this evaluation are unspecified.

In addition, the prosecutor may move the court to order a pre-trial evaluation when the defendant gives notice that s/he intends to rely on an insanity defense and/or produce expert mental health testimony for any reason (i.e., to negate intent).²³⁶ In this event, the court will "authorize the district attorney general to designate a qualified expert to examine the defendant" when (1) an evaluation by a state-supported entity could not provide the necessary evaluation, or (2) if the court "determines that examination of the defendant by a qualified expert for the [S]tate is necessary to adjudicate fairly the matter before it."²³⁷ The process by which the State selects such an expert is unclear, but

²³⁰ See *supra* notes 165-177 and accompanying text.

²³¹ TENN. SUP. CT. R. 13 § 5(a)(1).

²³² TENN. CODE ANN. § 33-7-301(a)(1) (2006).

²³³ *Id.*; see also TENN. CODE ANN. § 33-1-101(5) (2006) (defining "commissioner").

²³⁴ TENN. CODE ANN. § 33-7-301(a)(1) (2006).

²³⁵ TENN. CODE ANN. § 33-7-301(a)(4) (2006).

²³⁶ TENN. R. CRIM. P. 12; TENN. CODE ANN. § 33-7-301(a)(2) (2006).

²³⁷ TENN. CODE ANN. § 33-7-301(a)(2)(A), (B) (2006).

mental health evaluations ordered by the court on the State's motion generally take place in the Forensic Services Division of the Middle Tennessee Mental Health Institute.²³⁸

Furthermore, if a question regarding a death-row inmate's competency to withdraw his/her post-conviction relief arises, the court will appoint up to two mental health professionals, chosen from a list submitted by the State and counsel for the petitioner, to evaluate the inmate.²³⁹ Under this arrangement, the court has the ability to nominate the expert(s) on the basis of his/her qualifications, but is not mandated to do so.²⁴⁰

In sum, when the court approves funding for a mental health expert to evaluate an indigent defendant, this expert is generally selected by the defendant and serves the defense, not the court. However, in instances in which the court appoints the expert to examine the defendant, it often makes this choice based upon the State's selection of an expert rather than the qualification of the expert. For this reason, the State of Tennessee is only in partial compliance with Recommendation #4.

E. Recommendation #5

Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

As discussed in Recommendation #3, capital defendants and post-conviction petitioners on death row may request that the court provide funds for expert services if the funds are "necessary to ensure that the constitutional rights of the defendant are properly protected."²⁴¹ This requires that the defendant demonstrate a "particularized need" for the services and that the fees for such services are reasonable.²⁴² As discussed under the Mental Retardation Analysis, the defense must explain, itemize, and detail the costs of any expert services and the Tennessee Supreme Court has set maximum hourly rates that a court may approve for expert services, including a maximum of \$25,000 for all expert services during post-conviction proceedings for a death-row inmate.²⁴³

As in Recommendation # 3 of the Mental Retardation Analysis, we were unable to assess whether Tennessee courts are exercising their discretion to authorize compensation that is sufficient to attract the services of well-trained experts and to ensure thorough

²³⁸ DAVID LOUIS RAYBIN, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE § 14.19 (2006) (Regarding sanity evaluations, "[t]he initial evaluation is conducted by community based mental health agencies. For incarcerated defendants, the more intense evaluations are usually conducted in Nashville at the forensic unit of the Middle Tennessee Mental Health Center").

²³⁹ TENN. SUP. CT. R. 28 § 11(B)(2).

²⁴⁰ *Id.*

²⁴¹ TENN. CODE ANN. § 40-14-207(b) (2006).

²⁴² TENN. SUP. CT. R. 13 § 5(c)(1).

²⁴³ *See supra* notes 165-177 and accompanying text.

evaluations. We, therefore, are unable to determine whether the State of Tennessee is in compliance with Recommendation #5.

F. Recommendation #6

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Recommendation #7

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. [A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.]

The State of Tennessee excludes from the death penalty defendants who have mental retardation at the time of the offense, defined as (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient score of seventy or below and (2) deficits in adaptive behavior that (3) manifest during the developmental period, or by eighteen years of age.²⁴⁴ This prohibition does not include defendants who have mental disabilities other than mental retardation, such as dementia or traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning, but may manifest after the age of eighteen.²⁴⁵ This exclusion also does not apply to individuals who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to conduct, or to conform their conduct to the requirements of the law. As a result, the State of Tennessee is not in compliance with either Recommendation #6 or Recommendation #7.

The Tennessee Death Penalty Assessment Team recommends that the State of Tennessee should adopt a law or rule: (a) forbidding death sentences and executions with regard to

²⁴⁴ TENN. CODE. ANN. § 39-13-203(a) (2006).

²⁴⁵ The Tennessee Court of Criminal Appeals has expressly rejected the notion that the “developmental period” in which mental retardation manifests may extend past the age of eighteen. *See State v. Strode*, 2006 WL 1626919, *11 (Tenn. Crim. App. 2006) (unpublished opinion). Similarly, the Court of Criminal Appeals had found that mental retardation which occurs in adults as a result of untreated mental illness and drug abuse does not meet the requirements of section 39-13-203 to exempt these persons from capital punishment. *See Van Tran v. State*, 2006 WL 3327828, *25-*27 (Tenn. Crim. App. Nov. 9, 2006) (unpublished opinion).

everyone who, at the time of the offense, had significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury; (b) forbidding death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired their capacity (i) to appreciate the nature, consequences or wrongfulness of their conduct, (ii) to exercise rational judgment in relation to their conduct, or (iii) to conform their conduct to the requirements of the law; and (c) providing that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the inmate’s own case.

G. Recommendation #8

To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6-#7 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.

Section 39-13-204 of the T.C.A. contains two relevant mitigating circumstances that permit a capital jury to consider the defendant’s mental condition: (1) “[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;” and (2) “[t]he capacity of the defendant to appreciate the wrongfulness of the defendant’s conduct or to conform the defendant’s 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 affected the defendant’s judgment.”²⁴⁶ The T.C.A. also allows the jury to consider “[a]ny other mitigating factor that is raised by the evidence produced by either the prosecution or defense, at either the guilt or sentencing hearing.”²⁴⁷ However, neither the T.C.A. nor the Tennessee Criminal Pattern Jury Instructions require or recommend that judges instruct capital juries that mental illness is a mitigating, not aggravating, factor.

Section 39-13-204(j)(8) of the T.C.A., permitting juror consideration of the defendant’s mental state at the time of the offense, instructs jurors that use of mental mitigation during the sentencing phase is distinct from the standard required to establish a defense to the crime.²⁴⁸ Jurors are instructed that mitigation exists if the defendant’s mental condition “substantially affected the defendant’s judgment,” and need not be legally

²⁴⁶ TENN. CODE ANN. § 39-13-204(j)(2), (8) (2006).

²⁴⁷ TENN. CODE ANN. § 39-13-204(j)(9) (2006).

²⁴⁸ TENN. CODE ANN. § 39-13-204(j)(8) (2006).

sufficient to have established a defense to the crime.²⁴⁹ However, the State of Tennessee does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor.

Because the State of Tennessee does not require that jurors be instructed, when applicable, on any of the three issues contained within this recommendation, the State is not in compliance with Recommendation #8.

H. Recommendation #9

Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.

The State of Tennessee does not require and has not promulgated any pattern jury instruction to communicate to jurors that (1) the defendant is under medication for a mental disorder or disability; (2) this affects the defendant's perceived demeanor; and (3) such demeanor should not be considered in aggravation. Accordingly, the State of Tennessee is not in compliance with Recommendation #9.

I. Recommendation #10

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

Recommendation #10 is divided into two parts; the first, which is identical to Recommendation #7 in the Mental Retardation section, pertains to the existence of state mechanisms that protect against waivers resulting from an inmate's mental disability, and the second pertains to the specific mechanism of "next friend" petitions.

As discussed in the Mental Retardation Analysis, the State of Tennessee has in place certain mechanisms to protect individuals with a mental disorder or disability against waivers of counsel and mitigation at sentencing.²⁵⁰ For further discussion on this topic, see Recommendation #7 in the Mental Retardation Analysis.²⁵¹

²⁴⁹ *Id.*

²⁵⁰ *See supra* notes 191-208 and accompanying text.

²⁵¹ *See id.*

Apart from the mechanisms discussed in Recommendation #7 in the Mental Retardation Analysis, Tennessee Supreme Court Rule 28 requires courts to determine competency when a death-row inmate seeks to withdraw his/her post-conviction relief.²⁵² If the inmate has waived or withdrawn his/her post-conviction relief due to mental incompetence that existed prior to the expiration of the statute of limitations, the inmate may seek to toll the statute of limitations.²⁵³ If the petitioner shows by clear and convincing evidence that s/he is not competent to proceed with post-conviction relief, the court may appoint a “next friend,” or guardian *ad litem*, if necessary, to pursue post-conviction relief on the petitioner’s behalf.²⁵⁴ However, it is in the court’s discretion as to whether a “next friend” may be appointed to pursue post-conviction relief on behalf of the petitioner.²⁵⁵

Tennessee courts employ a similar process to determine whether a petition for post-conviction relief may be filed or initiated by a “next friend” on behalf of an inmate who had not signed or verified the petition under oath due to mental incompetence.²⁵⁶ If there is a showing that the putative next friend is acting in the best interest of the petitioner and there is a *prima facie* showing that the death-row inmate is not competent to proceed with post-conviction relief, additional hearings may be held for a determination of mental competency.²⁵⁷

If at anytime the court has reason to believe a petitioner is not competent to proceed with post-conviction relief, the court may also order the defendant to submit to a mental evaluation.²⁵⁸

Although the State of Tennessee protects against waivers that are a product of mental illness, it is within the court’s discretion as to whether a “next friend” will be appointed to act on behalf of a petitioner who wishes to forego or terminate post-conviction proceedings due to their mental incompetence. Consequently, the State of Tennessee is only in partial compliance with Recommendation #10.

J. Recommendation #11

²⁵² TENN. SUP. CT. R. 28 § 11(A).

²⁵³ See *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001).

²⁵⁴ See *Reid v. State*, 197 S.W.3d 694, 706 (Tenn. 2006); see also *Holton v. State*, 201 S.W.3d 634-35, (Tenn. 2006) (requiring a “next friend” to make a *prima facie* showing of inmate’s mental incompetence, identical to that required to toll the statute of limitations, if inmate has not signed the petition or verified the allegations of his/her incompetence under oath).

²⁵⁵ See *Reid*, 197 S.W.3d at 706 (stating that “a finding of incompetence requires neither a partial nor complete stay of the proceedings. Instead, the trial court *should* appoint, *if necessary*, a ‘next friend’ or guardian *ad litem* to pursue the action on behalf of the petitioner.”) (emphasis added).

²⁵⁶ See *Holton*, 201 S.W.3d at 634.

²⁵⁷ See *id.* (citing *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001)) (describing the initial showing a petitioner must make in order for the court to grant a hearing to determine whether the statute of limitations for post-conviction relief should be tolled due to the prisoner’s mental incompetence). For a detailed discussion on the procedures that a mentally incompetent death-row inmate or his/her “next friend” may utilize to have the death sentence set aside, see factual discussion “Mental Illness: C. Competency to Waive and Proceed with Post-Conviction Proceedings.”

²⁵⁸ TENN. CODE ANN. § 33-7-301(a)(4) (2006).

The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.

The State of Tennessee does not permit the courts to stay post-conviction proceedings for an incompetent death-row inmate. In fact, the Tennessee Supreme Court has held that a stay of post-conviction proceedings “advances neither the interest of the State nor, to the extent the claims presented are valid, the interest of the petitioner.”²⁵⁹ The Tennessee Supreme Court also has rejected a “bifurcated approach” in post-conviction proceedings in which the court would permit purely legal and factual claims that do not require the inmate’s input to proceed and factual claims that require the inmate’s input to be held in abeyance until the inmate returned to competency.²⁶⁰ Instead, if a court finds that the death-row inmate is not competent to proceed with post-conviction relief, it will not stay the proceedings, but may appoint a “next friend” to pursue post-conviction relief on behalf of the inmate.²⁶¹

In addition, the State of Tennessee does not allow a death-row inmate to have his/her sentence reduced if there is no significant likelihood of restoring the inmate’s capacity to participate in post-conviction proceedings in the foreseeable future.²⁶²

Because the State of Tennessee will not stay post-conviction proceedings, even if the defendant is incompetent, and will not reduce a death-row inmate’s sentence even if there is no significant likelihood of restoring the inmate’s capacity to participate in post-conviction proceedings, the State of Tennessee is not in compliance with Recommendation #11.

K. Recommendation #12

The jurisdiction should provide that a death-row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled,

²⁵⁹ *Reid*, 197 S.W.3d at 706.

²⁶⁰ *Id.* at 705.

²⁶¹ *Id.* at 706.

²⁶² A “next friend” must pursue the action on behalf of the inmate unless the competency rises to the level of incompetent to be executed.

the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.

Recommendation #12 is divided into two parts; the first pertains to the State's standard for determining whether a death-row inmate is competent to be executed, and the second pertains to the State's sentencing procedures after a death-row inmate has been found incompetent to be executed.

Standard for Competency to Be Executed

In order for a death-row inmate to be "competent" for execution under Recommendation #12, the death-row inmate must not only "understand" the nature and purpose of the punishment, but s/he also must "appreciate" its personal application in the death-row inmate's own case—that is, why it is being imposed on the death-row inmate.

The State of Tennessee prohibits the execution of any death-row inmate found incompetent to be executed.²⁶³ A death-row inmate in Tennessee may not raise the issue of competency to be executed until s/he has exhausted all state and federal remedies for challenging the validity and constitutionality of his/her conviction and sentence and the Tennessee Supreme Court has set an execution date.²⁶⁴ However, once those preconditions are met, a death-row inmate will be found incompetent to be executed if the inmate lacks the mental capacity to understand the fact of the impending execution and the reason for it.²⁶⁵ The existence of a mental disorder does not automatically translate into a finding of incompetency to be executed.²⁶⁶ For example, the Tennessee Supreme Court has found a defendant competent to be executed when the death-row inmate believed that his execution would allow him to leave prison, walk around, go live with his wife and daughter, and may temporarily make him become "one of these balls of fire that speaks to people."²⁶⁷

Sentencing Procedures after a Finding of Incompetence

In cases in which an inmate is found incompetent to be executed, the State of Tennessee does not require that the inmate's sentence be reduced to life imprisonment without the possibility of parole or life imprisonment. In fact, the Tennessee Supreme Court has called for clarifying legislation to determine what is to be done with a prisoner who is

²⁶³ See *Van Tran v. State*, 6 S.W.3d 257, 267 (Tenn. 1999).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 266.

²⁶⁶ See *Coe v. State*, 17 S.W.3d 193, 221 (Tenn. 2000).

²⁶⁷ *Id.* at 219-20; see also *Thompson v. State*, 134 S.W.3d 168, 180-81 n.11-n.14 (Tenn. 2004) (finding inmate competent to be executed despite the fact that the defendant believed he "buried one million dollars, two gold bars, one Grammy award, and two stock certificates from Quaker State and Apple Computers near a church in Georgia," that he would not be executed because of his status as an "officer" in the Navy and as such was "federal property" that could not be executed by the State, that his military record would allow for a "mistrial" and that he would be discharged and go live in Hawaii, and that he is a Klingon and that his soul will go to Valhalla).

found incompetent to be executed.²⁶⁸ In the absence of such legislative direction, the Tennessee Supreme Court requires that if the inmate is found to be incompetent, the order staying the execution will direct the parties to file status reports summarizing the inmate's mental condition every six months with the Tennessee Supreme Court.²⁶⁹ If the reports indicate that the inmate has regained competency, the Court will remand the case to the trial court for a determination of competency in which the State will bear the burden of proving competency by a preponderance of the evidence.²⁷⁰

Conclusion

The State of Tennessee does not require that a death-row inmate possess a rational appreciation of the reason why s/he is to be executed in order to be found competent to be executed. Additionally, in cases in which the inmate is found incompetent to be executed, the State does not reduce the inmate's death sentence to life imprisonment without the possibility of parole. Based on this information, the State of Tennessee is not in compliance with Recommendation #12.

The Tennessee Death Penalty Assessment Team, therefore, makes the following recommendation: The State of Tennessee should adopt a rule or law providing that when a finding of incompetence is made after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence will be reduced to life without the possibility of parole.

L. Recommendation #13

Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.

The Tennessee Department of Mental Health and Developmental Disabilities (Department) has established criminal justice/mental health liaisons throughout the State, in public defender offices, jails, and in mental health facilities, to work within the criminal justice system to identify mental illness in incarcerated persons, as well as to provide diversion programs for persons entering the criminal justice system.²⁷¹ In 2003, the Department's *Survey of County Jails* recommended judicial best practices, including

²⁶⁸ See *Van Tran*, 6 S.W.3d at 272. The T.C.A. provides the mechanism by which an inmate may be transferred from the Department of Corrections to a facility of the Department of Mental Health and Developmental Disabilities, but these procedures may not apply to a death-row inmate whose execution has been stayed due to incompetency. *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Telephone Interview by Sarah Turberville with Liz Ledbetter, Mental Health Program Specialist, Tennessee Department of Mental Health and Developmental Disabilities in Nashville, Tenn. (Nov. 21, 2006).

training for judicial personnel (judges, prosecutors, and attorneys) on mental illness and recommending that judicial personnel inform defense counsel of a defendant's mental condition and treatment resources.²⁷² In its publications for judicial personnel and law enforcement, the Department also provided "Best Practices" for mental health care in jails, Crisis Intervention Teams, and for case management for individuals within the criminal justice system suffering from severe mental illness.²⁷³

Since the State of Tennessee has developed and disseminated models of best practices on ways to identify and protect mentally ill individuals within the criminal justice system and works collaboratively with entities devoted to protecting mentally disabled persons, the State is in compliance with Recommendation #13.

²⁷² SITA DIEHL AND ELIZABETH HILAND, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES SURVEY, A SURVEY OF COUNTY JAILS IN TENNESSEE: FOUR YEARS LATER, A DESCRIPTIVE STUDY OF SERVICES TO PEOPLE WITH MENTAL ILLNESS AND SUBSTANCE ABUSE PROBLEMS, 21-23, February 2003, *available at* <http://tennessee.gov/mental/policy/surveymay2003.pdf> (last visited Nov. 21, 2006).

²⁷³ MENTAL HEALTH IN TENNESSEE COURTS: A PROCEDURAL MANUAL FOR JUDGES, DEFENSE ATTORNEYS AND DISTRICT ATTORNEYS 84-94 (July 2006), (on file with author).

APPENDIX 1

**Race and Death Sentencing in Tennessee
1981-2000**

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Concerns about the possibility of racial bias in death sentencing in the United States have been voiced for several decades. In the 1972 decision in *Furman v. Georgia*, which (in effect) struck down all existing death penalty statutes in the U.S., Justice Marshall rested his concurring decision in large part on concerns that capital punishment was discriminatorily applied against black defendants.¹ Since 1972 there have been several research studies that have continued to examine the possible effects of a defendant's or victim's race on death sentencing decisions.² In this report, we focus our attention on the State of Tennessee to see if contemporary death sentencing decisions are correlated with the racial characteristics of defendants and/or victims, or with the region of the State in which the homicide occurred.

At least on the surface, American death sentencing patterns today appear to be even more strongly correlated with defendant's race than they were before the *Furman* decision. Between 1930 and 1972 there were 3,859 executions in the U.S., 54.6 percent of which claimed the lives of black defendants. Among executions for homicides during that period, 1,664 (49.9 percent) were of white defendants and 1,670 (50.1 percent) were of black defendants.³ Today we measure defendant's race and ethnicity more precisely, breaking down minority groups into black, Hispanic, Native American and Asian categories. Among those on death row as of July 1, 2006, 1,525 (45.3 percent) were white and 1,840 (54.7 percent) were nonwhite.⁴ Therefore, if we compare the races of

¹ *Furman v. Georgia*, 408 U.S. 238, 374-66 (1972).

² See U.S. GEN. ACCT. OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57 (1990), at 5. For a review of studies done since the GAO Report, see David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIMINAL LAW BULLETIN 194 (2003).

³ U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, 1976. National Prisoner Statistics Bulletin SD-NPS-CP-5 (1977), at 13.

⁴ NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. 1 (2006),

those executed for homicide between 1930 and 1967 and the races of those on death row today, the nonwhite proportion has actually increased from 50.1 percent to 54.7 percent.⁵

This does not prove racial bias, but certainly raises flags and questions.

This report focuses on Tennessee, where no comprehensive research has studied the possibility of racial biases in death sentencing since the time of *Furman*. In the following pages we describe a study that we conducted to ascertain if the race of homicide defendants and victims is correlated with contemporary death penalty decisions in Tennessee.

Methodology

To study the possible relationships between the races of homicide suspects and victims and death penalty decisions, researchers must begin by comparing two groups of suspects and victims: those involved in cases in which the death penalty is imposed, and those involved in homicides that do not result in a death sentence. Should rates of death sentencing vary between races of suspects and victims (e.g., if higher rates of death sentencing are found among those who kill whites than those who kill blacks, for example), researchers must then examine legally relevant factors to ascertain if such factors account for the different rates between races. In a similar manner, comparisons of death sentencing rates can also be examined across other dimensions of interest to policy makers. For this report, we examine differences across different regions of the state of Tennessee and across different time periods.

http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2006.pdf (last visited Dec. 4, 2006).

⁵ However, among the 1,057 inmates executed between 1977 and the end of 2006, 43 percent (n= 454) were nonwhite; whites are a higher proportion of those executed since 1977 (57 percent) than their 2006 population on death row (45.3 percent). See Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=5&did=184> (last visited Jan. 7, 2007).

To allow us to make comparisons between all homicide suspects and the subset of those suspects who were ultimately sentenced to death, information was collected on 1) all homicide suspects associated with homicides committed in Tennessee over the twenty-year study period (1981 through 2000) where the races of both the offender(s) and victim(s) were either white or black,⁶ and 2) the subset of all those homicides which ended with a defendant being sentenced to death. This information was collected from the following two data sources:

1. Supplemental Homicide Reports (SHRs): The Supplemental Homicide Reports are the product of the FBI's national data collection system for all homicide incidents reported to local law enforcement agencies. SHR reports on homicides are collected by local police agencies throughout the United States. These agencies report the SHR data to the FBI either directly or through their state's crime reporting program. Eventually, information on each homicide collected through the SHR reporting system is included in the FBI's Uniform Crime Reports.⁷ While the SHR reports do not record the suspects' or victims' names or the specific date of the homicide, they do include the following information: the month, year, and county in which the homicide occurred; the age, gender, race, and ethnicity of the suspects and victims; the victim-suspect relationship; the weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).⁸ Since local law enforcement agencies usually

⁶ There were a total of 7,238 homicide suspects reported via SHR reports in Tennessee over the period 1981 to 2000. Eighty-one involved homicide incidents where either a victim or suspect was not white or black. These 81 cases were removed from our sample, leaving us with a final sample of 7,157 homicide suspects for analysis. Homicides where either a victim or suspect was not white or black are excluded because they constitute too few cases to analyze when the appropriate control variables are incorporated into the analysis.

⁷ See NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, LEARN MORE ABOUT THE SUPPLEMENTARY HOMICIDE REPORTS, <http://www.icpsr.umich.edu/NACJD/SDA/shr7699d.html> (last visited Dec. 22, 2006).

⁸ *Id.*

report these data long before the suspect has been convicted (or sometimes even before the suspect has been arrested), these data are for homicide “suspects,” not arrested defendants or convicted offenders.⁹

2. Death Sentence Data Set: Information on all cases that ended in a death sentence for murders committed in Tennessee during the study period was obtained and checked by the Tennessee Death Penalty Assessment Team (“the Team”). A total of 138 defendants were sentenced to death over the 20 year study period. The Team obtained the majority of this information from Tennessee “trial judge reports.” Tennessee law requires trial judges to complete trial judge reports in each case in which the defendant was convicted of first-degree murder.¹⁰ The trial judge report, which is a multi-page questionnaire, requires judges to provide information on a number of issues, including the race of the victim, the aggravating and mitigating circumstances, and the date of the offense.¹¹ To confirm the accuracy of the trial judge reports, the Team compared the reports with data compiled by The Tennessee Justice Project (“Tennessee Justice Project”). The Team also relied on the Tennessee Justice Project data in cases in which the trial judge report was not filed or was missing pertinent information. Finally, in cases in which the Tennessee Justice Project data was insufficient, the Team reviewed Tennessee court decisions and contacted defense attorneys to obtain the necessary information. Once the Team gathered all of this information, it was sent to Professor

⁹ *Id.*

¹⁰ TENN. SUP. CT. R. 12(1). Rule 12 reports also must be completed for first-degree murder cases which have been “remanded by the appellate court for retrial and/or resentencing” or in which the defendant pled guilty. *Id.*

¹¹ TENN. SUP. CT. R. 12, Report of Trial Judge in First Degree Murder Cases. Although the trial judge report does not ask for the race of the defendant, it does contain questions that require the judge to compare the racial composition of the jury with the defendant’s race. *Id.* The report specifically contains the following questions: (1) What percentage of the population of the county from which the jury was selected is the same race as the defendant; and (2) Were members of defendant’s race represented on the jury. *Id.*

Paternoster who, with the assistance of two graduate students, entered the data into a SPSS file, checked it for accuracy by comparing the SPSS file back to the original data sources, and corrected any inaccuracies. Specifically, the variables that were double checked for accuracy were the race(s) of the suspect(s) and victim(s), the number of victims, whether there were additional felonies that accompanied the homicide, the county of offense, and the year of the offense.

In addition to information on the races of suspects and victims, both data sets collected information on legally relevant factors that are known to be important (and legitimate) in death penalty decisions. For this analysis, we examined two of the most important legally relevant aggravating factors that are related to the decision of who is sentenced to death: 1) whether the crime took the life of more than one victim, and 2) whether the homicide involved an accompanying felony, such as a rape or a robbery. Considering these two aggravating factors allowed us to focus our analysis on the question of who is sentenced to death among all those who commit what most would agree are truly some of the “worst of the worst” homicides.¹² With these two variables, we were able to classify each homicide in both the SHR and the Death Sentence Data Set as involving zero, one, or two potentially aggravating factors. In addition, in order to look for potential variations in death sentencing by geography, we classified the county of occurrence for each homicide in terms of the three major administrative divisions (East, Middle and West) that Tennessee counties are grouped into pursuant State law.¹³

¹² As we will see *infra*, the presence of one or both of these aggravating factors is a strong predictor of who is sentenced to death in Tennessee. In other research, we have found that these two factors also are important predictors of who is sentenced to death in California. Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA LAW REVIEW 1, 23-4 (2005).

¹³ Tennessee Code Annotated Title 4, Chapter 1, Part 2; *see also* <http://www.state.tn.us/sos/bluebook/online/section5/counties.pdf> (last visited December 27, 2006).

Finally, each homicide incident was also classified by the decade in which the homicide occurred (*i.e.*, 1981-1990 or 1991-2000). This allowed us to examine whether any patterns of death sentencing changed over time.

To conduct the analysis of death sentencing patterns, we merged the SHR “suspect” Data Set with the Death Sentence Data Set by matching cases based on victim’s race (white or black), suspect’s race (white or black), aggravating circumstances (none, one, or two), time period (1981-1990 vs. 1991-2000), and major administrative region of Tennessee (Eastern, Middle or Western counties). In effect, this procedure involved identifying which of the 7,157 cases in the SHR data ended with a death sentence. We were unable to match one of the 138 death penalty cases with a corresponding case in the SHR data set.¹⁴ In order to include the case in the analysis, we constructed a new case for this homicide and added it to the SHR data, thereby increasing our sample of SHR homicide suspects from 7,157 to 7,158. Other researchers who have used this matching method have also encountered similar problems in matching because of occasional (minor) errors in the SHR data. For example, Gross and Mauro noted that their efforts to match SHR data with death penalty cases created a problem when “[o]ften more than one SHR case would correspond to a given death row case; however, since this matching was done only for the purpose of analyzing data on variables that were reported in both sources, it did not matter whether a particular death row case was identified with a unique SHR case.”¹⁵ In other words, if two homicides in

¹⁴ The lack of a matching case in the SHR data set occurs because of either a failure of the police to report the homicide to the SHR reporting program or reporting a case with several variables missing that are needed for matching.

¹⁵ SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 38-39 (1989).

the SHR data base have identical characteristics, it does not matter which is flagged as a case in which the defendant was sentenced to death.

Results

As shown in Table 1, we identified 7,158 homicide suspects in Tennessee who allegedly committed offenses between January 1, 1981, and December 31, 2000. Of these, 5,536 (77.34 percent) had neither of our aggravating factors present, 1,559 (21.78 percent) had one (either a multiple murder or a murder involving one or more contemporaneous felonies), and 63 (.88 percent) had both aggravating factors present. For homicide incidents with neither aggravator present, .019 of those who killed whites and .004 of those who killed blacks were sentenced to death, indicating that those who killed whites were 4.75 times more likely to be sentenced to death than those who killed blacks ($.019 \div .004$). Among those cases where one aggravating factor is present, .063 of those who killed whites and .020 of those who killed blacks were sentenced to death, a ratio of 3.15 ($.063 \div .020$). Where there are two aggravating factors present, .341 of those who killed whites and .182 of those who killed blacks were sentenced to death, a ratio of 1.87 ($.341 \div .182$).¹⁶ However, although these differences are large, the low number of cases in which two aggravating factors are present (63) prevents the differences from attaining statistical significance.

Tables 1a and 1b subdivide the information presented in Table 1 by decade. There was a dramatic decrease in death sentences over the two decades, falling from 88 in 1981-90 (Table 1a) to 50 in 1991-2000 (Table 1b). Comparing Tables 1a and 1b, it can be seen that the victim's race effect is much larger in the 1981-1990 data than it is in

¹⁶ Pearson Chi-Square = .1788, which is not statistically significant.

the data from 1991-2000. In cases where no aggravating factors are present, in 1981-1990 those who were suspected of killing whites were 5.40 times more likely to be sentenced to death than those who were suspected of killing blacks ($.027 \div .005$), but the comparable ratio for the period 1991-2000 is 2.00 ($.008 \div .004$). In cases with one aggravating factor present, in the earlier decade those suspected of killing whites were 4.23 times more likely than those suspected of killing blacks to be sentenced to death ($.089 \div .021$), a ratio that drops to 2.21 for 1991-2000 ($.042 \div .019$). In the period 1981-1990, 42.9 percent of those suspected of killing whites in cases with two aggravating factors were sentenced to death, but none of those suspected of killing blacks were sentenced to death. By 1991-2000, this death sentencing rate among the two groups is roughly equal. In Tables 1a and 1b, the differences in death sentencing for homicides with white vs. black victims are statistically significant for five of the six comparisons (two categories of decade by three categories of aggravating circumstances), with those who kill whites more likely than those who kill blacks to be sentenced to death in every one of these five categories (1981-1990 with zero, one, or two aggravators and 1991-2000 for zero and one aggravator).

Table 2 examines more specific forms of potential race-related disparities in death sentencing rates by combining both the race of the suspect/defendant and the race of the victim. It can be seen that adding the suspect/defendant's race does not have a strong effect in improving the ability of the victim's race to explain who is sentenced to death. That is, the "Totals" rows at the bottom of Table 2 show that those who kill whites are more likely to be sentenced to death than those who kill blacks, but once the victim's race is considered, there are relatively small differences between the death sentencing rates of

white and black suspects (.027 of the blacks suspected of killing whites were sentenced to death compared to .036 of the whites suspected of killing whites; .008 of the blacks suspected of killing blacks were sentenced to death compared to .011 of the whites suspected of killing blacks). Overall, whites killing whites are slightly more likely to be sentenced to death than blacks killing whites (.036 vs. .027), and whites killing blacks are slightly more likely to be sentenced to death than blacks killing blacks (.011 vs. .008). Interpretation of the patterns of death sentencing by race of the suspect and victim controlling for aggravating factors is limited by the fact that a number of the cells in the table had expected frequencies of less than 5, and Chi Square tests of significance become less reliable below this threshold. Nevertheless, the highest death sentencing rates are found among whites suspected of killing whites in cases where both aggravating factors are found (.371). In cases where either zero or one aggravating circumstances are present, the differences in death sentencing rates between the four categories of suspect and victim's races are statistically significant. However, in cases where both aggravators are present, the differences in death sentencing rates are not statistically significant.

Tables 2a and 2b arrange the data from Table 2 by decade. These tables show that higher death sentencing rates for blacks suspected of killing whites where neither aggravating factor is present is entirely attributable to cases from 1981-1990, where 8.7 percent of such cases ended with a death sentence. Among cases where whites were suspected of killing other whites where both the aggravating factors are present, there are high death sentencing rates in both decades (.444 in 1981-1990 and .294 in 1991-2000). Statistically significant differences are found between death sentencing rates for races in

1981-1990 where zero or one aggravators are present, but in 1991-2000 only for cases where one aggravator is present.

Table 3 examines potential changes in death sentencing rates over time. This Table reinforces the point that there was a significant drop in death sentencing rates in Tennessee in the 1990s compared to the 1980s. From 1981-1990, 2.5 percent of the homicides ended with a death sentence, but this fell to 1.4 percent over the period 1991-2000. In other words, the death sentencing rate was approximately 1.8 times higher in the 1980s than in the 1990s ($.025 \div .014$).¹⁷

Table 4 shows that this decline in death sentencing rates over time occurred only among the less aggravated cases. Homicide incidents with zero or one associated aggravating factors showed significant declines in death sentence rates between the two decades. Only for homicide incidents with two aggravating factors was there no statistically significant change in death sentence rates between 1981-1990 and 1991-2000. This indicates that in the most aggravated cases, death sentencing rates were relatively stable over the two decades.

Table 4 also shows the importance of the two aggravating factors we have measured in predicting the probability of a death sentence. As shown in the last column of Table 4, one percent of the cases with no aggravating factors ended with a death sentence, as did 4 percent of the cases with one aggravating factor and 28.6 percent of the cases with two aggravating factors. Therefore, these aggravating factors can serve as

¹⁷ One possible contributor to this decline was the fact that “Life Without Parole” sentences became possible in Tennessee in 1993. See Tenn. Code Ann. § 39-13-204(a) (Supp. 1993). Nationally, death sentences increases from 2,682 in the period 1981-1990 to 2,882 in 1991-2000. See Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment 2002* (Bureau of Justice Statistics NCJ 201848) (Nov. 2003), at 14.

important control variables, allowing us to assess race and regional effects among cases with similar levels of aggravation.

Table 5 explores the question of whether or not there is geographical variation in death sentencing rates. For this analysis, homicide incidents that occurred in the East and Middle region counties were grouped into one region and compared with death sentencing rates from counties in the West region.¹⁸ Overall, death sentencing rates are roughly similar, with 2.2 percent of the homicides in the East/Middle Region ending with a death sentence, compared to 1.8 percent of the homicides in the West. But when broken down by decade, we can see that major decline in Tennessee death sentencing between the two decades is almost entirely attributable to a decline in death sentencing rates in the East/Middle Tennessee counties. Death sentence rates for East/Middle Tennessee counties showed a statistically significant decline from .033 in 1981-1990 to .011 in 1991-2000, whereas in West counties there was a change of only .020 to .017, a difference that is not statistically significant. In addition, the East/Middle region showed the highest death sentence rates in the 1981-1990 period (3.3 percent of the homicides in the East/Middle region ended with death sentences vs. 2 percent for those in the West). In the 1991-2000 period, the West counties showed a slightly higher death sentencing rate than the rest of the state (1.7 percent for the West region vs. 1.1 percent for the East/Middle region). The regional differences in death sentencing rates in the 1990s, however, are small, and not statistically significant. Finally, the decline in death sentence rates that occurred in the East/Middle region was not a function of shifts in the

¹⁸ There were 364 homicide suspects in Tennessee SHR data for the period 1981 to 2000 that did not identify the county where the homicide incident occurred. As a result, there are only 6,794 homicide suspects available for geographic analyses that rely on grouping regions (i.e., East, Middle and West) by counties.

aggravating factors associated with homicide incidents occurring in this region (see Table 6).

Tables 7a and 7b examine death sentence rates by the race of victims and offenders controlling for region (i.e., East/Middle vs. West) and decade. For the period 1981-1990 (Table 7a), both regions had high death sentencing rates for white-victim homicides. In East/Middle Tennessee, death sentencing rates were .041 for blacks suspected of killing whites and .047 for whites suspected of killing whites, and in West Tennessee, .070 of the blacks suspected of killing whites and .060 of the whites suspected of killing whites were sentenced to death. For the 1991-2000 period (Table 7b), in both regions, the highest rate of death sentencing was for whites suspected of killing whites. These results are limited by the fact that a number of the cells in the table had expected frequencies of less than 5 and Chi Square tests of significance become less reliable below this threshold. Nonetheless, the data do support the conclusion that for both decades (1981-1990 and 1991-2000) and for both regions of the State (West and East/Middle), the race differences in death sentencing rates are statistically significant.

Tables 8a and 8b eliminate the suspect/defendant's race, pinpointing the relationship between the victim's race and death sentencing by region and by decade.¹⁹ In both decades and regions (West and East/Middle), death sentencing rates are higher for those suspected of killing whites than for those suspected of killing blacks. In Table 8a it can be seen that in the period 1981-1990 in the East/Middle region, those suspected of killing whites were 4.70 times more likely to be sentenced to death than those suspected of killing blacks (.047 ÷ .010). In West Tennessee, those suspected of killing whites

¹⁹ Focusing on only race of victim reduces the number of cells in the table and increasing the likelihood of falling below the threshold of 5 for expected frequencies for the Chi Square test.

were 10.66 times more likely to be sentenced to death than those suspected of killing blacks (.064 ÷ .006). Table 8b presents analogous data from 1991-2000. Here it can be seen that in East/Middle Tennessee, those suspected of killing whites were 3.40 times more likely to be sentenced to death than those suspected of killing blacks (.017 ÷ .005), with a roughly similar ratio of 3.08 in western Tennessee (.037 ÷ .012).

To examine the combined effects of victim's and offender's race, region, and aggravating circumstances on death penalty decisions in Tennessee, a multivariate statistical technique was used. For the analysis of dichotomous dependent variables (such as death sentence vs. no death sentence), the appropriate statistical technique is logistic regression analysis.²⁰ Table 9 presents the results of the logistic regression analysis for the period 1991-2000. The independent variables are all entered into the analysis as dichotomous measures. Thus, where there was one aggravating circumstance or two aggravating circumstances, such data were entered as dichotomous variables. Cases with neither aggravating circumstance present were left out of the equation so they could be used as the reference or comparison category. Similarly, variables measuring the racial combinations of victims and suspects were entered into the analysis as

²⁰ As we have explained elsewhere, "Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case is 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, $y = \ln(P / (1-P))$ and $(1) \ln(y) = \hat{\alpha}_0 + X\hat{\alpha} + \xi_i$ where $\hat{\alpha}_0$ is an intercept, $\hat{\alpha}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ξ_i is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of 1 means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor." Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OREGON LAW REVIEW 39, 59 (2002).

dichotomous variables: one for white suspects and white victims, a second for white suspects and black victims, and a third for black suspects and white victims. Cases with black suspects and black victims were left out of the equation so they could be used as the reference or comparison category. For Region we coded all counties in the East/Middle region as 1 and the West region as 2.

Table 9 presents the estimated effect of a single independent variable, controlling for the effects of all other variables, using the exponentiated value of the Beta (β) coefficient, which is the logistic regression beta coefficient, $\text{Exp}(\beta)$. The results of the analysis show there are four statistically significant factors that help explain who is sentenced to death over this ten year period. The $\text{Exp}(\beta)$ in Table 9 shows that the odds of receiving a death sentence for homicide cases with one aggravating circumstance increase by a factor of 7.553 over those cases with no aggravating circumstances, controlling for the other independent variable. The odds of receiving a death sentence for homicide cases with two aggravating circumstances present increase by a factor of 77.998 over those with no aggravating circumstances, again controlling on all the other independent variables. In addition, Table 9 shows that the odds of receiving a death sentence for homicide cases where the suspect is white and the victim is white increase by a factor of 5.747 (relative to the reference group of black suspect/black victim homicides), controlling on the other independent variables. The other two combination of victims' and suspects' race (i.e., black on white homicides and white on black homicides) are not statistically significant predictors of death sentence decisions in Tennessee. Overall, the logistic analysis shows that homicide cases with higher levels of aggravating circumstances are statistically more likely to receive the death sentence in

Tennessee, and that white-on-white homicides are more likely than black-on-black homicides to result in a death sentence, even after the level of homicide aggravation is statistically controlled. Finally, the odds of a death sentence in the East/Middle region increase by a factor of 2.40 over cases in the West region.

Conclusions

The data indicate that the probability of a death sentence increases with the number of aggravating factors present. Table 1 shows that one percent of Tennessee homicides with neither of our aggravating factors present ended with a death sentence, compared to 4 percent of the cases with one aggravator and 28.6 percent of the cases with two aggravators. We also saw in Table 1 that those who kill whites are more likely to be sentenced to death than those who kill blacks in homicides with zero or one aggravating factor present. However, because of the lower number of cases where both aggravators are present (63), the difference in death sentence rates between white and black victim homicides with two aggravators (.341 vs. .182), though large, is not statistically significant. The data therefore do not allow us to conclude that there are victim race effects among cases with the highest level of aggravation.

There was a significant drop in the number of death sentences from 1981-1990 to 1991-2000. In the 1980s there were 88 death sentences, or 63.8 percent of the total of 138 death sentences observed over the twenty year study period. In the 1980s, 2.47 percent of all homicides resulted in a death sentence ($88 \div 3,567$); in the 1990s, this proportion fell to 1.4 percent ($50 \div 3591$). Table 1a shows that in the 1980s, when death sentencing was more common, regardless of the level of aggravation, those who killed

whites were more likely to be sentenced to death than those who killed blacks. In the 1990s, the race-of-victim effect is not statistically significant among the cases where two aggravators are present (Table 1b), but is still present among the two groups of less aggravated homicides. In addition, among cases with zero or one aggravator, the relationship between victim's race and death sentencing in the 1990s (although still statistically significant) is lower than in the 1980s.

Tables 2, 2a, and 2b show that adding the suspect/defendant's race adds little to the ability to predict death sentences. Overall whites killing whites are slightly more likely to be sentenced to death than blacks who kill whites, and whites who kill blacks are slightly more likely to be sentenced to death than are blacks who kill blacks, but the biggest differences are between those who kill whites and those who kill blacks, regardless of race.

Tables 3 and 4 focused on the decline in death sentencing rates over time. The decrease was not observed among cases with both aggravating factors present. Among cases with no aggravators, a death sentence was three times more likely in the 1980s than in the 1990s ($.015 \div .005$), and among cases with one aggravator present, death sentences were twice as likely in the 1980s as in the 1990s ($.058 \div .029$). Table 5 shows that the decline in death sentencing in Tennessee is due mostly to a decline in death sentences in the East and Middle region, not in the West. In the East/Middle region, 3.3 percent of the cases from the 1980s ended with death, compared to only 1.1 percent in the 1990s. Table 6 shows that the decline in death sentencing in the East/Middle region between the two decades is consistent regardless of the level of aggravation of the cases.

Tables 8a and 8b combine victim's race, region, and decade. These data show that for both regions and both decades, those who kill whites are more likely than those who kill blacks to be sentenced to death. Again, the race differences for both regions were stronger in the 1980s, but are still statistically significant for the 1990s. Overall, the results presented in Tables 8b and 9 (which uses logistic regression analysis to control for the presence of either aggravating factors) show that regardless of which region in the State a homicide occurs, the victim's race remains a statically significant factor in death sentence outcomes.

Table 1a
Sentencing Outcome by Victim's Race by Number of Aggravating Factors
1981-1990 (n=3,567)

		White Victim	Black Victim	Total	
χ^2 Sig. ²² ,	Aggravating Factors				
		Sentence			
		Not Death	1,240	1,630	2,870
	Zero	Death	35	8	43
		TOTAL	1,275	1,638	2,913
	Proportion Death Sentences	.027	.005	.015	
$p < .001$	-----				
	Not Death	306	283	589	
One	Death	30	6	36	
	TOTAL	336	289	625	
	Proportion Death Sentences	.089	.021	.058	
$p < .001$	-----				
	Not Death	12	8	20	
Two	Death	9	0	9	
	TOTAL	21	8	29	
	Proportion Death Sentences	.429	.0	.310	
$p = .033$ ²³					

²² Fisher's Exact Test (2-sided)

²³ 1 cell had an expected count of less than 5.

Table 1b
Sentencing Outcome by Victim's Race by Number of Aggravating Factors
1991-2000 (n=3,591)

		White Victim	Black Victim	Total
Aggravating Factors	Sentence			
	Not Death	989	1,620	2,609
Zero	Death	8	6	14
	TOTAL	997	1,626	2,623
	Proportion Death Sentences	.008	.004	.005
<hr/>				
One	Not Death	392	515	907
	Death	17	10	27
	TOTAL	409	525	934
	Proportion Death Sentences	.042	.019	.029
<hr/>				
Two	Not Death	15	10	25
	Death	5	4	9
	TOTAL	20	14	34
	Proportion Death Sentences	.250	.286	.265

²⁴ Fisher's Exact Test (2-sided)

²⁵ One cell had an expected count of less than 5.

Table 2
Sentencing Outcome by Suspect/Defendant-Victim's Race
by Number of Aggravating Factors
1981-2000 (n=7,158)

		WkW ²⁶	WkB ²⁷	BkW ²⁸	BkB ²⁹	Total	χ^2 Sig.
Aggravating Factors	Sentence						
	Not Death	2,007	129	222	3,121	5,479	
	Zero						
	Death	34	1	9	13	57	
	TOTAL	2,041	130	231	3,134	5,536	
	Proportion Death Sentences	.017	.008	.039	.004	.010	p < .001 ³⁰

	Not Death	326	50	372	748	1,496	
One	Death	41	1	6	15	63	
	TOTAL	367	51	378	763	1,559	
	Proportion Death Sentences	.112	.020	.016	.020	.040	p < .001 ³¹

	Not Death	22	2	5	16	45	
Two	Death	13	0	1	4	18	
	TOTAL	35	2	6	20	63	
	Proportion Death Sentences	.371	.0	.167	.200	.286	p = .362 ³²
=====							
OVERALL TOTALS	Not Death	2,336	181	599	3,885	7,020	
	Death	89	2	16	32	108	
	Total	2,444	183	615	3,917	7,158	
	Proportion Death Sentences	.036	.011	.027	.008	.015	

²⁶ White kills White.

²⁷ White kills Black.

²⁸ Black kills White.

²⁹ Black kills Black.

³⁰ 2 cells had an expected frequency of less than 5.

³¹ 1 cell had an expected frequency of less than 5.

³² 4 cells had an expected frequency of less than 5.

Table 2a
Sentencing Outcome by Suspect/Defendant-Victim's Race
by Number of Aggravating Factors
1981-1990 (n=3,567)

		WkW ³³	WkB ³⁴	BkW ³⁵	BkB ³⁶	Total	χ^2 Sig.
Zero	Sentence						
	Not Death	1,145	79	95	1,551	2,870	
	Death	26	0	9	8	43	
	TOTAL	1,171	79	104	1,559	2,913	
	Proportion Death Sentences	.022	.0	.087	.005	.015	p < .001 ³⁷

One	Not Death	156	19	150	264	589	
	Death	27	1	3	5	36	
	TOTAL	183	20	153	269	625	
	Proportion Death Sentences	.148	.050	.020	.019	.058	p < .001 ³⁸

Two	Not Death	10	2	2	6	20	
	Death	8	0	1	0	9	
	TOTAL	18	2	3	6	29	
	Proportion Death Sentences	.444	.0	.333	.0	.031	p = .163 ³⁹
	=====						
OVERALL TOTALS	Not Death	1,311	100	247	1,821	3,479	
	Death	61	1	13	13	88	
	Total	1,372	101	260	1,834	3,567	
	Proportion Death Sentences	.044	.001	.050	.007	.025	

³³ White kills White.

³⁴ White kills Black.

³⁵ Black kills White.

³⁶ Black kills Black.

³⁷ 2 cells had an expected frequency less 5.

³⁸ 1 cell had an expected frequency less 5.

³⁹ 6 cells had an expected frequency less 5.

Table 2b
Sentencing Outcome by Suspect/Defendant-Victim's Race
by Number of Aggravating Factors
1991-2000 (n=3,591)

		WkW ⁴⁰	WkB ⁴¹	BkW ⁴²	BkB ⁴³	Total	χ^2 Sig. ⁴⁴	
Aggravating Factors	Sentence							
	Not Death	862	50	127	1,570	2,609		
	Zero	Death	8	1	0	5	14	
	TOTAL	870	51	127	1,575	2,623		
	Proportion Death Sentences	.009	.020	.0	.003	.005	p = .091 ⁴⁵	

One	Not Death	170	31	222	484	907		
	Death	14	0	3	10	27		
	TOTAL	184	31	225	494	934		
	Proportion Death Sentences	.076	.0	.013	.020	.029	p < .001 ⁴⁶	

Two	Not Death	12	0	3	10	25		
	Death	5	0	0	4	9		
	TOTAL	17	0	3	14	34		
	Proportion Death Sentences	.294	0	0	.286	.265	p = .552 ⁴⁷	
=====								
OVERALL TOTALS	Not Death	1,044	81	352	2,064	3,541		
	Death	27	1	3	19	50		
	Total	1,071	82	354	2,083	3,591		
	Proportion Death Sentences	.025	.012	.008	.009	.014		

⁴⁰ White kills White.

⁴¹ White kills Black.

⁴² Black kills White.

⁴³ Black kills Black.

⁴⁴ Fisher's Exact Test (2-sided)

⁴⁵ Three cells had an expected frequency less 5.

⁴⁶ One cell had an expected frequency less 5.

⁴⁷ Four cells had an expected frequency less 5.

Table 3
Sentencing Outcome by Decade

Final Sentence	1981-1990	1991-2000	Total	χ^2 Sig. ⁴⁸
Not Death	3,479	3,541	7,020	
Death	88	50	138	
TOTAL	3,567	3,591	7,158	
Proportion Death Sentences	.025	.014	.019	p < .001

⁴⁸ Fisher's Exact Test (2-sided)

Table 4
Sentencing Outcome by Decade by Number of Aggravating Factors (n=7,158)

		1981-1990	1991-2000	Total	χ^2 Sig. ⁴⁹	
Aggravating Factors	Sentence					
	Not Death	2,870	2,609	5,479		
	Zero	Death	43	14	57	
	TOTAL	2,913	2,623	5,536		
	Proportion Death Sentences	.015	.005	.010	p < .001	

One	Not Death	589	907	1,496		
	Death	36	27	63		
	TOTAL	625	934	1,559		
	Proportion Death Sentences	.058	.029	.040	p = .006	

Two	Not Death	20	25	45		
	Death	9	9	18		
	TOTAL	29	34	63		
	Proportion Death Sentences	.310	.265	.286	p = .783	

⁴⁹ Fisher's Exact Test (2-sided).

Table 5
Sentencing Outcome by Decade by Region (n=6,794)

Region	Sentence	1981-1990	1991-2000	Total	χ^2 Sig. ⁵⁰
East & Middle	Not Death	1,757	1,895	3,652	
	Death	60	22	82	
	TOTAL	1,817	1,917	3,734	
	Proportion Death Sentences	.033	.011	.022	p < .001

West	Not Death	1,407	1,597	3,004	
	Death	28	28	56	
	TOTAL	1,435	1,625	3,060	
	Proportion Death Sentences	.020	.017	.018	p = .686

⁵⁰ Fisher's Exact Test (2-sided).

Table 6
Sentencing Outcome by Decade by Region (n=6,794)

Aggravating Circumstances

	<u>Region</u> χ^2 Sig. ⁵¹	<u>Sentence</u>	<u>1981-1990</u>	<u>1991-2000</u>	<u>Total</u>	
None	East & Middle	Not Death	1,487	1,377	2,864	
		Death	26	5	31	
		TOTAL	1,513	1,382	2,895	
		Proportion Death Sentences	.017	.004	.011	
		p < .001				
		West	Not Death	1,233	1,185	2,318
	Death	17	9	26		
	TOTAL	1,435	1,625	3,060		
	Proportion Death Sentences	.012	.006	.008		
	p = .115					
	One	East & Middle	Not Death	267	502	769
			Death	27	10	37
TOTAL			294	512	806	
Proportion Death Sentences			.092	.020	.046	
p < .001						
West			Not Death	265	403	668
Death		9	17	26		
TOTAL		274	420	694		
Proportion Death Sentences		.033	.040	.037		
p = .686						
Two		East & Middle	Not Death	3	16	19
			Death	7	7	14
	TOTAL		10	23	33	
	Proportion Death Sentences	.700	.304	.424		
	p < .057 ⁵²					

⁵¹ Fisher's Exact Test (2-sided).

⁵² One cell had an expected frequency of less than 5.

	West	Not Death	9	9	18	
		Death	2	2	4	
		TOTAL	11	11	22	
		Proportion Death Sentences	.182	.182	.182	p
	= .1.000 ⁵³					

⁵³ Two cells had an expected frequency of less than 5.

Table 7a
Sentencing Outcome by Suspect/Defendant-Victim's Race by Region
1981-1990 (n=3,252)

Region	Sentence	WkW ⁵⁴	WkB ⁵⁵	BkW ⁵⁶	BkB ⁵⁷	Total	χ^2 Sig.
East & Middle	Not Death	967	51	117	622	1,757	
	Death	48	1	5	6	60	
	TOTAL	1015	52	122	628	1,817	
	Proportion Death Sentences	.047	.019	.041	.010	.033	p < .001 ⁵⁸

West	Not Death	203	42	106	1,056	1,407	
	Death	13	0	8	7	28	
	TOTAL	216	42	114	1,063	1,435	
	Proportion Death Sentences	.060	.0	.070	.007	.020	p < .001 ⁵⁹

⁵⁴ White kills White.

⁵⁵ White kills Black.

⁵⁶ Black kills White.

⁵⁷ Black kills Black.

⁵⁸ Two cells had expected frequencies of less than 5.

⁵⁹ Three cells had expected frequencies of less than 5.

Table 7b
Sentencing Outcome by Suspect/Defendant-Victim's Race by Region
1991-2000 (n=3,542)

Region	Sentence	WkW ⁶⁰	WkB ⁶¹	BkW ⁶²	BkB ⁶³	Total	χ^2 Sig.
East & Middle	Not Death	834	51	202	808	1,895	
	Death	18	1	0	3	22	
	TOTAL	852	52	202	811	1,917	
	Proportion	.021	.019	.0	.004	.011	p =
West	Not Death	172	30	143	1,252	1,597	
	Death	9	0	3	16	28	
	TOTAL	181	30	146	1,268	1,625	
	Proportion	.050	.0	.021	.013	.017	p =

⁶⁰ White kills White.

⁶¹ White kills Black.

⁶² Black kills White.

⁶³ Black kills Black.

⁶⁴ Two cells had expected frequencies of less than 5.

⁶⁵ Three cells had expected frequencies of less than 5.

Table 8a
Sentencing Outcome by Victim's Race by Region
1981-1990 (n=3,251)

Region	Sentence	White Victim	Black Victim	Total
East & Middle	Not Death	1084	673	1,757
	Death	53	7	60
	TOTAL	1,137	679	1,817
	Proportion Death Sentences	.047	.010	.033

West	Not Death	309	1,098	1,407
	Death	21	7	28
	TOTAL	330	1,105	1,435
	Proportion Death Sentences	.064	.006	.020

⁶⁶ Fisher's Exact Test (2-sided).

Table 8b
Sentencing Outcome by Victim's Race by Region
1991-2000 (n=3,542)

Region	Sentence	White Victim	Black Victim	Total
East & Middle	Not Death	1,036	859	1,895
	Death	18	4	22
	TOTAL	1,054	863	1,917
	Proportion Death Sentences	.017	.005	.011

West	Not Death	315	1,282	1,597
	Death	12	16	28
	TOTAL	327	1,298	1,625
	Proportion Death Sentences	.037	.012	.017

⁶⁷ Fisher's Exact Test (2-sided).

Table 9
 Logistic Regression Analysis of
 Race of Victim and Aggravating Circumstances on the Imposition of a Death Sentence
 1991-2000

Independent Variables**	β	Sig.	Exp(β)
One aggravating circumstance	2.022	.000	7.553
Two aggravating circumstances	4.36	.000	77.988
Black Suspect /White Victim	-.642	.315	.526
White Suspect /Black Victim	.286	.785	1.331
White Suspect /White Victim	1.749	.000	5.747
Region	.876	.006	2.400
Constant	-.8.092	.000	.000

Number of cases = 3,542

-2 Log likelihood = 424.429

“Death Sentence” is coded as 0 = no death sentence, 1 = death sentence.

“One aggravating circumstance” is coded: 0 = either no circumstance or two circumstances, 1 = one circumstance

“Two aggravating circumstances” is coded: 0 = no or one circumstance, 1 = two circumstances

“Region” is coded as 1=East/Middle, 2=West.

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