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[4]
I. Introduction

In 1964, Congress passed Title VII of the Civil Rights Act ("Title VII"), thereby making it illegal for an employer to discriminate against any individual because of their “race, color, religion, sex, or national origin.” It is the scope of Title VII’s prohibition against sex discrimination that is of principal concern in *Hively v. Ivy*

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Tech Community College of Indiana. The overarching issue presented in Hively is one of statutory interpretation: whether Title VII’s protections against sex discrimination prohibit employers from discriminating against individuals based on the individual’s sexual orientation. The Seventh Circuit Court of Appeals answered this question in the affirmative, holding that individuals who allege that they “experienced employment discrimination on the basis of [their] sexual orientation [have] put forth a case of sex discrimination for Title VII purposes.”

The plaintiff, Kimberly Hively (“Hively”), started her career as an adjunct professor at Ivy Tech Community College of Indiana (“Ivy Tech”) in 2000. Between 2009 and 2014, Hively unsuccessfully applied for at least six full-time positions at Ivy Tech until her part-time contract was not renewed in July 2014. In December 2013, Hively—convinced that Ivy Tech was discriminating against her based on her sexual orientation—received a right-to-sue letter from the Equal Employment Opportunity Commission (“EEOC”) and filed a complaint in the U.S. District Court for the Northern District of Indiana. Hively’s complaint alleged that she was “[d]enied full[-]time employment and promotions based on sexual orientation” which she alleged violated Title VII.

In response, Ivy Tech successfully filed a motion to dismiss for failure to state a claim on which relief can

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3 Id.
4 Id. at 351–52.
5 Id. at 341.
6 Id.
7 Id.
8 Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 699 (7th Cir. 2016) (first alteration in original), rev’d 853 F.3d 339 (7th Cir. 2017) (en banc).
be granted, asserting that “sexual orientation is not a protected class under Title VII.” On appeal, the Seventh Circuit Court of Appeals affirmed the district court’s decision after “an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation” because the Seventh Circuit “felt bound to adhere to [its] earlier decisions.” Citing “the importance of the issue,” and cognizant of the power of the full court to overrule its earlier decisions, a majority of the regularly active judges on the Seventh Circuit voted to grant a petition to rehear en banc.

Historically, the United States Courts of Appeals have interpreted the prohibition against sex discrimination to not include discrimination premised on an individual’s sexual orientation. This interpretation—adopted by both the Seventh Circuit and most of its sister courts—is guided by the inference that when Congress passed Title VII, the word “sex” referred to “nothing more than the traditional notion of ‘sex’” However, the Second Circuit recently muddied the interpretive waters when it noted that, although that particular panel was powerless to overturn precedent, an

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9 *Hively*, 853 F.3d at 341.
10 *Id.* at 343.
11 *Id.*
12 *Id.* at 340.
13 *Id.* at 341 (quoting Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 572 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998), *and abrogated by* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); *see also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000). *See generally* Sandifer v. U.S. Steel Corp., 678 F.3d 590 (7th Cir. 2014) (“[I]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).
openly gay man had “pledged a claim of gender stereotyping that was sufficient to survive dismissal.”

Although notably absent in the debate about the scope of sex discrimination protections in an employment context, the Supreme Court has provided opinions on some related issues. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court ruled that workplace sexual harassment is within the reach of Title VII. In *Price Waterhouse v. Hopkins*, the Supreme Court held that gender-norm stereotyping falls within Title VII’s prohibitions against sex discrimination. Also in an employment context, *Oncale v. Sundowner Offshore Services, Inc.*, provided more clarity, stating that it does not matter if the harasser and the victim are of the same sex for the purposes of a gender nonconformity claim.

More recently, the Supreme Court has issued decisions that seemingly recognize the rapid rate at which society’s views on homosexuality (e.g., an individual’s sexual orientation) have evolved. These

14 *Hively*, 853 F.3d at 342 (citing Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017)).
15 Id. at 342.
17 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); see also *Hively*, 853 F.3d at 342.
18 *Oncale*, 523 U.S. at 79.
decisions, together with the historical interpretation that Title VII does not outlaw sexual-orientation discrimination, have created a “paradoxical legal landscape,” where individuals can get fired from their jobs simply for getting married.\textsuperscript{20} In light of this dichotomy, the \textit{Hively} court granted a rehearing en banc to clarify both “what it means to discriminate on the basis of sex” and “whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.”\textsuperscript{21}

Finding the traditional first steps of statutory analysis inadequate,\textsuperscript{22} the \textit{Hively} court adopted the \textit{Oncale} court’s interpretive approach, mostly disregarding the legislative intent in passing Title VII.\textsuperscript{23} In an 8–3 decision, the \textit{Hively} court held that “discrimination on the basis of sexual orientation is a

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\textsuperscript{20} See \textit{Hively}, 853 F.3d at 342 (quoting \textit{Hively}, 830 F.3d at 714).

\textsuperscript{21} \textit{Hively}, 853 F.3d at 343.

\textsuperscript{22} E.g., reviewing the “plain language” of the statute and analyzing the “legislature’s intent” in passing the statute. \textit{Id.} at 343. See generally \textsc{William Eskridge, Jr., \& Philip Frickey}, \textsc{Legislation and Statutory Interpretation} (2d ed. 2007); \textsc{Antonin Scalia \& Bryan A. Garner}, \textsc{Reading Law: The Interpretation of Legal Texts} (2012); \textsc{Adrian Vermeule}, \textsc{Judging Under Uncertainty: An Institutional Theory of Legal Interpretation} (2006); \textsc{Victoria F. Nourse}, \textsc{A Decision Theory of Statutory Interpretation: Legislative History by the Rules}, 122 \textsc{Yale L.J.} 70 (2012); \textsc{Cass R. Sunstein}, \textsc{Interpreting Statutes in the Regulatory State}, 103 \textsc{Harv. L. Rev.} 407 (1989).

\textsuperscript{23} The \textit{Oncale} approach held that Title VII prohibits “sexual harassment of any kind that meets the statutory requirements,” including male-on-male harassment in the workplace. \textit{Oncale}, 523 U.S. at 80. The \textit{Oncale} court was unmotivated by the legislative intent in passing Title VII because “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” \textit{Oncale}, 523 U.S. at 79.
form of sex discrimination,” and that employers are therefore prohibited from engaging in sexual-orientation discrimination.\textsuperscript{24} Invoking “the logic of the Supreme Court’s decisions,” and persuaded by the “common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex,” the Seventh Circuit created a split amongst the United States Courts of Appeals with its \textit{Hively} decision.\textsuperscript{25}

To be clear, although it is unlikely Ivy Tech will appeal the Seventh Circuit’s opinion to the Supreme Court, this case is still not entirely over.\textsuperscript{26} Rather, \textit{Hively} simply reversed the decision granting Ivy Tech’s motion to dismiss for failure to state a claim upon which relief can be granted, remanding the additional issues back to the district court for further litigation.\textsuperscript{27}

The immediate effect of the \textit{Hively} decision is that victims of sexual-orientation discrimination in the Seventh Circuit’s jurisdiction now have a cognizable Title VII sex discrimination claim;\textsuperscript{28} such a sex discrimination

\textsuperscript{24} \textit{Hively}, 853 F.3d at 341.
\textsuperscript{25} \textit{Id.} at 351.
\textsuperscript{27} For example, whether Ivy Tech committed discriminatory actions against Hively based on her sex has yet to be determined.
claim is supported by invoking either the tried-and-true comparative method or the associational theory.\textsuperscript{29}

II. Analysis

The Supreme Court is now likely to enter the debate concerning the scope of Title VII’s sex discrimination prohibition given the circuit split.\textsuperscript{30} To be certain, it is of fundamental importance for the Supreme Court to provide ultimate authority on whether employers are prohibited from engaging in sexual-orientation discrimination. If the Supreme Court grants certiorari and reviews the issue on first impression, then the four contrasting philosophies relating to statutory interpretation provide helpful insight into the likely ruling.\textsuperscript{31}

Similarly, now that the Supreme Court is likely to pick up this issue,\textsuperscript{32} it is critical to have a clear understanding of the legal theories justifying an interpretation that sexual-orientation discrimination is a form of sex discrimination. The first of the two approaches relies on the comparative method where the court tries to “isolate the significance of the plaintiff’s sex to the employer’s decision” by controlling every variable but the plaintiff’s sex.\textsuperscript{33} The comparative method, therefore, attacks the key point of a Title VII sex discrimination claim: “whether the [plaintiff’s] protected characteristics played a role in the adverse employment

\textsuperscript{29} Hively, 853 F.3d at 345–49.


\textsuperscript{31} The four contrasting approaches to statutory interpretation are illuminated by the majority opinion, the two separate concurring opinions, and the dissenting opinion. See Hively, 853 F.3d 339.

\textsuperscript{32} Eskridge, supra note 30, at 329.

\textsuperscript{33} Hively, 853 F.3d at 345.
decision.”

The second approach supporting the theory that Title VII’s prohibition against sex discrimination includes acts based on an individual’s sexual orientation relies on the associational theory. The associational theory holds that when people are “discriminated against because of the protected characteristic of one with whom [they] associate[],” then they are “actually being disadvantaged because of [their] own traits.”

With a firmer understanding of both the comparative method and the associational theory, it is now possible to understand the legal reasoning underlining *Hively*. Serendipitously, *Hively* presents four different strains of statutory analysis: the majority’s opinion offers a text-book case study in purposivism; Judge Flaum’s concurring opinion demonstrates a

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34 Id.

35 Id. at 347.

36 Id.; see also Holcomb v. Iona Coll., 521 F.3d 130, 132 (2d Cir. 2008) (“[A]n employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.”); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1988) (stating that the key question for an associational race discrimination claim is whether the plaintiff’s race was the cause of the discrimination); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.”); Loving v. Virginia, 388 U.S. 1, 12 (1967) (“[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

textualist approach; Judge Sykes’ dissent adopts the originalist approach; and Judge Posner’s concurring opinion, for its part, embraces a form of legal pragmatism (hereinafter “Posnerism”).

In a utilitarian sense, the *Hively* court certainly reached the most correct decision in holding that sex discrimination includes discriminatory acts taken based on an individual’s sexual orientation. The alternative methods of statutory interpretation (i.e., textualism, originalism, and Posnerism) would each bring different

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39 *Hively*, 853 F.3d at 359 (Sykes, J., dissenting). Originalism is the theory that seeks to “implement the democratically elected legislature’s original design, as embodied in a statute’s text and history.” Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 237 (1997); see also Nicholas S. Zeppos, *The Use of Statutory Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078 (1992) (“[O]riginalism resolves the interpretative questions in statutory cases by asking how the enacting Congress would have decided the question.”).

40 *Hively*, 853 F.3d at 352 (Posner, J. concurring). Judge Posner, in his concurrence, seemingly eschewed all traditional theories of statutory interpretation and adopted a form of pragmatism: “I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.” *Hively*, 853 F.3d at 357 (Posner, J. concurring).
negative externalities to society. But \textit{Hively} was correct in that it logically follows from existing legal precedent.\textsuperscript{42}

\textbf{III. Conclusion}

To be clear, \textit{Hively} was a landmark decision that reflects society’s evolving understanding of the meaning of “sex.” Drawing on the logic used by the Supreme Court in ruling on cases concerning sex discrimination,\textsuperscript{43} the \textit{Hively} court felt empowered to overturn its own precedent—thereby recognizing society’s growing acceptance for individuals with a nontraditional sexual orientation. This recognition is the beauty of applying purposivism when interpreting old or ambiguous statutes: the judiciary can force outdated and anarchistic laws to reflect modern societal mores \textit{now}.


\textsuperscript{42} See generally \textit{Hively}, 853 F.3d at 351.

\textsuperscript{43} \textit{Id.} at 341–42.
ARTICLE

NOW IS THE WINTER OF GINSBURG’S DISSENT
Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test

Taylor Payne*

Abstract

The preliminary injunction is an equitable remedy that may be granted to prevent harm to a movant before adjudication on the merits can be reached. The United States Supreme Court most recently iterated in Winter v. Natural Resources Defense Counsel, Inc. the four factors a court must consider for a preliminary injunction to issue.1 A movant seeking a preliminary injunction must establish that the movant is likely to succeed on the merits; that the movant is likely to suffer irreparable harm in the absence of preliminary

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1 555 U.S. 7 (2008).
relief; that the balance of equities tips in the movant’s favor; and that an injunction is in the public interest.\textsuperscript{2} Federal circuits have long been split over how to apply these factors and what kind of test these factors create. Following Winter, there is still no consensus. The circuits apply three different tests to preliminary injunction questions: the sequential test, the sliding scale test, and the gateway factor test.

Circuits that apply the sequential test require a movant to prove each of the four factors in turn, and a failure to prove one factor bars injunctive relief. Circuits that apply the sliding scale test balance all four factors, and a higher showing on one factor can make up for a lesser showing on another factor. Circuits that apply the gateway factor test require movants to demonstrate a likelihood of success on the merits and a likelihood of suffering irreparable harm in the absence of preliminary relief before addressing the remaining two elements. Under this approach the first two factors are dispositive.

This article argues that the sliding scale test is the most appropriate test when determining whether to issue a preliminary injunction. The history of equity in the United States supports this assertion. Further, the Supreme Court has historically endorsed the sliding scale test.

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I. Introduction

A national music publisher takes notice that a national restaurant chain is violating the music publisher’s copyright for the public performance of certain music. To rectify this, the music publisher seeks to immediately enjoin the continuing copyright violation.
The music publisher must tread carefully, however. If the publisher brings the action in the Seventh Circuit, an injunction may be issued, but if brought in the Fourth Circuit, the injunction may not issue. Different circuits apply different standards to preliminary injunctions, and between the several circuits different results may follow.

The circuit split over the test for the issue of preliminary injunctions is not a recent development. Discrepancies between the circuits have existed for a long time. *Winter v. Natural Resource Defense Council, Inc.* is the most recent Supreme Court case to address the requirements for a preliminary injunction, and some circuits have used *Winter* as the strop on which to hone their policy.

Following *Winter*, the circuits are divided as to whether that case mandated the sequential test, the sliding scale test, or the gateway factor test. A sequential test, generally, is a test that is applied step by step—each element must be fulfilled in turn. For example, the test for adverse possession is generally a sequential test. In Washington, a claimant must show possession that is exclusive, actual and uninterrupted, open and notorious, hostile, and in good faith before a judgment in favor of the movant will be entered. The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test to preliminary injunction questions. These circuits require a movant to demonstrate all four elements, as stated in *Winter*, before a preliminary injunction will issue—failure to prove any single element will result in the preliminary injunction being denied.

A sliding scale test, generally, is a test that may be fulfilled if the elements of the test taken together favor

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a certain outcome. For example, unconscionability is sometimes a sliding scale test. California courts have used a sliding scale where substantive and procedural unconscionability are balanced but are not required to be present in the same degree.\(^6\) Less procedural unconscionability may be counterbalanced by a lot of substantive unconscionability and vice versa. The Second, Sixth, Seventh, and Ninth Circuits apply a sliding scale test to preliminary injunction questions by balancing the four traditional factors given in *Winter*. Under the sliding scale test, a lesser showing on a single factor can be balanced by a greater showing on another factor, and a preliminary injunction may still issue, despite the weak showing on a single factor.

A gateway factor test, generally, is a test that considers certain elements to be threshold elements which must be met before the remaining elements of the test are considered. For example, the Federal Death Penalty Act of 1994 requires juries to conduct a gateway analysis under the Eighth Amendment to determine whether a defendant is eligible for the death penalty before balancing any mitigating factors.\(^7\) The First, Third, and Eighth Circuits apply the gateway factor test, a hybrid test which blends the sequential test and the sliding scale test. These circuits first examine the likelihood of success on the merits and the likelihood of irreparable harm—the gateway factors—before balancing the remaining factors. A lack of either of these gateway factors is dispositive and will result in an injunction not being issued. The circuit courts disagree on whether the test for issuing a preliminary injunction is a sequential test, sliding scale test, or a gateway factor test.

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Justice Ginsburg’s dissent in Winter states that courts have historically applied the sliding scale test which awards “relief based on a lower likelihood of harm when the likelihood of success is very high.”

Ginsburg states that the Supreme Court has historically followed this test, and that Winter does not abrogate previous holdings that have applied that test. The sliding scale test should be applied by all circuits.

Part II of this article discusses the background of the preliminary injunction beginning with the origins of equity, the historical standards for preliminary injunctions, and the most recent Supreme Court cases interpreting preliminary injunctions. Part III of this article addresses the circuit split and how the circuit courts interpret Winter as well as the precedential merits of the sequential test and the sliding scale test. Part IV analyzes each approach and proposes that every circuit court should apply the sliding scale test in determining whether to issue a preliminary injunction.

II. Background

A. History of Equity

Historically, equity was a separate realm of jurisprudence from law. Equity practice arose because English Courts of Law adhered to an unwavering writ system. Each writ was a unique, prefabricated complaint that required plaintiffs to provide specific facts to meet each element of the writ. In this writ system, a plaintiff could bring claims before a common law King’s Court only with these pre-existing writs—writs which

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8 Winter, 555 U.S. at 51 (Ginsburg, J. dissenting).
9 Id.
have merged into modern day common law torts, such as trespass or conversion— and, much to many a plaintiff’s chagrin, the scope of these writs was quite narrow. If a person were punched in the face, he could pursue the writ of trespass *vi et armis*, which promised a plaintiff damages if—and only if—the plaintiff presented the evidence listed in the writ in the manner defined by the writ.

The King’s Chancellor prepared and maintained the paperwork for the standardized writs whenever a complaint meeting the requirements of a specific writ was presented. English judges initially served as the King’s personal representatives in exercising the King’s own desire to ensure justice was served. In some cases, however, a plaintiff could not fit his claim within the narrow requirements of a writ and could not go to court, so the plaintiff would petition the King directly for relief. Courts gradually grew apart from the King as judges began to recognize substantive law independent of any particular ruler. As the common law courts gradually became an institution separate from the King, petitions to the King continued to be made.

The nature of the system of writs used by the courts motivated the continued appeals to the King. Although the writ system was orderly and consistent,

12 Id. at 440.
13 *Vi et armis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“By or with force and arms.”).
15 Main, supra note 11, at 438–39.
17 Main, supra note 11, at 441.
18 Pushaw, supra note 16, at 805.
19 Main, supra note 11, at 440–41.
writs did not resolve every injustice, and many would-be plaintiffs were left without a cause of action. In 1258, the Chancellor was prohibited from creating any new writs. No new avenues of relief were laid. By the early fourteenth century, appeals to the King had become so numerous that appeals for relief were referred to the Chancellor.

The Chancellor was “the keeper of the [K]ing’s conscience” and the King's secretary. The Chancery itself was the secretary of the state. As the voice of the King, the Chancellor could resolve issues referred to him. Free from the fetters of the unbending writ system, the Chancellor could resolve disputes to fair and just ends.

The traditional view of equity was based on three fundamental ideas. First, natural law served as the proper source for rules to decide equitable disputes. Second, equity eschewed precedent in favor of deciding each case on its own facts. Third, equity was “absolute and unlimited” judicial authority to decide a case as

20 See Pries, supra note 14, at 10.
22 Pries, supra note 14, at 10.
23 Main, supra note 11, at 441.
24 Id.
25 Id. at 438.
26 Id. at 441.
29 Id. at 1434.
justice required. The overall goal of equity was to provide an avenue for “remedial substantive justice in cases and situations where the common law, with its commitment to fixed rules and inflexible adherence to precedent, will do harm.” Equity relaxed the rigid and uniform application of law by “incorporating standards of fairness and morality into the judicial process.”

A distinct court soon rose under the Chancellor, called the Court of Chancery, and practice in that court was less formal than the Courts of Law, requiring plaintiffs to merely tell the Chancellor about their problems. Over time, the Court of Chancery’s decisions became predictable, and a nebulous law of equity emerged. The decisions either followed newly created equitable remedies or equitable remedies which followed preexisting legal causes of action.

Due to the dichotomy between the Courts of Law and the Courts of Equity, conflict arose between the common law courts and the Chancellor with the Courts of Law charging the Chancellor with “attempting to subvert the whole law of England by substituting conscience for definite rule.” This was especially evident when certain circumstances would give a plaintiff a choice of remedy both in law and in equity. In other cases, a plaintiff who could not otherwise recover in law could recover in equity if the Chancellor felt recovery was

30 Id. at 1435 (quoting LORD NOTTINGHAM, MANUAL OF CHANCERY PRACTICE AND PROLEGOMENA OF CHANCERY AND EQUITY 189 (D.E.C. Yale ed. 1965)).
31 Id. at 1435.
32 Main, supra note 11, at 430.
33 Preis, supra note 14, at 11.
34 Id.
35 Id. at 11–12.
37 Main, supra note 11, at 442.
appropriate. For example, Courts of Law could award only damages to provide a remedy after a wrong was committed but had no authority to prevent the wrong from occurring in the first place. A Chancellor could issue an injunction which Courts of Law were loath to issue, allowing a plaintiff with no legal remedy to recover in equity.

A few Chancellors sought to rectify the split between equity and law, and under the Chancellorships of Lord Bacon, Lord Nottingham, and Lord Hardwicke, the imperfect maxim that “equity follows law” was born. Chancery developed the adequacy doctrine wherein a plaintiff could only obtain equitable relief if the plaintiff could demonstrate a lack of adequate legal remedy. Though equity would follow the law in cases where a preexisting writ afforded relief, equity could not follow law where a legal remedy did not exist, hence “equity follows law” was an imperfect maxim. This reformed view of equity would endure in the subsequent generation of legal scholarship.

As North America was colonized, “[e]quity was transplanted to the American Colonies along with the common law.” The traditional concepts of equity were transplanted as well. For example, chancellors in Virginia were bound to decide cases “according to equity and good conscience,” just as English chancellors had long practiced. By the time the Constitution was

38 Id.; Preis, supra note 14, at 13–14.
39 Lannetti, supra note 27, at 280.
40 Preis, supra note 14, at 12.
42 Weissshaar, supra note 3, at 1019; Denlow, supra note 21, at 501.
43 Preis, supra note 14, at 12–13.
44 Kroger, supra note 28, at 1438.
45 Id.
46 Id. (quoting 1777 Va. Acts ch. 15).
drafted, “there was a movement to merge law and equity for procedural purposes, because Americans were skeptical” of equity and its shortcomings.47

Specific grievances regarding the courts of equity included the lack of juries, abuse of power by colonial governors acting as chancellors, and that the equity court system was not dissimilar enough from the English Court of Chancery, which was wrapped tightly around the throne.48 In response to these criticisms, “[t]he Judiciary Act of 1789 gave American federal courts jurisdiction over all suits in equity, and the Supreme Court has held that this jurisdiction is equivalent to ‘the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.’”49 Three years later, in 1791, Congress “produced the Permanent Process Act, which stated that in equity cases, federal courts were to proceed ‘according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law.’”50 The Supreme Court would then interpret these acts to create a uniform scheme of equitable power for federal courts.

The Supreme Court held in Robinson v. Campbell that a federal court was not bound to apply state law that created specific equitable remedies.51 In 1819, in United States v. Howland, Chief Justice Marshall stated that “as

48 Id.
51 Id. at 276 (citing Robinson v. Campbell, 16 U.S. 212, 222–23 (1818)).
the [c]ourts of the Union have a [c]hancery jurisdiction in every state, and the judiciary act confers the same [c]hancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other [s]tates.”

52 Howland held that federal courts would apply a uniform body of equity procedures, regardless of substantive or procedural state law or the adequacy of state law remedies.

53 Three years after Howland, in 1822, the first federal rules of equity were drafted—likely by Justice Story—to codify uniform equity procedure in the lower federal courts. The Supreme Court also issued an additional set of equity rules in 1842. Both sets of equity rules gave the circuit courts authority to “make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion,” and any gaps left by the equity rules would “be regulated by the practice of the High Court of Chancery in England.”

54 In its early equitable decisions, other factors also played important roles in Supreme Court decisions. The Court rejected stare decisis by employing discretionary authority in procedural and substantive matters to reach results equitable in a particular case. Also, the Court

56 Rules of Practice, 20 U.S. (7 Wheat.) at xiii, r. 32, 33; accord Rules of Practice, 42 U.S. (1 How.) at lxix, r. 89, 90; see also Collins, supra note 50, at 274.
57 See Kroger, supra note 28, at 1474 (citing GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 9 (1982)).
58 Id.
relied upon discourses outside of the realm of law to justify its decisions based on moral reasoning and public policy.\textsuperscript{59} All of these principles have continued to be applied to equity cases in federal courts.\textsuperscript{60}

In 1938, the federal district courts of the United States recognized a single unified set of actions, both legal and equitable, under the Federal Rules of Civil Procedure.\textsuperscript{61} Like previous iterations of federal equity law, the Federal Rules of Civil Procedure remained open ended as to how courts should apply equitable remedies. Modern cases like \textit{Brown v. Board of Education}\textsuperscript{62} demonstrated that the long-held principles applied by the Supreme Court were still viable even after the adoption of the Federal Rules of Civil Procedure.\textsuperscript{63} Modern equity jurisprudence has led to much debate over the limit of contemporary federal equity powers as viewed in the framework of the historical application of equity in the United States.\textsuperscript{64}

Gary McDowell argues in his book, \textit{Equity and the Constitution}, that both the Warren and Burger Courts' equity jurisprudence was "illegitimate" because the "understanding of equity expressed in \textit{Brown} (II) and its progeny differs from the traditional understanding" of equity.\textsuperscript{65} McDowell states that "[t]he Court, in using its 'historic equitable remedial powers' to impose its politics on society, is often forced to ignore or deny the great tradition of equitable principles and precedents, which had always been viewed as the inherent source of restraint in equitable dispensations."\textsuperscript{66} In \textit{The Law's

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item Main, \textit{supra} note 11, at 431 (citing \textit{Fed. R. Civ. P. 2} ("There shall be one form of action to be known as 'civil action.'")).
\item 347 U.S. 483 (1954).
\item Kroger, \textit{supra} note 28, at 1471–72.
\item \textit{Id.}
\item \textit{Id.} at 1473 (quoting McDowell, \textit{supra} note 57, at 9).
\item \textit{Id.} at 1472 (quoting McDowell, \textit{supra} note 57, at 4).
\end{enumerate}
\end{footnotesize}
Conscience: Equitable Constitutionalism in America, Peter Charles Hoffer responds to McDowell’s criticism, stating that Brown and subsequent cases are “very good constitutional equity” but poor constitutional law. As to both of these commentators, John Kroger states that both reach “contradictory, but equally suspect” conclusions. The modern Supreme Court has continued to apply traditional equitable principles in cases where an equitable remedy is appropriate. The primary difference between modern equity jurisprudence and the equity jurisprudence of the past is that law and equity have largely fused following the Federal Rules of Civil Procedure. Though the line between law and equity has blurred, the division has persisted, however, in remedies. “Courts and scholars continue to refer to some remedies as ‘legal’ and others as ‘equitable.’” Legal and equitable remedies both are awarded by courts of law.

One equitable remedy perpetuated from centuries past is the injunction—an action in equity designed to protect a plaintiff from irreparable injury to his property or other rights by prohibiting or commanding certain acts. The next section will discuss the origins of the preliminary injunction and how it has evolved in American law.

B. The Preliminary Injunction

67 Kroger, supra note 28, at 1472 (quoting Peter Charles Hoffer, The Law’s Conscience: Equitable Constitutionalism in America xiii (1990)).
68 Id. at 1473.
69 See id. at 1474.
71 Id.
An injunction is a court order that requires a party to act or abstain from acting.\textsuperscript{73} Injunctions are equitable remedies derived from decisions in the English Court of Chancery.\textsuperscript{74} “There are three basic types of injunctions . . . : (1) temporary restraining orders, (2) preliminary injunctions, and (3) permanent injunctions.”\textsuperscript{75} Each variety of injunction varies in duration, but all require a party to act or refrain from acting, and all are enforceable through contempt.\textsuperscript{76} “[T]he primary purpose for granting a preliminary injunction . . . is ‘to preserve the relative positions of the parties until a [full] trial on the merits can be held.’”\textsuperscript{77} A preliminary injunction cannot be issued \textit{ex parte}, like a temporary restraining order, and unlike a permanent injunction, a full hearing is not needed for a preliminary injunction to issue.\textsuperscript{78}

The modern standards for preliminary injunctions developed in the seventeenth and eighteenth centuries when the “Court of Chancery began to speak in terms of irreparable harms and [the] assessment of the [likely] outcome on the merits.”\textsuperscript{79} “By the nineteenth century, the Court of Chancery first began to speak of the role of preliminary injunctions in preserving the ‘status quo.’”\textsuperscript{80} These early articulations regarding maintenance of the status quo were soon synthesized in William Kerr's influential treatise on injunctions:

\begin{footnotes}
\item[73] Denlow, \textit{supra} note 21, at 498–99.
\item[74] \textit{Id.} at 500.
\item[75] \textit{Id.} at 499.
\item[76] \textit{Id.}
\item[77] \textit{Id.} at 507 (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).
\item[78] \textit{Id.}
\item[80] \textit{Id.} at 127.
\end{footnotes}
The effect and object of the interlocutory injunction is merely to preserve the property in dispute in statu quo until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives [it] as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in statu quo.\textsuperscript{81}

Kerr states that injunctions seek to preserve the status quo. He also notes that a court issuing an injunction does not “profess to anticipate the determination of the right,”\textsuperscript{82} that is, that a court need not determine that a claim will absolutely be successful. Kerr illustrates this point multiple times:

A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of.\textsuperscript{83}

\begin{flushright}
\textsuperscript{81} \textit{William W. Kerr, A Treatise on the Law and Practice Of Injunctions in Equity} 11–12 (1867), \textit{as quoted in Lee, supra} note 79, at 128. \\
\textsuperscript{82} \textit{Id.} \\
\textsuperscript{83} Kerr, \textit{supra} note 81, at 11–12, \textit{as quoted in Denlow, supra} note 21, at 502.
\end{flushright}
Kerr states that a party seeking an injunction need only demonstrate a “fair question”84 of the right he is seeking to enforce, not an absolute likelihood of success.

The United States Supreme Court addressed Kerr’s treatise in Russell v. Farley,85 the Court’s first substantive decision regarding injunctions.86 In Russell, the Court noted in dicta that the “settled rule of the Court of Chancery, in acting on applications for injunctions,” required that preliminary injunctive relief depended on a comparison of the balance of the harms between the parties.87 Further, when considering an injunction, a court must “regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused,” and “if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party.”88

In discussing Kerr’s treatise, the Court did not state that a likelihood of success must be shown to issue an injunction. Rather, a balancing test examining the harms and “comparative injuries” the parties may sustain should be applied.89 Further, even a low likelihood of success does not bar a court from issuing an injunction. If no “material injury” will result from the injunction, a court may issue the injunction.90 “Russell’s dicta also is consistent with the notion of a “sliding scale”—if the moving party’s ‘legal right is doubtful,’ then the court should be more ‘reluctant’ to enter the preliminary injunction,” but a court is not barred.91

84 Id.
86 Lee, supra note 79, at 114.
87 Id. (quoting Russell, 105 U.S. at 438).
88 Id. (quoting Russell, 105 U.S. at 438).
89 Russell, 105 U.S. at 438.
90 Id.
91 Lee, supra note 79, at 114 (quoting KERR, supra note 81, at 220).
Arthur Wolf asserted that if the movant could demonstrate a clear legal right, “plain and free from doubt,” the injunction would issue; whereas if the legal right was in doubt, then the movant would have to show a balance of hardships in her favor.\textsuperscript{92} Courts would consider the likelihood of success, but that element was not dispositive. “[A]s early as \textit{Russell}, the Supreme Court had adopted at least three of the four factors currently applied by the [Circuit] [C]ourts.”\textsuperscript{93}

Following \textit{Russell}, the Court issued unclear but largely consistent opinions regarding preliminary injunctions. In its per curiam opinion in \textit{Ohio Oil} citing a lower court decision,\textsuperscript{94} the Court “suggest[ed] that if the movant can show he will likely suffer irreparable harm in the absence of a preliminary injunction and that the preliminary injunction will cause only ‘inconsiderable’ harm to the nonmovant, then the injunction should be granted.”\textsuperscript{95} This was merely a reiteration of the balancing test in \textit{Russell}. Into the 1940s, in \textit{Yakus v. United States}, the Court continued to hold that “even though irreparable injury may otherwise result to the plaintiff,” other factors must be considered.\textsuperscript{96}

In the late 1930s, the final element—the public interest element—emerged,\textsuperscript{97} creating a four-part test

\begin{thebibliography}{99}
\bibitem{92} Id. (quoting Arthur D. Wolf, \textit{Preliminary Injunctions: The Varying Standards}, 7 W. NEW ENG. L. REV. 173, 177–78 (1984)).
\bibitem{93} Id.
\bibitem{94} \textit{Ohio Oil Co. v. Conway}, 279 U.S. 813, 815–16 (1929) (per curiam) (citing \textit{Love v. Atchison, Topeka & Santa Fe Ry. Co.}, 185 F. 321, 331–32 (8th Cir. 1911)).
\bibitem{95} Weisshaar, \textit{supra} note 3, at 1026 (citing \textit{Ohio Oil Co.}, 279 U.S. at 814).
\bibitem{96} \textit{Yakus v. United States}, 321 U.S. 414, 440 (1944). \textit{Cf. Weisshaar, supra} note 3, at 1026 (asserting that \textit{Yakus} creates a stricter standard by holding that “irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction”).
\bibitem{97} Lannetti, \textit{supra} note 27, at 288; Lee, \textit{supra} note 79, at 114;

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generally consisting of: “(1) the movant’s likelihood of success on the merits; (2) the irreparable harm to the movant in the absence of preliminary relief; (3) the balance of the equities between the movant and the nonmovant; and (4) the public interest” and how it will be affected by the injunction.\(^9\) Though widely adopted by courts, the analysis of the public interest factor remained inconsistent, even at the Supreme Court level.\(^9\)

In *Hecht Company v. Bowles*, the Supreme Court held that “the standards of the public interest[,] not the requirements of private litigation[,] measure the propriety and need for injunctive relief” in price setting cases.\(^10\) In *Hecht*, the Court also rejected a proposal to apply a rigid test, noting that equity allows a court “to mould each decree to the necessities of the particular case” and that “[f]lexibility rather than rigidity has distinguished” law from equity.\(^11\) The Court felt that applying a rigid test would be a “major departure from that long tradition” of flexibility in equity.\(^12\) Subsequent Supreme Court cases continued to apply a flexible standard.

In *Brown v. Chote*, the Supreme Court affirmed a lower court opinion that balanced two factors to determine whether to issue a preliminary injunction: the plaintiff’s “possibilities of success on the merits” and “the

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\(^9\) Lannetti, *supra* note 27, at 289.
\(^9\) *Id.* at 289–90; *see* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 646 (1943) (noting that the district court “considered no evidence and made no findings upon the question whether equitable relief should be denied on other grounds, such as inadequacy of consideration and the like”).
\(^10\) Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); *see also* Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 3 (1943); Inland Steel Co. v. United States, 306 U.S. 153, 158 (1939); Bowles v. Montgomery Ward & Co., 143 F.2d 38, 42 (7th Cir. 1944).
\(^11\) *Hecht*, 321 U.S. at 329; *see also* Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).
\(^12\) *Hecht*, 321 U.S. at 329–30.
possibility that irreparable injury would have resulted, absent interlocutory relief.”103 A year later in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, the Court noted that when seeking a temporary restraining order the Court may treat the request identically to a preliminary injunction and require the party seeking the injunction to “bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury” if an injunction is denied and the “likelihood of success on the merits.”104 The Court did not fully describe the test for a preliminary injunction; rather, the Court succinctly noted “various factors” must be proven, such as the likelihood of injury and success.105 The Court did not abandon the four-factor sliding scale test.106

Following those cases, the Court observed in *Doran v. Salem Inn* that the “traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.”107 “[T]he Court cautioned that a district court must ‘weigh carefully the interests of both sides,’” and this requirement is “stringent.”108

The Supreme Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal

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105 *Id.*
106 *Id.* at 441. *But see* Denlow, *supra* note 21, at 510 (asserting the Court moved away from the sliding scale test and spoke of a two-factor test).
108 Denlow, *supra* note 21, at 510–11 (quoting *Doran*, 422 U.S. at 931–32 (citing *Brown*, 411 U.S. at 457)).
remedies.\textsuperscript{109} This follows the traditional notions of equity. Trial courts have the discretion to allow equitable claims to be tried ahead of legal ones to protect the rights of the plaintiff to have a fair and orderly adjudication of the controversy.\textsuperscript{110} Though not always clear, the Supreme Court—even in the modern day—has continued to apply the sliding scale test and uphold traditional notions of equity. The next section will examine the most recent decisions issued by the Supreme Court regarding preliminary injunctions.

C. The Supreme Court Preliminary Injunction Decisions

1. Munaf v. Geren

\textit{Munaf} was a consolidated case involving two separate but factually similar cases.\textsuperscript{111} Two American citizens, Mohammad Munaf and Shawqi Omar, voluntarily traveled to Iraq and allegedly committed crimes there.\textsuperscript{112} Both were captured by an international coalition of military forces, including the United States, and detained pending investigation and prosecution under Iraqi law.\textsuperscript{113} They were then placed in the custody of the U.S. military.\textsuperscript{114} Both plaintiffs sought habeas corpus petitions.\textsuperscript{115} Before a writ of habeas corpus was issued, the district court granted a preliminary injunction at

\textsuperscript{111} Munaf v. Geren, 553 U.S. 674 (2008).
\textsuperscript{112} Id. at 679.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 680–81.
\textsuperscript{115} Id. at 679.
Omar’s request to prevent his transfer to Iraqi custody, to prevent sharing details concerning his potential release with the Iraqi government, and to prevent presenting him to the Iraqi courts for investigation and prosecution.116 The United States Court of Appeals for the District of Columbia Circuit affirmed.117

On petition of certiorari, the Supreme Court examined the jurisdictional limits of the injunction and “whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign’s territory to that sovereign’s government for criminal prosecution.”118 The Court addressed these issues “cognizant that ‘courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.’”119

The Court noted that a preliminary injunction is an “extraordinary and drastic remedy,”120 never awarded as of right.121 Further, a party seeking a preliminary injunction must “demonstrate, among other things, ‘a likelihood of success on the merits.”’122 The district court failed to address the likelihood of success on the merits of Omar’s claim, and only concluded that the “jurisdictional issues” presented questions “so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative

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116 Id. at 683.
117 Id. at 682.
118 Id. at 689.
119 Id. (quoting Dep’t of the Navy v. Egan, 484 U.S. 518, 530 (1988)).
120 Id. at 689 (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (3d ed. 2013)).
121 Id. at 690 (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).
122 Id. (quoting Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 428 (2006)).
investigation.” Likewise, on appeal, the United States Court of Appeals for the District of Columbia Circuit held that it “need not address” the merits of Omar’s habeas claims because the merits had “no relevance.” The D.C. Circuit stated that the only question before it was whether the district court had jurisdiction.

The Supreme Court held that a difficult question as to jurisdiction was no reason to grant a preliminary injunction. Finding a low likelihood of success on the merits due to potential impediments to reaching the merits of the case was not a determination of the “likelihood of success on the merits.” If the likelihood of success on the merits only meant that the district court likely had jurisdiction, then preliminary injunctions would become a matter of right, not the drastic, exceptional remedy they are. The Court concluded that it was an abuse of discretion for the district court to grant a preliminary injunction on the basis of “jurisdictional issues” in Omar’s case without even considering the merits of the underlying habeas petition, so the Court reversed and remanded with instruction to consider the likelihood of success on the merits. The next major Supreme Court case involving with preliminary injunctions is Winter v. Natural Resources Defense Council.

2. Winter v. Natural Resources Defense Council

123 Id. (quoting Omar v. Harvey, 416 F. Supp. 2d 19, 23–24, 27 (D.D.C. 2006)).
124 Id. (quoting Omar v. Harvey, 479 F.3d 1, 11 (D.C. Cir. 2007)).
125 Id. (citing Omar, 479 F.3d at 11).
126 Id.
127 Id.
128 Id.
129 Id. at 690–91.
Winter v. Natural Resources Defense Council concerned the Navy’s use of “mid-frequency active” sonar during training exercises involving surface ships, submarine, and aircraft together as a “strike group.” The Southern California waters where the exercises were conducted contained thirty-seven species of marine mammals that the Natural Resources Defense Council alleged were being harmed by the sonar. The district court entered a preliminary injunction prohibiting the Navy from using the sonar during its training exercises, but the Ninth Circuit remanded the case, holding the injunction to be overbroad.

The district court then entered another preliminary injunction, imposing six specific restrictions on the Navy’s use of sonar during its training exercises. The Navy appealed, seeking two of the district court’s restrictions removed. The Circuit Court of Appeals upheld the district court’s injunction holding that “the Navy may return to the district court to request relief on an emergency basis’ if the preliminary injunction ‘actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense.’” In reaching their holdings, both the district court and the Ninth Circuit held that a preliminary injunction may be entered based only on a “possibility” of irreparable harm. The United States Supreme Court then granted certiorari.

131 Id.
132 Id.
133 Id. at 8.
134 Id. at 31 (quoting Nat. Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 703 (9th Cir. 2008), [hereinafter “Winter II”]).
135 Id. at 21 (citing Winter II, 518 F.3d at 696; Nat. Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008) (quoting Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007); Earth Island Inst. V. United States Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006))).
NOW IS THE WINTER OF GINSBURG’S DISSENT

In the Court’s opinion, Chief Justice Roberts, author of Munaf, wrote that “a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest.”136 The Court noted that historically it has iterated that irreparable harm must be “likely” to occur, not merely possible, the standard used by the Ninth Circuit.137 In determining whether irreparable harm is likely to occur, the Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”138 Further, the Court should especially heed “public consequences in employing the extraordinary remedy of injunctive relief.”139

In determining whether a preliminary injunction should issue, the Court “conclude[d] that the balance of equities and consideration of the overall public interest . . . tip strongly in favor of the Navy.”140 Even if the plaintiffs had shown irreparable injury from the Navy’s training exercises, any such injury was outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.141 The Court held that a proper consideration of the four preliminary injunction factors required denial of the requested injunctive relief, and the Court removed the restrictions to the extent sought by the Navy.142

136 Id. at 20.
137 Id. at 22.
138 Id. at 24 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).
139 Id. at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).
140 Id. at 26.
141 Id.
142 Id. at 33.
i. Ginsburg’s Dissent

Justice Ginsburg concluded in her dissent that the district court “conscientiously balanced the equities and did not abuse its discretion.”143 Justice Ginsburg provided more specific facts in her dissent than the majority did in its opinion and stated that “[i]n light of the likely, substantial harm to the environment” and “NRDC’s almost inevitable success on the merits of its claim,” the Ninth Circuit’s decision should be upheld.144 It is notable that the majority opinion stated that “[a]lthough the [Ninth Circuit] referred to the ‘possibility’ standard, and cited Circuit precedent along the same lines, it affirmed the [d]istrict [c]ourt’s conclusion that plaintiffs had established a ‘near certainty’ of irreparable harm” and that it was unclear whether using a “possibility” standard actually bore on the Ninth Circuit’s decision.145 The facts, states Justice Ginsburg, clearly show that the Natural Resources Defense Council met its burden.146 Though Justice Ginsburg comes to the opposite conclusion of the majority, the most important element of her dissent is Justice Ginsburg’s statements regarding the test for preliminary injunctions.

Justice Ginsburg noted that “[f]lexibility is a hallmark of equity jurisdiction,” and that a Chancellor has the power “to do equity and to mould each decree to the necessities of the particular case.”147 Equity, as distinguished from Law, is flexible.148 “[C]ourts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury

143 Id. at 44 (Ginsburg, J., dissenting).
144 Id. at 53.
145 Id. at 22 (majority opinion).
146 Id. at 53 (Ginsburg, J., dissenting).
147 Id. at 51 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).
148 Id. at 51.
before awarding equitable relief."\textsuperscript{149} Rather, courts evaluate equitable claims on a sliding scale, even “awarding relief based on a lower likelihood of harm when the likelihood of success is very high.”\textsuperscript{150} Ginsburg stated that the Court has never rejected such a formulation and the majority did not do so in its opinion, a contention not disputed by the majority.\textsuperscript{151} The next major Supreme Court case involving preliminary injunctions is \textit{Nken v. Holder}.\textsuperscript{152}

3. \textit{Nken v. Holder}

\textit{Nken v. Holder} involved Jean Marc Nken, a citizen of Cameroon who entered the United States on a transit visa in April 2001.\textsuperscript{153} Nken sought asylum and to stay his removal until a determination of asylum was made.\textsuperscript{154} An immigration judge and the Fourth Circuit both denied asylum and his request to stay removal.\textsuperscript{155} Nken then appealed to the Supreme Court for a stay of removal pending adjudication of a petition for review of his case or, in the alternative, for a resolution to a split among the circuits as to what standard governs a request for a stay.\textsuperscript{156}

The Court noted that a stay pending appeal functionally overlaps with a preliminary injunction.\textsuperscript{157} Both a stay and a preliminary injunction can have the practical effect of preventing some action before a conclusive legal determination; however, “a stay achieves this result by temporarily suspending the source of

\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 422.
\textsuperscript{154} \textit{Id.} at 423.
\textsuperscript{155} \textit{Id.} at 422–23.
\textsuperscript{156} \textit{Id.} at 423.
\textsuperscript{157} \textit{Id.} at 428.
authority to act—the order or judgment in question—not by directing an actor's conduct," as an injunction does.158 “A stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts.'”159

The Court lists the four factors for a stay. A court must determine: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies” if the injunction is issued.160 These four factors are virtually identical to the factors recited in Winter.161 Though the elements considered for a stay and a preliminary injunction may be similar,162 the Court is careful to note that a stay and a preliminary injunction are not “one and the same”; rather, the elements are similar “because similar concerns arise whenever a court order” requires “action before the legality of that action has been conclusively determined.”163 The Court cites to Winter, though, for the assertion that a mere possibility of irreparable harm is not sufficient for a stay to issue.164

Justice Kennedy’s concurrence notes that the statutory authority governing stays is a very narrow category.165 Justice Kennedy notes that the Illegal Immigration Reform and Immigrant Responsibility Act

158 Id. at 428–29.
159 Id. at 429 (alteration in original) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986)).
160 Id. at 434 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).
162 Id. (citing Winter, 555 U.S. at 24).
163 Id.
164 Id. at 435 (citing Winter, 555 U.S. at 22).
165 Id. at 437 (Kennedy, J., concurring).
of 1996 repealed prohibitions on removal as well as an automatic stay provision thus allowing courts to review petitions of aliens after they have been removed.166 These changes greatly raised the threshold for proving "irreparable harm" because only the most extreme circumstances would cause irreparable harm.167 Removal alone no longer constitutes irreparable harm because a petition may still be granted in absentia.168 Though the requirements for a stay and preliminary injunction are similar, they vary in application and should not be considered identical. The next major Supreme Court case involving preliminary injunctions is Glossip v. Gross.169

4. Glossip v. Gross

In Glossip v. Gross, several prisoners sentenced to death in the State of Oklahoma filed an action in federal court to enjoin the use of the drug midazolam in executions.170 The complaint contended that midazolam violated the Eighth Amendment protections against cruel and unusual punishments by creating an unacceptable risk of severe pain.171 After holding an evidentiary hearing, the district court denied the prisoners’ application for a preliminary injunction, finding that they had failed to prove that midazolam was ineffective.172 The Court of Appeals for the Tenth Circuit affirmed, accepting the district court’s finding of fact regarding midazolam’s efficacy. Before the United States Supreme Court accepted certiorari, Oklahoma executed one of the prisoners; however, the Court “subsequently voted to grant review and then stayed the executions of

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166 Id. at 438.
167 Id.
168 Id.
170 Id. at 2731.
171 Id.
172 Id.

[43]
[the remaining plaintiffs] pending the resolution of this case.”

The Court discussed the history of the Eighth Amendment—made applicable to the states through the Fourteenth Amendment—and what methods of execution are considered infliction of cruel and unusual punishments. In order for a prisoner to successfully challenge a method of execution, they must establish that the method presents a risk that is “sure or very likely to cause serious illness and needless suffering,” and give rise to “sufficiently imminent dangers.” To prevail on such a claim, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”

The Court cited the factors from Winter: “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” The parties agreed that the primary issue was whether the plaintiffs were able to establish a likelihood of success on the merits, as required for a preliminary injunction.

The Court did not define a “likelihood of success on the merits;” rather, the Court examined whether the

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173 Id. at 2736.
174 Id. at 2737.
175 Id. (emphasis omitted) (quoting Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion)).
177 Id. at 2737.
plaintiffs would succeed on their individual claims. First, the Court held that plaintiffs “failed to identify a known and available alternative method of execution that entails a lesser risk of pain,” which must be shown to succeed on all Eighth Amendment method-of-execution claims. Second, the Court held that “the [d]istrict [c]ourt did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.” Because the plaintiffs presented insufficient evidence as to their claims, the Court affirmed the lower court decision.

A very recent case involving preliminary injunctions is *Trump v. International Refugee Assistance Project*. Trump v. International Refugee Assistance Project involves a series of consolidated cases involving challenges to President Donald J. Trump’s Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. The executive branch sought a stay on injunctions enjoining the enforcement of Executive Order No. 13780. Though the primary issue in this case was whether to stay an injunction—as opposed whether to issue one—the Court made several notes about its prior decisions involving preliminary injunctions.

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178 *Id.* at 2736–37.
179 *Id.* at 2731 (citing *Baze*, 553 U.S. at 61).
180 *Id.*
181 *Id.*
183 *Id.* at 2082.
184 *Id.* at 2083.
First, the Court noted that “[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.”\(^{185}\) Further, “a court must also ‘conside[r] . . . the overall public interest.’”\(^{186}\) The purpose of a preliminary injunction is “to balance the equities as the litigation moves forward.”\(^{187}\) The Court did not cite to the factors in *Winter*.

Second, the Court noted that “[b]efore issuing a stay, it is ultimately necessary . . . to balance the equities—to explore the relative harms to [the parties], as well as the interests of the public at large.”\(^{188}\) The Court mentions no element-based test; rather, the Court states that the circuit courts “took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens” arising if the executive order was enforced.\(^{189}\) The Court granted President Trump’s stay over all aspects of the injunction except provisions barring foreign nationals with connections to the United States.\(^{190}\) The next section will address the Circuit Split over the requirements for a preliminary injunction to issue.

### II. The Circuit Split

This section will first outline the sequential test applied by the Fourth, Fifth, Tenth, and Eleventh Circuits. Then, this section will outline the sliding scale test applied by the Second, Sixth, Seventh, Ninth, and

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\(^{186}\) *Id.* (alteration in original) (quoting *Winter*, 518 F.3d at 26).

\(^{187}\) *Id.*


\(^{189}\) *Id.* at 2087.

\(^{190}\) *Id.* at 2088.
District of Columbia Circuits. Finally, this section will discuss the gateway factor test as applied by the First, Third, and Eighth Circuits.

A. The Sequential Test: The Fourth, Fifth, Tenth, and Eleventh Circuits

The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test. A sequential test generally is a step-wise test where each individual element must be met before the relief sought will be granted.191 These circuits require plaintiffs to demonstrate each element before a preliminary injunction will be issued. “[A]ny modified test which relaxes one of the prongs for preliminary relief and thus deviates from the [Winter] standard test is impermissible” in these circuits.192 The Winter analysis is a “difficult” and “stringent” test to fulfill, and the failure of a plaintiff to establish even one of the four elements bars injunctive relief.193 Each factor is independent of the others, and “satisfying one

191 For additional sequential tests, see Pepper v. Barnhart, 342 F.3d 853, 854 (8th Cir. 2003) (discussing a three-step sequential test to determine the validity of an alleged disability); Bingue v. Prunchak, 512 F.3d 1169, 1173 (9th Cir. 2008) (applying the Supreme Court’s two-part sequential test for qualified immunity).
192 Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
193 See e.g., Texans for Free Enter. v. Tex. Ethics Comm’n, 732 F.3d 535, 536–37 (5th Cir. 2013); Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 275, 278 (5th Cir. 2012); Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 348 (5th Cir. 2012); S. Monorail Co. v. Robbins & Myers, Inc., 666 F.2d 185, 186 (5th Cir. 1982); Spiegel v. City of Houston, 636 F.2d 997, 1001 (5th Cir. Unit A Feb. 1981); Vision Ctr. v. Opticks, Inc., 596 F.2d 111, 114 (5th Cir. 1979).
requirement does not necessarily affect the analysis of the other requirements.”\textsuperscript{194}

One commentator suggests that Winter creates a sequential test because the “most natural reading of Winter is that it requires a sequential test, with likely success on the merits constituting one of the four required elements.”\textsuperscript{195} Further, “Winter’s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction ‘and,’” a formulation generally indicating that “all of the elements are required.”\textsuperscript{196} It is alleged that circuits which do not follow the sequential test “ignore the plain meaning of Winter’s text and instead invoke the ‘venerab[ility]’ of their sliding-scale tests in order to justify their conclusions.”\textsuperscript{197} A case illustrative of the sequential test is \textit{Diné Citizens Against Ruining Our Environment v. Jewell}\.\textsuperscript{198}

\begin{enumerate}
\item \textit{Diné Citizens Against Ruining Our Environment v. Jewell}
\end{enumerate}

In \textit{Diné Citizens Against Ruining Our Environment v. Jewell}, plaintiffs moved for a preliminary injunction to prevent drilling on certain oil wells while a claim under the National Environmental Policy Act proceeded.\textsuperscript{199} In 2000, the Bureau of Land Management

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\textsuperscript{194} Def. Distributed v. U.S. Dep’t of State, 838 F.3d 451, 457 (5th Cir. 2016).
\textsuperscript{195} Weisshaar, \textit{supra} note 3, at 1049.
\textsuperscript{196} \textit{Id}.
\textsuperscript{197} \textit{Id}. (alteration in original) (quoting Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 38 (2d Cir. 2010); Judge v. Quinn, 612 F.3d 537, 546 (7th Cir. 2010)).
\textsuperscript{198} Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
\textsuperscript{199} \textit{Id}. at 1280.
\end{flushleft}
began revising its 1988 Resource Management Plan. The Bureau contacted “the New Mexico Institute of Mining and Geology to develop a ‘reasonably foreseeable development scenario,’ . . . to predict the foreseeable oil and gas development likely to occur over the next twenty years.” It was projected “that 9,970 new oil and gas wells would be drilled on federally managed lands in the New Mexico portion of the San Juan Basin.” In 2014, the Bureau prepared amended predictions to add the possibility of an additional 1,930 oil wells and 2,000 gas wells. In 2015, plaintiffs filed suit challenging approval for 260 of these wells and seeking to enjoin their use.

The district court issued a 101-page decision giving its reasoning for not issuing a preliminary injunction. The district court held that though the plaintiffs had proven irreparable harm, they were not likely to succeed on the merits of their claims, and if the injunction were issued, the potential harm to plaintiffs would be outweighed by the economic harms to the defendant and the public. Plaintiff appealed.

The circuit court noted that for a preliminary injunction to issue, the plaintiff must establish: “(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely

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200 Id.
201 Id. at 1279.
202 Id.
203 Id. at 1280.
204 Id.
205 Id.
206 Id.
affect the public interest.” Further, “[b]ecause a preliminary injunction is an extraordinary remedy, the [plaintiff]’s right to [injunctive] relief must be clear and unequivocal.”

The plaintiffs demonstrated “irreparable harm but had not satisfied the other three prerequisites for obtaining a preliminary injunction,” and each of the preliminary injunction elements must be met for a preliminary injunction to issue. The circuit court then affirmed the district court’s holdings as to each element under an abuse of discretion standard. Because the court found no abuse of discretion in the district court’s reasoning, the Tenth Circuit affirmed the district court’s rejection of the preliminary injunction. The following section will address the policy considerations behind the sliding scale test.

B. The Sliding Scale Test: The Second, Sixth, Seventh, Ninth, and D.C. Circuits

The Second, Sixth, Seventh, and Ninth Circuits apply the sliding scale test by balancing the four traditional factors given in Winter. A sliding scale test

207 Id. at 1281 (quoting Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002)).
208 Id. (quoting Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1224 (10th Cir. 2008)).
209 Id. at 1281.
210 Id.
211 Id.
212 See e.g., Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 37 (2d Cir. 2010); Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009); All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). Though the Seventh Circuit has not expressly stated that the effect Winter had on preliminary injunctions, the Seventh Circuit
generally is a test where a “strong showing on one factor could make up for a weaker showing on another.” 213 Each of these circuits balance the preliminary injunction factors against each other to determine whether to issue a preliminary injunction. A case illustrative of this approach is *Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company*. 214

1. *Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company*

*Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company* involved a claim for a preliminary injunction in a dispute between a craft beer company and a beer distributor. 215 The Great Lakes Brewing Company is a craft beer manufacturer based in Ohio; “its home and most important market, accounting for two-thirds of its sales.” 216 Glazer’s of Ohio, Inc., an alcohol distributor specializing in beer distribution, was Great Lakes’ distributor in the Columbus market. 217

Great Lakes and Glazer’s entered into a written


215 *Id.* at 847.

216 *Id.* (internal quotation marks omitted).

217 *Id.*
agreement for distribution which included provisions for the termination of the agreement, such as a change in ownership of Glazer’s.218

In January 2016, rumors of a merger between Glazer’s and another large distributor, Southern Wine & Spirits of America (“Southern”) became public.219 “Great Lakes asked Ohio Glazer’s for details of the impending deal ‘in order to assess their options in the Greater Columbus market.’”220 Ohio Glazer’s informed Great Lakes that Great Lakes’ consent was not necessary.221 Great Lakes considered the merger plans a change of ownership as defined by their agreement, withheld consent, and offered to provide evidence to support its reasonable business judgment in that regard.222 The merger was completed in June 2016, with Glazer’s and Southern becoming Ohio Southern Glazer’s, and Great Lakes cancelled the franchise agreement by written notice.223

Glazer’s attempted to salvage the relationship through a letter stating that “while it did not believe prior consent was required, it ‘respectfully request[ed] its consent’ after the fact, [and] offer[ed] to provide any information Great Lakes might need to make that decision.”224 “Great Lakes declined the invitation to retroactively cure the purported breach and sought to implement a mutually agreeable plan to ensure an orderly transition to a new distributor.”225

218 Id.
219 Id.
220 Id.
221 Id. at 848.
222 Id.
223 Id.
224 Id.
225 Id.
Glazer’s immediately filed a declaratory action in federal court, seeking a preliminary injunction barring Great Lakes from terminating its franchise agreement. The District Court granted the motion for a preliminary injunction by balancing the four traditional preliminary injunction factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; (4) and whether the public interest would be served by the issuance of an injunction. The District Court held that the first three factors weighed in favor of granting the injunction, and the fourth factor was neutral. An appeal followed.

The Sixth Circuit reviewed the District Court’s analysis of each of the four factors. As to Glazer’s likelihood of success on the merits, the Sixth Circuit found that “the contractual basis for Great Lakes’ proposed termination [was] valid under” Ohio law, and “[t]hus, the sole basis on which plaintiff intended to succeed at trial [was] without legal support.” The second factor, whether Glazer’s was likely to suffer irreparable harm in the absence of preliminary relief, was based on whether the injury was “fully compensable by monetary damages” and whether “the nature of the plaintiff’s loss would make damages difficult to calculate.” The Circuit Court found that Glazer’s had proven irreparable harm because “Great Lakes[’]

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226 Id. at 849.
227 Id. (citing Bays v. City of Fairborn, 668 F.3d 814, 818–19 (6th Cir. 2012)).
228 Id.
229 Id. at 852.
230 Id. (quoting Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012); Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)).
products make up a large portion of Ohio Southern Glazer’s portfolio, comprising 25% of the Columbus branch’s beer revenue and 4% of that branch’s overall revenue.\footnote{231}

As to the third factor, whether the injunction would cause substantial harm to others, there was no sign that restricting Great Lakes from terminating the franchise would harm anyone else because Columbus area retailers would continue to receive Great Lakes products through other means.\footnote{232} The fourth factor, whether the public interest would be served by the injunction, did not favor an injunction.\footnote{233} The Circuit Court held that the public had a strong interest in holding private parties to their agreements, and Ohio law supported Great Lakes’ termination of the franchise agreement.\footnote{234} Based on these conclusions, the Sixth Circuit reversed the issuance of the injunction because only two factors were in favor of the injunction.\footnote{235} The next section will address the policy considerations of the gateway factor test.

### C. The Gateway Factor Test: The First, Third, and Eighth Circuits

The First, Third, and Eighth Circuits apply the gateway factor test, a hybrid test which blends the sequential test and the sliding scale test. These circuits first examine the likelihood of success on the merits and the likelihood of irreparable harm—the gateway factors—before balancing the factors together.\footnote{236} These

\footnote{231}{Id. at 853.}
\footnote{232}{Id.}
\footnote{233}{Id. at 853.}
\footnote{234}{Id.}
\footnote{235}{Id. at 854.}
\footnote{236}{Reilly v. City of Harrisburg, 858 F.3d 173, 177 (3d Cir. 2017).}
gateway factors must be met before any balancing occurs.\textsuperscript{237} A lack of either of the first two factors is dispositive.\textsuperscript{238} These circuits do not apply either a purely sequential or a purely sliding scale test. A case illustrative of this approach is Reilly v. City of Harrisburg.

1. Reilly v. City of Harrisburg

In Reilly v. City of Harrisburg, the City of Harrisburg, Pennsylvania, issued an ordinance prohibiting anyone from “knowingly congregat[ing], patrol[ling], picket[ing], or demonstrat[ing] in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility.”\textsuperscript{239} The ordinance exempted certain classes, including police and employees of the health care facility.\textsuperscript{240} Plaintiffs—“individuals purporting to provide ‘sidewalk counseling’ to those entering abortion clinics . . . to dissuade [them] from getting abortions”—argued that the ordinance created unconstitutional “buffer zones” that prevented them from effectively counseling.\textsuperscript{241} The plaintiffs “claim[ed] that the ordinance violat[ed] their First Amendment rights to speak freely, exercise their religion, and assemble, as well as their Fourteenth Amendment due process and equal protection rights.”\textsuperscript{242} The plaintiffs “sought a preliminary injunction to enjoin enforcement of the ordinance.”\textsuperscript{243} The district court ruled that the plaintiffs did not meet their burden of demonstrating that they were likely to succeed on the

\begin{footnotesize}
\bibitem{237} Id.
\bibitem{238} Id.
\bibitem{239} Id. at 175 (quoting HARRISBURG, PA. MUN. CODE § 3-371.4A).
\bibitem{240} Id.
\bibitem{241} Id.
\bibitem{242} Id.
\bibitem{243} Id.
\end{footnotesize}
merits, and thus denied plaintiffs their requested relief.244

The Third Circuit historically applied a four factor to test to preliminary injunctions.245 For an injunction to issue, a plaintiff must demonstrate, “(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted.”246 Further, if they are relevant, a court should consider, “(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.”247 The circuit court noted that in Nken that the Supreme Court held that the “first two factors of the traditional standard are the most critical.”248 Nken would be nonsensical if it elevated two factors and then required a moving party to prevail in a balance of all factors.249 The Third Circuit then settled its own precedent by holding “that a movant for preliminary equitable relief must meet the threshold for the first two ‘most critical’ factors,” and “[i]f these ‘gateway factors’ [were] met, a court . . . then determines . . . if all four factors . . . balance in favor of granting the requested preliminary relief.”250

The Third Circuit did not reach the merits of the plaintiff’s claims. The Third Circuit remanded the case to the district court to reconsider the case in accordance with the test created in Reilly.251 The next section will analyze the policy considerations and justifications between the three approaches.

244 Id.
245 Id. at 176 (citing Del. River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919–20 (3d Cir. 1974)).
246 Id. (alterations in original) (quoting Del. River Port Auth., 501 F.2d at 919–20).
247 Id. (quoting Del. River Port Auth., 501 F.2d at 919–20).
248 Id. at 179 (quoting Nken, 556 U.S at 434).
249 Id.
250 Id.
251 Id. at 180.
III. Analysis and Proposal

This section will analyze the considerations behind the sliding scale test, the sequential test, and the gateway factor test and discuss how each comports with equitable precedent and traditional notions of Supreme Court equity. This section will then propose a solution to the split based on that analysis.

A. Analysis

There are three different tests that circuit courts apply to preliminary injunctions: the sequential test, the sliding scale test, and the gateway factor test. Circuits that apply the sequential test analyze each preliminary injunction factor in turn, and if any factor is not proven to a certain degree, a preliminary injunction will not be issued. Circuits that apply the sliding scale test balance each of the four factors and issue an injunction if the factors taken together balance in favor of the plaintiff. These circuits will award “relief based on a lower likelihood of harm when the likelihood of success is very high.”\(^\text{252}\)

Circuits that apply the gateway factor test consider the first two factors of the preliminary injunction test—the likelihood of success on the merits and the likelihood of irreparable harm—dispositive of whether the injunction should issue. These circuits first examine those two factors; if those factors are met, the remainder of the factors will be examined, and all four factors will be balanced. The next section will examine the sequential test and the considerations that have led circuits to apply it.

1. The Sequential Test

The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test. The Fourth Circuit justifies the sequential test based on Winter’s articulation of four requirements.\(^\text{253}\) Prior to Winter, the Fourth Circuit applied a four-part test, the Blackwelder test, which asked: “[(1)] Has the petitioner made a strong showing that it is likely to prevail upon the merits? [(2)] Has the petitioner shown that without such relief it will suffer irreparable injury? [(3)] Would the issuance of the injunction substantially harm other interested parties? [(4)] Wherein lies the public interest?”\(^\text{254}\)

The Fourth Circuit abandoned this test on the grounds that Winter requires a plaintiff to make a clear showing that it will likely succeed on the merits and that it is likely to be irreparably harmed absent preliminary relief.\(^\text{255}\) Further, the Fourth Circuit noted that the Supreme Court “emphasized the public interest requirement” by requiring courts of equity to “pay particular regard for the public consequences in employing the extraordinary remedy of [the] injunction,” a factor that was not always examined under Blackwelder.\(^\text{256}\) Without further explanation, the Fourth Circuit concludes that each of the four factors must be proven before a preliminary injunction will issue.\(^\text{257}\)

\(^{255}\) Real Truth, 575 F.3d at 346–47.
\(^{256}\) Id. at 347 (quoting Winter, 555 U.S. at 24).
\(^{257}\) Id. at 346.
The Fifth, Tenth, and Eleventh Circuits applied four factor tests virtually identical to the Winter test before Winter was decided. Before Winter, the Fifth Circuit held that a preliminary injunction was an extraordinary equitable remedy that may be granted only if plaintiff established four factors identical to the Winter test.\textsuperscript{258} Winter did not alter the Fifth Circuit’s application of a sequential test, and the circuit continues to affirm that the injunction is an “extraordinary remedy.”\textsuperscript{259} The Tenth and Eleventh Circuits, likewise, before Winter, applied sequential tests similar in construction to the Winter test and, following Winter, have not substantially altered their tests.\textsuperscript{260}

\textsuperscript{258} McKinney ex rel. Nat’l Labor Relations Bd. v. Creative Vision Res., LLC, 783 F.3d 293, 299 (5th Cir. 2015).
\textsuperscript{259} Id. (quoting Winter, 555 U.S. at 24).
\textsuperscript{260} See Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (holding that a plaintiff must demonstrate that “(1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits” (alterations in original)); Jysk Bed’N Linen v. Dutta-Roy, 810 F.3d 767, 774 (11th Cir. 2015) (holding that district court may issue a preliminary injunction where the moving party demonstrates “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest.”); see also Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000); All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989).
Out of the four circuits which apply the sequential test, only the Fourth Circuit altered its approach following Winter. The Fifth, Tenth, and Eleventh Circuits have traditionally applied a four-part sequential test. Though Winter did not change the test for all four of the sequential test circuits, all four circuits have held that no prong of the test for a preliminary injunction may be relaxed to require less than a “likelihood” of success or irreparable harm. The next section will examine the policy considerations behind the circuits that apply the sliding scale test.

2. The Sliding Scale Test

The Second, Sixth, Seventh, Ninth, and District of Columbia Circuits continue to employ the sliding scale test by balancing the four traditional factors given in Winter. The Second Circuit historically required a party seeking a preliminary injunction to show “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.” This circuit has noted that the

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261 N.M. Dep’t of Game & Fish v. U. S. Dep’t of the Interior, 854 F.3d 1236, 1246 (10th Cir. 2017) (“Although we have applied this modified approach in the past, our recent decisions admonish that it is not available after the Supreme Court’s ruling in [Winter].”); United States v. Stinson, 661 F. App’x 945, 951 (11th Cir. 2016) (quoting Jysk Bed ‘N Linen, 810 F.3d at 774 n.16) (“[T]he plaintiff must show a likelihood of success on the merits rather than actual success.”).

overall burden of this test is no lighter than the likelihood of success on the merits prong stated in Winter.263

The Second Circuit holds that the value of this approach, “lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.”264 Preliminary injunctions, being extraordinary remedies, should not be “mechanically confined to cases that are simple or easy.”265

The Second Circuit holds that “Munaf, Winter, and Nken have not undermined . . . [the circuit’s] approval of the more flexible approach signaled” by the Supreme Court in 1929’s Ohio Oil.266 The Second Circuit holds that Winter was decided upon the balance of the equities and the public interest, not upon a sequential test.267 Although Winter did not reject the sliding scale test,268 courts cannot apply a lesser standard than the “likelihood” standard in Winter.269 As previously stated, the Second Circuit holds that the sliding scale test as it has long been applied is not a lesser standard than “likelihood of success on the merits” standard.270

263 Id. at 35.
264 Id.
265 Id.
266 Id. at 37; see Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam).
268 All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011) (citing Winter, 555 U.S. at 50 (Ginsburg, J., dissenting)).
269 Id. (citing Am. Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)); see also Barker ex rel. Nat’l Labor Relations Bd. v. A.D. Conner Inc., 807 F. Supp. 2d 707, 718 (N.D. Ill. 2011) (citing Bloedorn v. Francisco Foods, Inc., 276 F.3d 270, 286–87 (7th Cir. 2001)).
270 See supra note 263.
Second Circuit contends that “[i]f the Supreme Court had . . . [intended] to abrogate the more flexible standard for a preliminary injunction,” the Court would have referenced “the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.”

The Seventh Circuit, citing to Winter, holds that “[i]rreparable injury is not enough to support equitable relief.” In addition to irreparable injury there must also be a “plausible claim on the merits,” and the “balance of equities” must favor the plaintiff. “[T]he more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” The Seventh Circuit notes that a preliminary injunction need not be an exhaustive remedy. It can be limited to rectifying only “some preliminary relief.”

Though the Ninth Circuit’s decision was overturned in Winter due to its application of less than a “likelihood” of irreparable harm, the Ninth Circuit continues to apply a sliding scale on the grounds that the Supreme Court has not defined “likelihood.” The Ninth Circuit holds that in Munaf the Supreme Court did nothing more than note that the lower court had failed to

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271 Citigroup, 598 F.3d at 38.
273 Id. (citing Winter, 555 U.S. 7; Ill. Bell Tel. Co., 157 F.3d 500).
274 Id.
275 All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1133 (9th Cir. 2011) (quoting Hoosier Energy Rural Elec. Coop., 582 F.3d at 725).
276 Id. (quoting Hoosier Energy Rural Elec. Coop., 582 F.3d at 725).
277 Id.

[62]
address the likelihood of success on the merits, but the Court provided nothing in the way of a definition for a “likelihood of success on the merits.”\textsuperscript{278} \textit{Nken}, likewise, included the phrase “likely to succeed on the merits,” but the Court did not suggest that this factor requires a showing that the movant is “more likely than not” to succeed on the merits for a preliminary injunction to issue.\textsuperscript{279} Further the Ninth Circuit states that in \textit{Winter}, the Supreme Court only “cabined that flexibility with regard to the likelihood of harm,” leaving open the possibility of treating likelihood of success on the merits differently.\textsuperscript{280} Similar to the Second and Ninth Circuits, the District of Columbia Circuit weighs the four preliminary injunction factors and “allow[s] that a strong showing on one factor could make up for a weaker showing on another.”\textsuperscript{281} Two justices of this circuit have suggested that \textit{Winter} appears to require “that a party moving for a preliminary injunction must meet four independent requirements.”\textsuperscript{282} Despite this observation, this circuit has not yet decided whether \textit{Winter} requires a sequential test and continues to apply a sliding scale test.\textsuperscript{283} The following section will analyze the gateway factor test and the policy consideration behind it.

\textsuperscript{278} \textit{Id.} at 1134.
\textsuperscript{279} \textit{Nken} v. Holder, 556 U.S. 418, 434 (2009); \textit{All. For The Wild Rockies}, 632 F.3d at 1133 (quoting \textit{Citigroup Glob. Mkts., Inc.}, 598 F.3d at 35).
\textsuperscript{280} \textit{All. For The Wild Rockies}, 632 F.3d at 1139.
\textsuperscript{281} Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011).
\textsuperscript{282} \textit{Davis v. Pension Benefit Guar. Corp.}, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh & Henderson, JJ., concurring).
\textsuperscript{283} League of Women Voters of the U. S. v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016) (holding that “appellants satisfy each of the four preliminary injunction factors, this case presents no occasion for the court to decide whether the ‘sliding scale’ approach remains valid”).
3. The Gateway Factor Test

The First, Third, and Eighth Circuits apply the Gateway Factor test, a hybrid test which blends the sequential test and the sliding scale test. The status of the law in the Third Circuit has been muddied by inconsistent precedent. The Third Circuit has acknowledged an “inconsistent line of cases within [the Third Circuit] holding that all four factors must be established by the movant and the ‘failure to establish any element in its favor renders a preliminary injunction inappropriate.’”284 This line of cases stated that an “injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.”285 If a plaintiff failed to demonstrate that all four elements favored their claim for a preliminary injunction, a preliminary injunction would be “inappropriate.”286

This test was unlike the sliding scale test, as followed by other circuits where “[t]he more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail.”287 This line of Third Circuit cases required each factor to be analyzed

286 Id. (quoting NutraSweet Co, 176 F.3d at 153).
287 Id. (alteration in original) (quoting Korte v. Sebelius, 528 Fed. App’x 583, 586 (7th Cir. 2012)).
in turn and each element met for a preliminary injunction to issue.  

The second line of Third Circuit cases applied a balancing test. These cases required “[a]s a prerequisite to the issuance of a preliminary injunction” a plaintiff to show a “reasonable probability of eventual success in the litigation, and [] that it will be irreparably injured pendente lite if relief is not granted to prevent a change in the status quo.” Further, “in considering whether to grant a preliminary injunction, [a court] should take into account, when . . . relevant, [] the possibility of harm to other interested persons from the grant or denial of the injunction, and [] the public interest.” These factors would then be “delicate[ly]” balanced.

This conflicting standard began with Opticians Association of America v. Independent Opticians of America, holding that a court “must consider four factors” and that “[o]nly if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.” Through various subtle misinterpretations of longstanding jurisprudence starting with Opticians, the Third Circuit’s precedent became confused and unclear. In Reilly v. City of Harrisburg, the Third Circuit sought to unify its precedent in light of Winter with—quite appropriately—four reasons why Winter does not support the sequential test.

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288 Id.


291 Id.

292 Reilly v. City of Harrisburg, 858 F.3d 173, 177 (alteration in original) (quoting Opticians Ass’n of America v. Indep. Opticians of Am., 920 F.2d 187, 191–92 (3d Cir. 1990)).

293 Id.
First, Winter held that an injunction is a matter of equitable discretion that requires a court to balance the equities, and Justice Ginsburg in her dissent stated that the Court has never rejected the sliding scale formulation.294 Second, other courts, such as the Seventh Circuit, agree with the Third Circuit that Winter supports a sliding scale test.295 “Third, no test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion” because such a test would contravene traditional principles of equity.296 Fourth, barring the use of a sliding scale test is “inconsistent with the Supreme Court’s post-Winter instruction in Nken” which directed courts that “when evaluating whether interim equitable relief is appropriate, ‘[t]he first two factors of the traditional standard are the most critical.’”297

The Third Circuit reads Winter in conjunction with Nken to create a hybrid test. When seeking a preliminary injunction, a plaintiff must meet the threshold for the first two factors—that it can likely succeed on the merits and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.298 “If these gateway factors are met, a court then considers . . . in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.”299

295 Id. (quoting Hoosier Energy Rural Elec. Coop., Inc. 582 F.3d at 725).
296 Id.
297 Id. at 179 (alteration in original) (quoting Nken v. Holder, 556 U.S. 418, 434(2009)).
298 Id.
299 Id.
Though the Third Circuit purports to apply a sliding scale test, this test is a hybrid test: the gateway factor test. The first two factors are applied sequentially and only if those are met are the remaining two factors considered and balanced. The Eighth Circuit applies a similar test.

The Eighth Circuit, like a Third Circuit, applies a hybrid test to determine whether a preliminary injunction should issue. The Eighth Circuit has long applied four factors comparable to the Winter factors when considering preliminary injunctions. The factors cited in Dataphase Systems are consistent with the factors stated in Winter; however, Winter altered the Eighth Circuit’s historical requirement that the plaintiff establish “a fair ground for litigation” to require the plaintiff to establish “likelihood of success on the merits.”

The Eighth Circuit holds that a court must “flexibly weigh the case’s particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene.” Like the Third Circuit, this circuit first examines gateway factors. The lack of irreparable harm is “an independently sufficient ground upon which to deny” an injunction regardless of what the plaintiff proves.

300 Id.
303 Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 601 (8th Cir. 1999) (quoting United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998)).
regarding the other three factors.\textsuperscript{304} Further, the Eighth Circuit holds that “[t]he basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies.”\textsuperscript{305} This creates a hybrid test. The Eighth Circuit will not issue a preliminary injunction if there is a lack of irreparable harm regardless of the severity of the other factors.

The First Circuit likewise does not balance the factors equally. “The likelihood of success on the merits and irreparable harm weigh heavily in the analysis and these factors are assessed in relation to one another”\textsuperscript{306} however, the likelihood of success on the merits has been held to be the most important factor and may be dispositive.\textsuperscript{307} First Circuit courts have also held that when the likelihood of success on the merits is great, a preliminary injunction will issue even if the plaintiff does not demonstrate an equal likelihood of irreparable harm.\textsuperscript{308}

The next section will describe a proposal for the universal application of the sliding scale test among the several circuits.

\textbf{B. Proposal}

\textsuperscript{304} Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003).
\textsuperscript{307} Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 10 (1st Cir. 2013).
\textsuperscript{308} E.E.O.C. v. Astra U.S.A. Inc., 94 F.3d 738, 743 (1st Cir. 1996).
Federal Courts should apply the sliding scale test when determining whether to issue a preliminary injunction. Winter and other Supreme Court cases do not abrogate the sliding scale test traditionally applied when determining whether a preliminary injunction should issue. Further, cases subsequent to Winter do not apply a sequential test, and a sequential test is not mentioned. The traditional sliding scale test comports with the function of the preliminary injunction and the traditional notions of equity currently and historically applied by the Supreme Court.

This section will first discuss how the language of Winter does not abrogate the traditional sliding scale test. Next, this section will discuss how Winter does not alter any aspect of the traditional sliding scale test. Then, this section will discuss the significance of the Winter test containing “factors” as opposed to “elements.” Then, this section will discuss how Supreme Court precedent supports the sliding scale approach. Finally, this section will conclude with a discussion of how the equities must be balanced regardless of which test is applied, concluding that only the sliding scale test allows the equities to be properly balanced.

1. The Language of Winter Does Not Abrogate the Sliding Scale Test

Winter does not abrogate the traditional sliding scale test. First, the language of Winter does not suggest that a sequential test has now replaced the sliding scale test. Nothing in the opinion expressly or implicitly creates a sequential test. The Fourth Circuit may apply the sequential test, but the Fifth, Tenth, and Eleventh Circuits have always applied the sequential test, Winter notwithstanding. These circuits have noted that Winter requires a showing of likelihood of success on the merits
plus a likelihood of irreparable harm, but they have not stated how Winter has altered their test beyond that.\textsuperscript{309} The Fourth Circuit is the only circuit to expressly interpret Winter to create a sequential test.

The Fourth Circuit holds that Winter created a strict sequential test but does not cite language or give reasoning as to how the Supreme Court mandated it. This circuit only concludes that the factors must be proven “as articulated.”\textsuperscript{310} Nothing in Winter suggests that the Sliding Scale Test may no longer be applied. Further, Justice Ginsburg, in her dissent in Winter, states that the Supreme Court has historically followed a test which awards “relief based on a lower likelihood of harm when the likelihood of success is very high.”\textsuperscript{311} Justice Ginsburg states that Winter does not abrogate that test,\textsuperscript{312} and the majority does not dispute her contention.\textsuperscript{313}

2. The Plain Language of Winter Does Not Alter Any Element of the Test

Second, the plain language of Winter changes nothing about the sliding scale test. The Supreme Court held that issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the

\textsuperscript{309} Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
\textsuperscript{310} The Real Truth About Obama, Inc. v. Fed. Election Comm’n, 575 F.3d 342, 348 (4th Cir. 2009).
\textsuperscript{312} Id.
\textsuperscript{313} Cf. SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC, 62 V.I. 168, 183–84 (V.I. 2015) (noting that the “Ginsburg sliding scale test” is a unique variation of the sliding scale test).
Court’s characterization of preliminary injunctions.\textsuperscript{314} The Ninth Circuit—the circuit where Winter originated—acknowledges that, following Winter, “any modified test which relaxes one of the prongs for preliminary relief” is impermissible.\textsuperscript{315} Further, the Ninth Circuit states that in Winter, the Supreme Court only “cabined that flexibility with regard to the likelihood of harm,” leaving open the possibility of treating likelihood of success on the merits differently.\textsuperscript{316} The Ninth Circuit’s assertions are not correct, however. In Winter, the Court did not “cabin flexibility;” the Court merely restated its longstanding rule. The Supreme Court has always required a showing of a likelihood of success on the merits.\textsuperscript{317} Further, the Supreme Court has never endorsed a test which always issues an injunction if certain requirements are met.

In \textit{Ohio Oil}, the Supreme Court noted that when “questions presented in an application for a\[preliminary\] injunction are grave, and the injury to the moving party is certain and irreparable,” the injury to the defendant is inconsequential or indemnifiable through bond, and the final decree is in the moving party’s favor, the injunction \textit{usually} will be granted.\textsuperscript{318} The Court notes that the injunction will “usually” be granted regardless of

\begin{itemize}
\item\textsuperscript{314} \textit{Winter}, 555 U.S at 23.
\item\textsuperscript{315} \textit{Diné}, 839 F.3d at 1282; Bloedorn v. Francisco Foods, Inc., 276 F.3d 270, 286–87 (7th Cir. 2001).
\item\textsuperscript{316} All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1139 (9th Cir. 2011).
\item\textsuperscript{317} \textit{Ohio Oil Co. v. Conway}, 279 U.S. 813, 815 (1929) (per curiam) (holding that for a preliminary injunction to issue it must be shown that the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor).
\item\textsuperscript{318} \textit{Id.} (citing \textit{Love v. Atchison, Topeka & Santa Fe Ry. Co.}, 185 F. 321, 331–32 (8th Cir. 1911)).
\end{itemize}
whether the factors are fulfilled.\footnote{319} A preliminary injunction, as has often been stated, is not an automated process. It is not a right that arises if certain conditions are met.

The lack of clarity in the test for preliminary injunctions is a byproduct of the flexibility of the test itself. The Supreme Court has long adhered to certain equitable principles that are demonstrated throughout its decisions.\footnote{320} Most importantly, the Court has always been flexible in issuing preliminary injunctions to reach equitable conclusions.\footnote{321}

In \textit{Ohio Oil}, the Court held that harm must be “certain and irreparable” and the final decree “is in the moving party’s favor” without further definition.\footnote{322} In \textit{Winter}, a moving party must show “that he is likely to succeed on the merits” and “that he is likely to suffer irreparable harm in the absence of preliminary relief.”\footnote{323} Also, “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”\footnote{324} Likelihood then is less than actual success and greater than merely possible success, but the standard is still amorphous. District courts are given great discretion in issuing preliminary injunctions and are not overturned.

\begin{footnotes}
\footnote{319}{Id.}
\footnote{320}{Kroger, supra note 28, at 1471–72 (quoting Hoffer, supra note 67, at xiii).}
\footnote{321}{Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944); see also Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).}
\footnote{322}{Hecht Co., 321 U.S. at 330; see also Meredith, 320 U.S. at 235.}
\footnote{324}{Id. (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546, n.12 (1987)).}
\end{footnotes}
unless there has been an abuse of discretion.\textsuperscript{325} The test is unclear so that it can be flexible.

In \textit{Winter}, the district court did not consider all facts before it when reaching its conclusion.\textsuperscript{326} In considering all the facts, the Supreme Court found that in determining that the plaintiffs suffered only a “possibility” of irreparable harm—the harm was too remote.\textsuperscript{327} “A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury.”\textsuperscript{328} The district court effectively reached a conclusion counter to long standing precedent due to its lack of consideration of the facts.

If the facts in \textit{Winter} had pointed to a likelihood of irreparable harm, the Supreme Court would have allowed the lower court decision to stand regardless of the language used. In cases involving questions of national defense, which \textit{Winter} involved, the Court will “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”\textsuperscript{329} The Court noted that “it is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm.”\textsuperscript{330} It would not have mattered if the Ninth Circuit had applied the facts to a likelihood standard.

\begin{flushright}
\textsuperscript{325} \textit{Id.} at 33 (holding that the “District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions”); see also Summum v. Pleasant Grove City, 483 F.3d 1044, 1049 (10th Cir. 2007) (reviewing the district court's legal conclusions and findings of fact for abuse of discretion).
\textsuperscript{326} \textit{Winter}, 555 U.S. at 22.
\textsuperscript{327} \textit{Id.} at 21.
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} \textit{Winter}, 555 U.S. at 23 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).
\textsuperscript{330} \textit{Id.} at 22.
\end{flushright}
“Likelihood” is not a magic word that allows a court to abuse its discretion; rather, it is a standard less than actual success which must be met when fact pattern in question is analyzed.

_Munaf_ only noted that the lower court had failed to address the likelihood of success on the merits, but the Court provided nothing in the way of a definition for a “likelihood of success on the merits.”

_Nken_, likewise, included the phrase “likely to succeed on the merits,” but the Court did not suggest that this factor requires a showing that the movant is more likely than not to succeed on the merits for a preliminary injunction to issue.

_In Winter_, the facts simply did not demonstrate a likelihood of irreparable harm. The Ninth Circuit is incorrect in its assertion that _Winter_ changed the standard for irreparable harm.

One commentator has posited that the “plain language” of _Winter_ establishes a sequential test because “_Winter_’s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction ‘and.’” Further, the commentator suggests that “[t]ypically, this sort of formulation indicates a list where all of the elements are required.” Syntax and punctuation are thin nails on which to hang such a heavy assertion. For one, _Winter_ does not use semi-colons to separate the preliminary injunction factors: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in

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334 Weissshaar, _supra_ note 3, at 1049
his favor, and that an injunction is in the public interest.\footnote{Winter, 555 U.S. at 20.}

Further, a semicolon and conjunction formulation is not always used to create a sequential test. Some Supreme Court cases create sequential tests without using such a formulation.\footnote{Castaneda v. Partida, 430 U.S. 482, 494 (1977) (citing a sequential test for equal protection violations in grand jury selection without a semicolon and conjunction formulation); see also Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 78 (1978); Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49, (1999) (“To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.”); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 592 (1986) (noting each of these economic factors weighs more heavily as the time needed to recoup losses grows).} For example, \textit{Complete Auto Transit v. Brady}, is often cited as creating a four-part test for evaluating the constitutionality of state taxes though the Court never expressly cites a test.\footnote{Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977); see Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310–11 (1994) (holding that \textit{Complete Auto} created a four part test: “(1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State”).} Oftentimes, the Supreme Court actually states whether a test is sequential.\footnote{McCleskey v. Kemp, 481 U.S. 279, 352 (1987) (“Under \textit{Batson v. Kentucky} and the framework established in \textit{Castaneda v. Partida}, McCleskey must meet a three-factor standard.”); Barclays Bank, 512 U.S. at 311.} In \textit{Winter}, the Court does not expressly state that the test is sequential, and Justice Ginsburg does not believe the \textit{Winter} test to be sequential. Further,
the semicolon and conjunction formulation is used for applications that are not tests at all. \(^{339}\)

Courts have considered punctuation when interpreting statutes, but Winter did not interpret a statute. A semicolon can be used to punctuate a long sentence and indicate unrelated elements. \(^{340}\) A semicolon can be used to separate unrelated requirements in a statute. \(^{341}\) In some cases, a semicolon can be interpreted as “or” or “and” and still create a logical sentence. \(^{342}\) Context is important, and Winter does not specify a sequential test anywhere.

3. The Winter Test Has Factors, Not Elements

Third, the Court refers to the four parts of the preliminary injunction test as “factors,” not elements. \(^{343}\) “Elements” is the term generally used for sequential tests. For example, in Apprendi v. New Jersey the Supreme Court noted that “in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.” \(^{344}\) Factors are generally reserved for

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\(^{341}\) See, e.g., GTE New Media Servs. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000).


\(^{344}\) Apprendi v. New Jersey, 530 U.S. 466, 500 (2000) (emphasis added); see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (holding that the elements of standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case”). Compare Illinois v. Gates, 462 U.S. 213, 230 (1983) (“We do not agree, however, that these elements should be understood as entirely separate and independent
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Sliding Scale Tests. For example, in Miller-El v. Cockrell, the Court held that the credibility of a prosecutor’s race-neutral statements “can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.”

The Court also uses “factors” to mean conditions considered in reaching a decision. In Winter, the Court separates the requirements created by the district court for its injunction with semicolons. The Court’s use of requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply.”), with Hamling v. United States, 418 U.S. 87, 99 (1974) (quoting Roth v. United States, 354 U.S. 476 (1957)) (“[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”).

Lockett v. Ohio, 438 U.S. 586, 630 (1978) (in Florida, a trial court “is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed”) (White, J., dissenting).


Winter, 555 U.S. at 17–18 (“(1) imposing a 12-nautical mile ‘exclusion zone’ from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of ‘helicopter-dipping’ sonar; (4) limiting the use of MFA sonar in geographic ‘choke points’; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.”).
certain punctuation is neither dispositive nor helpful in determining whether the Winter test is sequential.

4. Precedent of the Supreme Court Supports a Sliding Scale

Fourth, Supreme Court precedent supports the Sliding Scale Test for issuing preliminary injunctions. One commentator suggests that earlier Supreme Court cases support a sequential test. In Doran v. Salem Inn, the Court stated that the plaintiff must show “he will suffer irreparable injury and also that he is likely to prevail on the merits.” 449 The Doran Court continued, “It is recognized, however, that a district court must weigh carefully the interests on both sides.” 450 In Yakus, the Court “indicated that irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction”; 451 however, the Court continued that “the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them.” 452 Applying a strict sequential test will allow preliminary injunctions to issue only in the narrowest of narrow, simple circumstances. The court in Citigroup v. VCG stated in its opinion that “limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility.” 453 The Supreme Court has never rejected

349 Weisshaar, supra note 3, at 1051 (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).
350 Doran, 422 U.S. at 931.
351 Weisshaar, supra note 3, at 1051 (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).
352 Yakus, 321 U.S. at 440.
353 Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, at 36 (2d Cir. 2010) (quoting WRIGHT ET AL., supra note 120, § 2948.3); see also Dataphase
the sliding scale test which requires a balancing of the equities and did not do so in Winter.354

The Supreme Court had the opportunity in Winter to create a definitive sequential test; however, the Court did not do so. The Court’s primary concern in Winter was the Ninth Circuit’s holding that a mere “possibility” of irreparable harm was sufficient to warrant an injunction.355 That does not follow the “basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”356 In Winter, the Supreme Court merely stated its own precedent and objected to the Ninth Circuit’s failure to consider all the facts.

5. All Circuits Balance the Equities Regardless of the Test Applied

Fifth, the Winter factors create a balancing test whether the sequential test, sliding scale test, or the gateway factor test is applied. The third factor in the Winter test requires “that the balance of equities” tip in the movant’s favor.357 “In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’”358 If the movant has shown only a

Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc).
354 Winter, 555 U.S. at 51 (Ginsburg, J., dissenting).
356 Id. at 1287–88 (alteration in original) (quoting Younger v. Harris, 401 U.S. 37, 43–44 (1971)).
357 Winter, 555 U.S. at 20.
358 Id. at 24 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).
likelihood of success on the merits or only irreparable harm, the balance of the equities will not likely sufficiently favor the movant.\textsuperscript{359} Further, the balance the equities may tip somewhat in favor of movant, but the lack of a likelihood of success on the merits and irreparable harm may not tip the equities far enough.\textsuperscript{360} A sequential test circuit may deny an injunction because a movant has not shown a likelihood of success on the merits while a sliding scale circuit would deny that same injunction on the grounds that not showing a likelihood of success on the merits fails to tip the balance of equities in favor of the movant. Circuits may reach identical conclusions regardless of the test applied, but this is not a universal maxim.

“The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of

\textsuperscript{359} See, e.g., Video Gaming Techs., Inc. v. Bureau of Gambling Control, 356 F. App’x 89, 94 (9th Cir. 2009) (holding that plaintiff only established a likelihood of success on the merits); Young v. 3.1 Phillip Lim, LLC, Case No.: SA CV 16-1556-DOC (KESx), 2016 WL 6781200, at *4, *6 (C.D. Cal. Nov. 16, 2016) (holding that plaintiff established a likelihood of success on the merits but that the balance of equities favored defendant); Dep’t of Educ. v. C.B. ex rel. Donna, Civil No. 11-00576 SOM/RLP, 2012 WL 220517, at *3 (D. Haw. Jan. 24, 2012) (holding the Dept. of Education “does not show that it will suffer irreparable harm or that the balance of equities tips in its favor”; however, “[t]he DOE does show that it is likely to succeed on the merits. The public interest factor is neutral”); Syngenta Seeds, Inc. v. Bunge N. Am., Inc., 820 F. Supp. 2d 953, 991 (N.D. Iowa 2011); Champagne v. Gintick, 871 F. Supp. 1527, 1537 (D. Conn. 1994) (holding that even with a likelihood of success on the merits, the balance of the equities would still favor against an injunction).

legal remedies.”³⁶¹ This is because an injunction should issue only where the intervention of a court of equity “is essential in order effectually to protect property rights against injuries otherwise irremediable.”³⁶² Winter is merely reiterating that a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief³⁶³ and never as a matter of right.³⁶⁴ The four factor test exists to ensure that when an injunction—a drastic remedy depriving a party of certain freedom to act—is issued there is no other way to make the movant whole.

When courts balance the equities, they consider the likelihood of success on the merits and the likelihood of irreparable harm. Without a likelihood of success on the merits and without a likelihood of irreparable harm, the equities as far as issuing a preliminary injunction are concerned, cannot be balanced except in extraordinary circumstances, such as the equities being balanced as a matter of law.³⁶⁵ If the movant is not likely to succeed and

³⁶² Weinberger, 456 U.S at 312 (citing Cavanaugh v. Looney, 248 U.S. 453, 456 (1919)).
³⁶³ Winter, 555 U.S. at 23 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).
³⁶⁴ Id. at 24 (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008)).
³⁶⁵ See Bhandari v. Capital One, N.A., No. C 12-04533 PSG, 2012 WL 5904694, at *7 (N.D. Cal. Nov. 26, 2012) (holding that failure to show likelihood of success on the merits and success in showing irreparable harm tip the balance in favor of the defendant); Cf. Defs. of Wildlife v. Salazar, 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009) (holding that though the plaintiffs have failed to meet their burden for issuing a preliminary injunction, the plaintiffs are likely to be able to meet their
not likely to be irreparably harmed, an injunction would not fulfill its purpose.

There must be a likelihood of success on the merits and a likelihood of irreparable harm before a preliminary injunction will issue; however, one of these factors may have a “lower likelihood” than the other.\textsuperscript{366} The Supreme Court has never defined what a “likelihood” of success on the merits entails. The Court has held that “likelihood” is less than “actual success.”\textsuperscript{367} As the Tenth Circuit has noted, under the “serious questions” test still applied by some Circuits, a party must show that there are serious questions going to the merits and that the balance of hardships tips decidedly in its favor, a burden no less than a “likelihood of success.”\textsuperscript{368} The test is vague because the entire point of a preliminary injunction is to balance the equities. If the test were mechanical, a preliminary injunction would not be an extraordinary remedy that is malleable to fit any set of circumstances; rather, an injunction would be a matter of right. Regardless of how the factors are applied, the \textit{Winter} test still requires a balancing of the equities. To the extent that the third element of the \textit{Winter} test is “balancing of the equities,” all three tests are balancing tests. Insisting on a rigid application of the factors may deprive courts of the flexibility historically associated with equity.

\textsuperscript{366} \textit{Winter}, 555 U.S. at 51 (Ginsburg, J., dissenting).

\textsuperscript{367} \textit{Id.} at 32 (majority opinion) (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)).

\textsuperscript{368} Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1288 (10th Cir. 2016) (Lucerno, J., dissenting) (citing Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35 (2d Cir. 2010)).
IV. Conclusion

The traditional sliding scale test for a preliminary injunction to issue is a sliding scale Test which most totally balances the equities. This sliding scale test was not abrogated by Winter. Circuits which apply the sequential test or the gateway factor test are still required to balance the equities as the third factor in the Winter analysis. In applying the Winter test, circuits who do not apply the sliding scale test should err on the slide of flexibility as historically applied to preliminary injunctions by the Supreme Court. Preserving flexibility in the application of equitable remedies is paramount to ensuring that an actual equity result is reached. In considering whether to issue a preliminary injunction, courts should focus on the reaching an equitable remedy, a result which can only be reached through the application of the flexible sliding scale test.
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ARTICLE

TENNESSEE’S DEATH PENALTY LOTTERY

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Abstract

Over the past 40 years, Tennessee has imposed sustained death sentences on 86 of the more than 2,500 defendants found guilty of first degree murder; and the State has executed only six of those defendants. How are those few selected? Is Tennessee consistently and reliably sentencing to death only the “worst of the bad”? To answer these questions, we surveyed all of Tennessee’s first degree murder cases since 1977, when Tennessee enacted its current capital punishment system. Tennessee’s scheme was designed in response to the U.S. Supreme Court’s decision in Furman v. Georgia, which held that a capital punishment system operating in an arbitrary manner violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Tennessee’s “guided discretion” scheme was purportedly structured to reduce the risk of arbitrariness by limiting and guiding the exercise of sentencing discretion. Our survey results and analysis show, however, that the state’s capital punishment system fails to satisfy Furman’s command. Rather, it has entrenched the very problems of arbitrariness that Furman sought to eradicate. This article explains the legal background of Tennessee’s death sentencing scheme, presents the most salient results of our survey, and examines the various factors that contribute to the arbitrariness of Tennessee’s system—including infrequency of application, geographical disparity, timing and natural deaths, error rates, quality of defense representation, prosecutorial discretion and misconduct, defendants’ impairments, race, and judicial disparity.

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I. Introduction

Imagine entering a lottery in which you are given a list of Tennessee’s 2,514 adult first degree murder cases since 1977, when our modern death penalty system was installed, along with a description of the facts and circumstances surrounding each case in whatever detail
you request. You are not told what the final sentences were—whether life, life without parole (LWOP), or death. Your job is to make two guesses. First, you must guess which 86 defendants of the 2,514 received sustained death sentences (i.e., death sentences sustained on appeal and in post-conviction and federal habeas review). Second, you must guess which six defendants were actually executed during the 40-year period from 1977 to 2017. What are the odds that your guesses would be correct?

We submit that the odds would be close to nil. Even with an abundance of information about the cases, trying to figure out who was sentenced to death, and who was actually executed, would be nothing but a crapshoot.

And what would you look for to make your guesses? The egregiousness of the crime? Maybe, but the vast majority of the most egregious cases (including rape-murder cases and multiple murder cases involving children) resulted in life or LWOP sentences. Perhaps it would make sense to look for other factors, such as the county where the case occurred (with a strong preference for Shelby County); the race of the defendant (choosing black for the most recent cases would be a very good strategy); the prosecutor (because some prosecutors like the death penalty, and others do not; and some prosecutors cheat, while others do not); the defense lawyers (because some know how to effectively try a capital case, and others do not); the wealth or appearance of the defendant (virtually all capital defendants were indigent at the time of trial, and all defendants on death row are indigent); the publicity surrounding the trial; the trial judge (because some judges are more prosecution oriented, and others are more defense oriented); the judges who reviewed the case on appeal or in post-conviction or federal habeas (because some judges are more inclined to reverse death sentences, and others almost always vote the other way); or the year of the sentencing (because a defendant convicted of first degree murder during the mid-1980’s was at least ten times
more likely to be sentenced to death than a defendant convicted over the most recent years).\(^1\) In guessing who may have been executed, perhaps the age of the defendant and his health would be relevant (because at current rates a condemned defendant is four times more likely to die of natural causes than to suffer the fate of execution).

Of course, other than the egregiousness of the crime, none of these factors should play a role in deciding the ultimate penalty of death. Yet we know, and the statistical evidence bears out, that these are exactly the kinds of factors we would need to consider in making our guesses in the lottery, if we were to have any chance whatsoever of guessing correctly.

The intent of this article is to bring to light a survey conducted by one of the co-authors, attorney H. E. Miller, Jr., of Tennessee’s first degree murder cases over the 40-year period from July 1, 1977, when Tennessee’s current capital sentencing scheme went into effect, through June 30, 2017. Mr. Miller conducted his survey in order to address the issue of arbitrariness in Tennessee’s capital sentencing system. Mr. Miller’s report is attached as Appendix 1.

Before turning to a discussion of Mr. Miller’s survey, we need to set the stage with the historical context of Tennessee’s system. Accordingly, in Part II we discuss the legal background of Tennessee’s scheme beginning with the seminal United States Supreme Court decision in *Furman v. Georgia*\(^2\) through the enactment of Tennessee’s scheme in response to *Furman*. In Parts III and IV we discuss two important developments in Tennessee’s scheme. In Part III we discuss the expansion of the class of death eligible defendants resulting from two sources: (i) the Tennessee Supreme Court’s liberal interpretation of the “aggravating circumstances” that define the class, and

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\(^1\) See infra Table 1 and accompanying text.

\(^2\) 408 U.S. 238 (1972).
(ii) the General Assembly’s addition over the years of new “aggravating circumstances.” In Part IV we discuss the Tennessee Supreme Court’s evisceration of its “comparative proportionality review” of death sentences. In Part V, we return to our lottery analogy by comparing two extreme cases: one resulting in the death sentence and the other in a life sentence. Then, having set the historical stage, in Part VI we turn to a description and evaluation of the results of Mr. Miller’s survey. Finally, in Part VII, we look at what others have said about our capital sentencing system, and we state our conclusion that Tennessee’s death penalty system is nothing more than a capricious lottery.

II. Background

We tend to forget the reason behind Tennessee’s current capital sentencing scheme. It stems from the 1972 case of *Furman v. Georgia*, where the United States Supreme Court expressed three principles that underlie the Court’s death penalty jurisprudence under the Eighth Amendment Cruel and Unusual Punishment Clause.3

The first principle is that death is different: “The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”4

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3 *Id.*
4 *Id.* at 306 (Stewart, J., concurring). The Supreme Court has reiterated this principle. The death penalty “is different in kind from any other punishment imposed under our system of criminal justice.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). “From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society,
The second principle is that the constitutionality of a punishment is to be judged by contemporary, “evolving standards of decency that mark the progress of a maturing society.”

And third, viewing how the sentencing system operates as a whole, the death penalty must not be imposed in an arbitrary and capricious manner. Justices Stewart and White issued the decisive opinions in *Furman* that represent the Court’s holding—the common denominator among the concurring opinions constituting the majority. Justice Stewart explained it this way:

> [T]he death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment’s guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these

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5 Trop v. Dulles, 356 U.S. 86, 101 (plurality opinion) quoted in *Furman*, 408 U.S. at 242 (Douglas, J., concurring). As Justice Douglas further explained, “[T]he proscription of cruel and unusual punishments ‘is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.’” *Furman*, 408 U.S. at 242 (Douglas, J. concurring) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1909)). The Court’s constitutional decisions should be informed by “contemporary values concerning the infliction of a challenged sanction.” *Gregg*, 428 U.S. at 173.

6 *Furman*, 408 U.S. at 274.

7 Justices Brennan and Marshall opined that the death penalty is per se unconstitutional. Justice Douglas’s position on the per se issue was unclear, but he found that the death penalty sentencing schemes at issue were unconstitutional.
sentences are “cruel” in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are “unusual” in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.8

And Justice White explained:

8 Furman, 408 U.S. at 309–10 (Stewart, J., concurring) (emphasis added) (footnotes omitted) (internal citations omitted).
I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society’s need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

... [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

... It is also my judgment that this point has been reached with respect to capital punishment as it is presently
administered under the statutes involved in these cases. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.\(^9\)

Since *Furman* and *Gregg*, the Court has repeatedly emphasized that the judicial system must guard against arbitrariness in the imposition of the death penalty, and the qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions.\(^10\) Therefore, courts must “carefully scrutinize[\(^9\)](Id. at 311–13 (White, J., concurring) (emphasis added)).\(^{10}\) See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.”); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., dissenting in part) (“[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.”), overruled on other grounds by *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Zant v. Stephens*, 462 U.S. 862, 884–85 (1983) (“[B]ecause there is a qualitative difference between death and any other permissible form of punishment, ‘there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.’” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (“The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”).
... capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death.”

*Furman* makes at least three more key points concerning a proper Eighth Amendment analysis in the death penalty context:

(i) Courts must view how the entire sentencing system operates—i.e., how the few are selected to be executed from the many murderers who are not—and not just focus on the particular case under review. As the Supreme Court explained, we must “look[] to the sentencing system as a whole (as the Court did in *Furman . . . *)”; a constitutional violation is established if a defendant demonstrates a “pattern of arbitrary and capricious sentencing.” It is worth noting that in *Furman*, Justice White’s opinion makes no reference to the facts or circumstances of the individual cases under review, and Justice Stewart’s opinion only refers to the dates of the trials in the cases in a footnote. Their opinions, along with the other three concurring opinions, dealt with the operation of the death penalty system under a discretionary sentencing scheme, and not with the merits of the individual cases.

(ii) How the capital sentencing system, operating as a whole, as well as evolving standards of decency, will change over time and eventually can reach a point where

11 *Spaziano*, 468 U.S. at 460 n.7.
13 *Id.* (emphasis added).
14 *Id.* at 195 n.46.
15 See *Furman* v. Georgia, 408 U.S. 238, 309 n.11 (1972) (Stewart, J., concurring). See generally *id.* at 310–14 (White, J., concurring). Indeed, there is virtually no reference to the facts of the cases under review in any of the nine *Furman* opinions.
the system is operating in an unconstitutional manner—as was the case in *Furman*.

(iii) An essential factor to consider in the Eighth Amendment analysis is the *infrequency* with which the death penalty is carried out.

To analyze the Eighth Amendment issue by viewing the sentencing system as a whole and ascertaining the infrequency with which the death penalty is carried out, it is necessary to look at statistics. After all, frequency is a statistical concept. A similar need to analyze statistics, particularly statistical trends, applies when assessing evolving standards of decency.

And, indeed, that is exactly what the majority did in *Furman*. Each of the concurring opinions in *Furman* relied upon various forms of statistical evidence that purported to demonstrate patterns of inconsistent or otherwise arbitrary sentencing. Evidence of such inconsistent results and of sentencing decisions that could not be explained on the basis of individual culpability indicated that the system operated arbitrarily and therefore violated the Eighth Amendment.

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17 See *Furman*, 408 U.S. at 290.

18 See *Furman*, 408 U.S. at 249–52 (Douglas, J., concurring); *id.* at 291–94 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

19 *Furman*, 408 U.S. 238.
The death penalty statutes under review in *Furman*, and virtually all then-existing death penalty statutes, were “discretionary.” Under those sentencing schemes, if the jury decided that the defendant was guilty of a capital offense, then either the jury or judge would decide whether the defendant would be sentenced to life or death. The sentencing decision was completely discretionary, with no narrowing of discretion or guidance in the exercise of discretion if the defendant was found guilty. *Furman* determined that under those kinds of discretionary sentencing schemes, the death penalty was being imposed capriciously, in the absence of consistently applied standards, and accordingly, any particular death sentence under such a system would be deemed unconstitutionally arbitrary. This problem arose in large measure from the infrequency of the death penalty’s application and the irrational manner by which so few defendants were selected for death.

In response to *Furman*, various states enacted two different kinds of capital sentencing schemes, which the Court reviewed in 1976. The two leading decisions were *Woodson v. North Carolina*, and *Gregg v. Georgia*.

In *Woodson*, the Court examined a mandatory sentencing scheme—if the defendant was found guilty of the capital crime, a death sentence followed automatically. Presumably, a mandatory scheme would

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20 In 1838, Tennessee was the first state to convert from a “mandatory” capital sentencing scheme to a “discretionary” scheme, purportedly to mitigate the strict harshness of a mandatory approach. Eventually all states with the death penalty followed course and converted to discretionary schemes. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 139 (2002).

21 *Furman*, 408 U.S. 238.


24 *Woodson*, 428 U.S. at 286.
eliminate the *Furman* problem of unfettered sentencing discretion. The Court, however, found that such a mandatory scheme violates the Eighth Amendment on three independent grounds. Most significantly for our purposes, the Court determined that North Carolina’s mandatory death penalty statute

fail[ed] to provide a constitutionally tolerable response to *Furman*’s rejection of unbridled jury discretion in the imposition of capital sentences. . . . [W]hen one considers the long and consistent American experience with the death penalty in first[ ]degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.25

The Court again looked at the historical record. The mandatory statute merely shifted discretion away from the sentencing decision to the guilty/not-guilty decision, which historically had involved an excessive degree of discretion—and therefore arbitrariness—in capital cases. The Court emphasized that mandatory sentencing schemes “do[] not fulfill *Furman*’s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.” 26

In *Gregg*, the Court upheld a “guided discretion” sentencing scheme.27 This type of scheme, patterned in part after section 210.6 of the Model Penal Code,28 was

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25 *Id.* at 302.
26 *Id.* at 303 (emphasis added).
designed to address *Furman*’s concern with arbitrariness by: (i) bifurcating capital trials in order to treat the sentencing decision separately from the guilty/not-guilty decision;\(^{29}\) (ii) narrowing the class of death-eligible defendants by requiring the prosecution to prove aggravating circumstances, thereby narrowing the range of discretion that could be exercised;\(^{30}\) (iii) allowing the defendant to present mitigating evidence to ensure that the sentencing decision is individualized, which is another constitutional requirement;\(^{31}\) (iv) guiding the jury’s exercise of discretion within that narrowed range by instructing the jury on the proper consideration of aggravating and mitigating circumstances;\(^{32}\) and (v) ensuring adequate judicial review of the sentencing decision as a check against possible arbitrary and capricious decisions.\(^{33}\) The Court explained the fundamental principle of *Furman*, that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”\(^{34}\)

When *Gregg* was decided, states had no prior experience with “guided discretion” capital sentencing. Whether such a scheme would “fulfill *Furman*’s basic requirement”\(^ {35}\) of removing arbitrariness and capriciousness from the system, and whether it would comply with our evolving standards of decency, could only be determined over time. Essentially, *Gregg*’s discretionary sentencing statute was an experiment, never previously attempted or tested.

\(^{29}\) *Gregg*, 428 U.S. at 191.

\(^{30}\) *Id.* at 196–97.

\(^{31}\) *Id.* at 206.

\(^{32}\) *Id.*

\(^{33}\) *Id.* at 174–175.

\(^{34}\) *Id.* at 189.

In 1977, Tennessee responded to Furman, Woodson, and Gregg by enacting its version of a guided discretion capital sentencing scheme. Tennessee’s scheme was closely patterned after the Georgia scheme upheld in Gregg and included the same elements itemized above. While the Tennessee General Assembly subsequently amended Tennessee’s statute a number of times, its basic structure remains. As was the case in Georgia, under Tennessee’s scheme, a death sentence can be imposed only in a case of “aggravated” first degree murder upon a “balancing” of statutorily defined aggravating circumstances proven by the prosecution and any mitigating circumstances presented by the defense. The Tennessee Supreme Court is statutorily

37 In 1993, the General Assembly provided for life without parole as an alternative sentence for first degree murder. TENN. CODE ANN. § 39-13-204(f) (2014). In 1995, as part of the “truth-in-sentencing” movement the General Assembly amended the provisions of Tennessee Code Annotated section 40-35-501 pertaining to release eligibility, which has been interpreted to require a defendant sentenced to life for murder to serve a minimum of 51 years before release eligibility. Id. § 40-35-501 (Supp. 2017); see Vaughn v. State, 202 S.W.3d 106 (Tenn. 2006). In 1999, the General Assembly adopted lethal injection as the preferred method of execution and subsequently, in 2014, allowed for electrocution as a fallback method if lethal injection drugs are not available. TENN. CODE ANN. § 40-23-114 (Supp. 2017). Additionally, over the years the General Assembly has broadened the class of death-eligible defendants by adding and changing the definition of certain aggravating circumstances. See discussion infra Part III.
39 See TENN. CODE ANN. § 39-13-204(g) (2014). To impose a death sentence, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstance(s) outweigh any mitigating circumstances; if a single juror votes for life or life without parole, then the death sentence cannot be imposed. Id.
required to review each death sentence to “determine whether: (A) [t]he sentence of death was imposed in any arbitrary fashion; (B) [t]he evidence supports the jury’s finding of statutory aggravating circumstance or circumstances; (C) [t]he evidence supports the jury’s finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) [t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.” The Court’s consideration of whether a death sentence is “excessive or disproportionate to the penalty imposed in similar cases” is referred to as “comparative proportionality review.”

III. Aggravators and the Expanded Class of Death-Eligible Defendants

The thesis of this article is that Tennessee’s capital punishment system operates as a capricious lottery. To put into proper context the lottery metaphor and recent trends in Tennessee’s capital sentencing, it is important to understand how the Tennessee General Assembly and the Tennessee Supreme Court have gradually expanded the class of death-eligible defendants. The expansion of this class has correspondingly broadened the range of discretion for prosecutors in deciding whether to seek death and for juries in making capital sentencing decisions at trial. This in turn has increased the potential for arbitrariness.

42 This phenomenon—the expansion over time of the class of death-eligible defendants—has occurred in a number of states and is sometimes referred to as “aggravator creep.” See Edwin Colfax, Fairness in the Application of the Death Penalty, 80 IND. L.J. 35, 35 (2005).
A fundamental feature of the capital sentencing scheme approved in *Gregg* and adopted by Tennessee is the narrowing of the class of first degree murder defendants who are eligible for the death penalty by requiring proof of the existence of one or more statutorily defined “aggravating circumstances” that characterize the crime and/or the defendant.\(^{43}\) As the Court in *Gregg* explained, “*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”\(^{44}\) A central part of the majority opinion in *Gregg* specifically addressed whether the statutory aggravating circumstances in that case effectively limited the range of discretion in the capital sentencing decision.\(^{45}\) The Court has repeatedly stressed that a state’s “capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”\(^{46}\)

In addition to defining the class of death-eligible defendants, aggravating circumstances also provide the prosecution with a means of persuading the jury to impose a death sentence. At sentencing, the jury is called upon to “weigh” the aggravating circumstances against the mitigating circumstances, and if the jury finds that the aggravators outweigh the mitigators, then the sentence “shall be death.”\(^{47}\) The more aggravators the prosecution can prove, the more likely the jury will give

\(^{44}\) *Gregg*, 428 U.S. at 189.
\(^{45}\) Id. at 200–04.
greater weight to the aggravators and return a death verdict. Moreover, along with expanding the number and definitional range of aggravators, the court and the legislature have also expanded the range of evidence that the prosecution can present to the jury at the sentencing hearing which also enhances the prosecution’s case for death.\footnote{48}

The Tennessee statute enacted in 1977 defined eleven aggravating circumstances that set the boundary around the class of death-eligible defendants.\footnote{49} Over the

\footnote{48} Tennessee Code Annotated section 39-13-204(c) allows the prosecution to introduce, among other things, evidence relating to “the nature and circumstances of the crime” or “the defendant’s character and background.” The Court has broadly interpreted this provision by holding that this kind of evidence “is admissible regardless of its relevance to any aggravating or mitigating circumstance.” State v. Sims, 45 S.W.3d 1, 13 (Tenn. 2001). The legislature also amended section 39-13-204(c) to allow introduction of evidence relating to a defendant’s prior violent felony conviction, which is discussed below in connection with the (i)(2) aggravator. Additionally, following \textit{Payne v. Tennessee}, 501 U.S. 808 (1991), the legislature amended section 39-13-204(c) to permit victim impact testimony in the sentencing hearing. \textit{See} State v. Nesbit, 978 S.W.2d 872, 887–94 (Tenn. 1998).

\footnote{49} The original version of the sentencing statute, Tennessee Code Annotated section 39-2404(i) (1977), defined the eleven aggravating circumstances:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.
(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.
(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his 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 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 he was in lawful custody or in a place of lawful confinement or during his 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 duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his 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 official duty or status and the defendant knew that the victim occupied said office.
years, the Tennessee General Assembly has added six aggravators to the original list, bringing the total number to 17, and it has amended other aggravators to further expand the class of death-eligible defendants.\footnote{\text{50}}

(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.

\text{TENNESSEE CODE ANN. § 39-2404(i) (enacted 1977) reprinted in Houston v. State, 593 S.W.2d 267, 274 n.1 (Tenn. 1980).}

\text{Tennessee Code Annotated section 39-13-204(i)(1)–(17) (2014) now defines the aggravators as follows (emphasis added for substantive changes from 1977 statute):}

(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, \text{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 \text{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 \text{knowingly committed, solicited, directed, or aided by the defendant}, while the defendant \text{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, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child, 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, probation and parole officer, 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 the victim was a law enforcement officer, corrections official, corrections employee, probation and parole officer, 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;
While the Tennessee legislature’s expansion of aggravators is significant, it is perhaps more significant that the Tennessee Supreme Court has interpreted a number of the most frequently used aggravators in a broad fashion. The important interpretations are as follows:

### A. (i)(2) Aggravator—Prior Violent Felony Conviction

In a large number of murder cases, the defendant was previously convicted of a violent felony, and prosecutors frequently use the prior violent felony conviction as an aggravator in seeking death sentences.51

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51 See, e.g., State v. Hawkins, 519 S.W.3d 1, 51–52 (Tenn. 2017); State v. Bell, 480 S.W.3d 486, 521–22 (Tenn. 2015); State v.
The Tennessee Supreme Court has broadened the application of this aggravator in a number of ways.

First, notwithstanding the plain language of the statute as amended, which requires that the “statutory elements” of the prior conviction involve the use of violence to the person, it is not necessary for the statutory elements of the prior crime to explicitly involve the use of violence. Instead, according to the court, in cases involving a prior crime which statutorily may or may not involve the use of violence, it is only necessary for the prosecution to prove to the judge (not the jury), based upon the record of the prior conviction, that as a factual matter the prior crime actually did involve the defendant’s use of violence to another person.

Thus, for example, in *State v. Cole* the defendant had been convicted of robbery and other crimes for which “the statutory elements of each of [the crimes] may or may not involve the use of violence, depending upon the facts underlying the conviction.” The Tennessee Supreme Court sustained the use of the prior violent felony aggravator upon the trial judge’s determination that the evidence underlying the prior convictions

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Freeland, 451 S.W.3d 791, 817–18 (Tenn. 2014); State v. Odom, 336 SW.3d 541, 570 (Tenn. 2011).

52 State v. Ivy, 188 S.W.3d 132, 151 (Tenn. 2006).

53 *Id.* (holding that the prior conviction may be used as an aggravator if the element of “violence to the person” was set forth in “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, [or] any explicit factual finding by the trial judge to which the defendant assented” (quoting Shepard v. United States, 544 U.S. 13, 16 (2005))); see also *State v. Sims*, 45 S.W.3d 1, 11–12 (Tenn. 2001) (“In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person for purposes of § 39-13-204(i)(2), we hold that the trial judge must necessarily examine the facts underlying the prior felony . . . .”).

54 155 S.W.3d 885 (Tenn. 2005).

55 *Id.* at 900.
established that in fact the crimes involved the defendant’s use of violence.\textsuperscript{56}

Second, the court has held that the “prior conviction” need not relate to a crime that occurred before the alleged capital murder; it is only necessary that the defendant be “convicted” of that crime before his capital murder trial.\textsuperscript{57} The “prior convicted” crime may have occurred after the murder for which the prosecution seeks the death penalty. It is not unusual for the prosecution to obtain a conviction for a more recent crime in order to create an aggravator for use in the capital trial on a prior murder.\textsuperscript{58}

Third, a prior conviction of a violent felony that occurred when the defendant was a juvenile, if he was tried as an adult, can qualify as an aggravator to support a death sentence for a murder that occurred later when the defendant was an adult\textsuperscript{59} even though juvenile offenders are not eligible for the death penalty.\textsuperscript{60}

Additionally, in 1998 the legislature expanded the range of permissible evidence the prosecution can introduce relating to a prior violent felony conviction.\textsuperscript{61} The 1998 amendment permits introduction of evidence “concerning the facts and circumstances of the prior

\textsuperscript{56} Id. at 899–905. Arguably the procedure by which the trial judge made the finding of violence to the person was modified by the court in \textit{State v. Ivy}, 188 S.W.3d 132 (Tenn. 2006).

\textsuperscript{57} See \textit{State v. Hodges}, 944 S.W.2d 346, 357 (Tenn. 1997) (“[S]o long as a defendant is convicted of a violent felony prior to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable.”).

\textsuperscript{58} See, \textit{e.g.}, \textit{State v. Nichols}, 877 S.W.2d 722, 736 (Tenn. 1994) (affirming the use of a prior violent felony aggravator even where the prosecutor admitted that the defendant’s multiple trials had been ordered in such a way as to create an additional aggravating circumstance).

\textsuperscript{59} \textit{State v. Davis}, 141 S.W.3d 600, 616–18 (Tenn. 2004).

\textsuperscript{60} \textit{Roper v. Simmons}, 543 U.S. 551 (2005).

conviction” to “be used by the jury in determining the weight to be accorded the aggravating factor.” The amendment gives the prosecution extremely broad license to use such evidence because “[s]uch evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party.”

B. (i)(5) Aggravator—Heinous, Atrocious, or Cruel

A murder defendant is eligible for the death penalty if “[t]he murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death”—often referred to as the “HAC aggravator.” Any murder, by definition, is a heinous crime that can evoke in a normal juror a strong, visceral negative reaction. In most premeditated murder cases the prosecution can allege the HAC aggravator. But under Furman and Gregg, most murder cases should not be eligible for capital punishment. The challenge is to create a meaningful, rational, and consistently applied distinction between first degree murder cases in general, all of which are “heinous” in some sense of the term, and the supposedly few murders that are “especially heinous, atrocious or cruel” justifying a death sentence, in order for this aggravator to serve the function of meaningfully narrowing the class of death eligible defendants.

What constitutes an “especially heinous, atrocious or cruel” murder is ultimately a subjective determination without clearly delineated criteria. In the early period following Furman, the United States Supreme Court

62 Id.
63 Id.
struck down similar kinds of aggravators as unconstitutionally vague.\textsuperscript{65} The Tennessee Supreme Court responded to those cases by applying a “narrowing construction” of the statutory language, stipulating that the HAC aggravator is “directed at ‘the conscienceless or pitiless crime which is unnecessarily torturous to the victim.’”\textsuperscript{66} In \textit{Cone v. Bell}, a Sixth Circuit panel declared Tennessee’s HAC aggravator to be unconstitutionally vague.\textsuperscript{67} The Supreme Court, however, reversed the Sixth Circuit and upheld Tennessee’s version based upon the narrowing construction.\textsuperscript{68} Although the Supreme Court upheld Tennessee’s HAC aggravator, it was a close call, and the criteria for its application remains subjective.

Even with its narrowing construction in response to early U.S. Supreme Court decisions, the Tennessee Supreme Court manages to give the HAC aggravator a very broad definition. The court’s fullest description of this aggravator can be found in \textit{State v. Keen}, where the court explained:

\begin{quote}
The “especially heinous, atrocious[,] or cruel” aggravating
\end{quote}

\textsuperscript{65} See, \textit{e.g.}, Maynard v. Cartwright, 486 U.S. 356 (1988) (invalidating Oklahoma’s “especially heinous, atrocious or cruel” aggravator); Godfrey v. Georgia, 446 U.S. 420 (1980) (invalidating Georgia’s “outrageously or wantonly vile, horrible or inhuman” aggravator).

\textsuperscript{66} State v. Dicks, 615 S.W.2d 126 (Tenn. 1981) (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); accord State v. Melson, 638 S.W.2d 342, 367 (Tenn. 1982). The Tennessee Supreme Court’s narrowing construction included language purportedly defining the term “torturous.” The Tennessee legislature followed suit by amending the language of the HAC aggravator to provide that it must involve “torture or serious physical abuse beyond that necessary to produce death.” \textsc{Tenn. Code Ann.} § 39-13-204(c)(i)(5) (2014).


\textsuperscript{68} \textit{Bell}, 543 U.S. 447, 459–60.
circumstance “may be proved under either of two prongs: torture or serious physical abuse.” This [c]ourt has defined “torture” as the “infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.” The phrase “serious physical abuse beyond that necessary to produce death,” on the other hand, is “self-explanatory; the abuse must be physical rather than mental in nature.” The “word ‘serious’ alludes to a matter of degree,” and the term “abuse” is defined as “an act that is ‘excessive’ or which makes ‘improper use of a thing,’ or which uses a thing ‘in a manner contrary to the natural or legal rules for its use.’”

Our case law is clear that “[t]he anticipation of physical harm to oneself is torturous” so as to establish this aggravating circumstance. Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within the meaning of the statute.69

The court has also held that although the HAC aggravator now contains two prongs—“torture” or “serious physical abuse”—jurors “do not have to agree on which prong makes the murder ‘especially heinous, atrocious, or cruel.’”70

The case of State v. Rollins71 illustrates the broad scope of the court’s definition of the HAC aggravator. The defendant was found guilty of stabbing the victim

71 State v. Rollins, 188 S.W.3d 553, 572 (Tenn. 2006).
multiple times.\textsuperscript{72} In the guilt phase, the medical examiner testified to the cause of death, describing in detail the multiple stab wounds.\textsuperscript{73} In the sentencing hearing, the medical examiner testified again, largely repeating his evocative guilt-phase testimony and further describing some of the stab wounds as “defensive,” meaning that the victim was conscious and experienced physical and mental suffering during the assault.\textsuperscript{74} According to the court, this evidence was sufficient to establish the HAC aggravator.\textsuperscript{75} It follows that in any murder case in which the victim was aware of what was happening and/or suffered physical pain during the assault, it may be possible to find the existence of the HAC aggravator. Certainly, the prosecution can allege it in a wide range of cases. With the court’s nebulous definition, it is difficult to see how the HAC aggravator meaningfully narrows the class of death eligible defendants.

\textbf{C. (i)(6) Aggravator—Avoiding Arrest or Prosecution}

The (i)(6) aggravator applies when “[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.”\textsuperscript{76} This aggravator can be alleged in any case in which the murder occurred during the commission of another crime, because in any such case the prosecution can argue that a motivating factor in the murder was to eliminate the victim as a witness. As with other aggravators, the Tennessee Supreme Court has broadly defined this aggravator.

\textsuperscript{72} Id. at 576.
\textsuperscript{73} Id. at 572.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} TENN. CODE ANN. § 39-13-204(c)(i)(6) (2014).
Although this aggravator addresses the defendant’s motivation, not much is required to prove it. While “[t]he defendant’s desire to avoid arrest or prosecution must motivate the defendant to kill, [] it does not have to be the only motivation. Nor does it have to be the dominant motivation. The aggravating circumstance is not limited to the killings of eyewitnesses or those witnesses who know or can identify the defendant.”\textsuperscript{77}

As one scholar has explained, “When applied broadly to any victim who could have possibly identified the defendant, this aggravating circumstance applies to almost all murders, in violation of the narrowing principle.”\textsuperscript{78}

\textbf{D. (i)(7) Aggravator—Felony Murder}

Many murders are committed during the commission of another crime, and a “felony murder” can be prosecuted as first degree murder even if the defendant was not the assailant and lacked any intent to kill.\textsuperscript{79} Also, a defendant who caused the victim’s death during the commission of another felony can be guilty of felony murder even if the defendant neither premeditated nor intended the victim’s death.\textsuperscript{80} If the defendant is guilty of felony murder, then the prosecution can allege and potentially prove the (i)(7) aggravator. \textsuperscript{81}

\textsuperscript{77} \textsc{Penny J. White, Tennessee Capital Case Handbook}, 15.40 (2010) (footnotes omitted) (citing State v. Ivy, 188 S.W.3d 132, 144 (Tenn. 2006); Terry v. State, 46 S.W.3d 147, 162 (Tenn. 2001); State v. Hall, 976 S.W.2d 121, 133 (Tenn. 1998); State v. Bush, 942 S.W.2d 489, 529 (Tenn. 1997) (Birch, C. J., dissenting); State v. Evans, 838 S.W.2d 185, 188 (Tenn. 1992)).

\textsuperscript{78} Id. at 15.41.

\textsuperscript{79} \textit{See generally} \textsc{Tenn. Code Ann. § 39-13-202(a) (2014)} (listing the elements of first degree premeditated murder and first degree felony murder).

\textsuperscript{80} State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013).

\textsuperscript{81} The other felonies that support this aggravator are “first degree murder, arson, rape, robbery, burglary, theft,
In the felony murder case of *State v. Middlebrooks*, the court invalidated the earlier version of this aggravator, because there was no distinction between the elements of the crime of felony murder and the felony murder aggravator.\(^{82}\) The Court held that in such a case, the felony murder aggravator was unconstitutional because, by merely duplicating the elements of the underlying felony murder, it did not sufficiently narrow the class of death eligible defendants.\(^{83}\)

The legislature responded by amending the statute in 1995 to add two elements to the felony murder aggravator: that the murder was “knowingly” committed, solicited, directed, or aided by the defendant; and that the defendant had a “substantial role” in the underlying felony while the murder was committed.\(^{84}\) In *State v. Banks*, the court upheld the amended felony murder aggravator because its elements did not merely duplicate the elements of felony murder, and therefore, according to the court, the aggravator satisfied the constitutional requirement to narrow the class of death eligible defendants.\(^{85}\)

Although the legislature amended the (i)(7) felony murder aggravator in response to the *Middlebrooks* kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb” TENN. CODE ANN. § 39-13-204(i)(7) (2011).


\(^{83}\) *Id.* at 323.


\(^{85}\) State v. Banks, 271 S.W.3d 90, 152 (Tenn. 2008); *see also* State v. Robinson, 146 S.W.3d 469, 501 (Tenn. 2004) (upholding felony murder aggravator when the defendant did not kill the victim); Carter v. State, 958 S.W.2d 620, 624 (Tenn. 1997) (upholding the aggravator when defendant was charged with both premeditated and felony murder relating to the same murder).
problem, it is not clear how this amendment created a practical difference in the statutory definition. The “knowing” and “substantial role” elements in the amended statute are relatively easy to prove and potentially could apply to virtually every felony murder, and these elements do not effectively perform a narrowing function.86

*  *  *  *

Because the court and legislature have expanded the number and meaning of aggravating circumstances that could support a death sentence, we submit that a large majority of first degree murder cases are now death-eligible. It is hard to imagine a case in which the prosecution could not allege and potentially prove the existence of an aggravator. With this development, it is especially significant that, as discussed in Part VI below, Tennessee has experienced a sharp decline in sustained death sentences over the past ten to twenty years, notwithstanding the availability of death as a sentencing option in a larger number of first degree murder cases. This not only implicates the problem of arbitrariness, it also strongly indicates that Tennessee’s evolving standard of decency is moving away from the death penalty.

IV. Comparative Proportionality Review and Rule 12

Another important development in Tennessee’s death penalty jurisprudence has been the evisceration of any kind of meaningful “comparative proportionality

86 See, e.g., State v. Pruitt, 415 S.W.3d 180, 205 (Tenn. 2013) (upholding felony murder aggravor when, although defendant caused victim’s death during a carjacking, there was no proof that he intended the death or knew that death would ensue).
review”⁸⁷ of death sentences by the Tennessee Supreme Court.

As noted above, in an effort to protect against the “arbitrary and capricious” imposition of the death penalty, and following Georgia’s lead, the Tennessee scheme requires the Tennessee Supreme Court to conduct a “comparative proportionality review” in every capital case.⁸⁸ Section 39-13-206(c)(1)(D) of the Tennessee Code Annotated provides that the court shall determine whether “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.”⁸⁹ According to the court, the statute’s purpose is to ensure “rationality and consistency in the imposition of the death penalty.”⁹⁰ Justice Aldolpho A. Birch, Jr., explained:

The principle underlying comparative proportionality review is that it is unjust to impose a death sentence upon one defendant when other defendants, convicted of similar crimes with similar facts, receive sentences of life imprisonment (with or without parole). . . . Thus, proportionality review serves a crucial role as an “additional safeguard against arbitrary or capricious sentencing.”⁹¹

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⁸⁸ Id.
⁸⁹ Id.
⁹¹ State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001) (Birch, J., concurring in part and dissenting in part) (quoting State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997)).
This follows from the principle that a state’s “capital sentencing scheme ‘... must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”

To facilitate comparative proportionality review, the Court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47) in 1978, requiring that “in all cases ... in which the defendant is convicted of first[ ]degree murder,” the trial judge shall complete and file so-called Rule 12 reports to include information about each of the cases. Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review in capital cases. In State v. Adkins, the court stated that “our proportionality review of death penalty cases ... has been predicated largely on those reports and has never been limited to the cases that have come before us on appeal.”

On January 1, 1999, the court issued a press release announcing the use of CD-ROMs to store copies of Rule 12 forms, in which then-Chief Justice Riley Anderson was quoted as saying, “The court’s primary interest in the database is for comparative proportionality review in [capital] cases, which is required by court rule and state law[.] ... The [Tennessee] Supreme Court reviews the data to ensure rationality and consistency in the imposition of

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93 TENN. SUP. CT. R. 12. As of November 27, 2017, the Rule 12 report included 76 detailed questions plus sub-questions divided into six parts, as follows: A. Data Concerning the Trial of the Offense (12 questions); B. Data Concerning the Defendant (18 questions); C. Data Concerning Victim, Co-Defendants, and Accomplices (15 questions); D. Representation of the Defendant (13 questions); E. General Considerations (8 questions); and F. Chronology of Case (10 questions). Additionally, the prosecutor and the defense attorney are given the opportunity to submit comments to be appended to the report. Id.
94 State v. Adkins, 725 S.W.2d 660, 663 (Tenn. 1987) (emphasis added).
the death penalty and to identify aberrant sentences during the appeal process.\textsuperscript{95}

The collection of Rule 12 data for comparative proportionality review was based on the idea, derived from \textit{Furman}, that capital cases must be distinguishable in a meaningful way from non-capital first degree murder cases. If there is no meaningful and reliable way to distinguish between capital and non-capital first degree murder cases, then the capital punishment system operates arbitrarily, contrary to constitutional principles and modern notions of human decency.

Under this concept of arbitrariness, Rule 12 data collection can make sense. By gathering and analyzing this kind of data, we can begin to see statistically whether our judicial system is consistently and reliably applying appropriate criteria or standards for selecting only the “worst of the bad” defendants for capital punishment,\textsuperscript{96} or whether there are other inappropriate criteria (such as race, poverty, geographic location, prosecutorial whim, or other factors) that play an untoward influence in capital sentencing decisions.

Unfortunately, the history of the court’s comparative proportionality review, and of Rule 12, has been problematic.\textsuperscript{97} Rule 12 data has rarely, if ever,

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\textsuperscript{96} Members of the Tennessee Supreme Court have used the term “worst of the bad” in reference to the proposition that the death penalty should be reserved only for the very worst cases. See, e.g., State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994); State v. Howell, 868 S.W.2d 238, 265 (Tenn. 1993) (Reid, C.J., concurring); State v. Middlebrooks, 840 S.W.2d 317, 350 (Tenn. 1992) (Drowota, J., concurring and dissenting).
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\textsuperscript{97} In only one case has the Tennessee Supreme Court set aside a death sentence based on comparative proportionality review. See State v. Godsey, 60 S.W.3d 759, 793 (Tenn. 2001).
\end{flushleft}
entered into the court’s comparative proportionality analysis. There was no effort by the court or any other public agency to organize or quantify Rule 12 data in any comprehensive way. All we have now are CD-ROMs with copies of more than a thousand Rule 12 reports that have been filed, with no indices, summaries, or sorting of information. There exist no reported Tennessee appellate court opinions that cite or use any statistical data compiled from the Rule 12 reports. And perhaps most significantly, in close to one-half of first degree murder cases, trial judges have failed to file Rule 12 reports, leaving a huge gap in the data.\footnote{See discussion infra Part VI; see also infra Appendix 1.}


Then in 1997, the court decided \textit{State v. Bland}, which dramatically changed the court’s purported methodology for conducting a comparative
proportionality review.\textsuperscript{102} Among other things, the court narrowed the pool of cases to be compared in the analysis. Under \textit{Bland}, the court now compares the capital case under review only with other capital cases it has previously reviewed, and not with the broader pool of all first degree murder cases, including those that resulted in sentences of life or life without parole.\textsuperscript{103} Justices Reid and Birch dissented in \textit{Bland}. Justice Reid repeated his earlier complaints that the court’s comparative proportionality review analysis lacks proper standards.\textsuperscript{104} Justice Birch agreed with Justice Reid and further dissented from the court’s decision to narrow the pool of cases to be considered.\textsuperscript{105} Thereafter, Justice Birch repeatedly dissented from the court’s decisions affirming death sentences, on the ground that the court’s comparative proportionality analysis was essentially meaningless.\textsuperscript{106} Justice Birch stated: “I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is

\begin{footnotesize}
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  \item \textsuperscript{102} State v. Bland, 958 S.W.2d 651, 665 (Tenn. 1997).
  \item \textsuperscript{103} \textit{Id.}
  \item \textsuperscript{104} \textit{Id.} at 674–79 (Reid, J., dissenting).
  \item \textsuperscript{105} \textit{Id.} at 679 (Birch, J., dissenting). Because of the meaningless of the court’s comparative proportionality analysis, Justice Birch consistently dissented when the court affirmed death sentences. \textit{See}, e.g., State v. Leach, 148 S.W.3d 42, 69 (Tenn. 2004) (Birch, J., concurring and dissenting) (“I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in \textit{State v. Bland}. As previously discussed, I believe that the three basic problems with the current proportionality analysis are that: (1) the proportionality test is overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective. In my view, these flaws undermine the reliability of the current proportionality protocol.”) (citations omitted).
  \item \textsuperscript{106} \textit{See} State v. Davis, 141 S.W.3d 600, 632–33 (Tenn. 2004) (Birch, J., concurring and dissenting). In this case, Justice Birch presented a list of such cases.
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overbroad, (2) the pool of cases used for comparison is inadequate, and (3) review is too subjective.”

In the 2014 decision of *State v. Pruitt*, Justices William C. Koch, Jr., and Sharon G. Lee dissented from the court’s comparative proportionality methodology. Justice Koch pointed out the problems with *Bland* as follows:

[T]he *Bland* majority then changed the proportionality analysis in a way that deviates not only from the language of Tenn. Code Ann. § 39-13-206(c)(1)(D) but also from the relevant decisions of the United States Supreme Court. Three prominent features of the *State v. Bland* analysis illustrate the difficulties with this change in approach.

First, the [c]ourt narrowed the pool of cases to be considered in a proportionality analysis. Rather than considering all cases that resulted in a conviction for first[ ]degree murder (as the [c]ourt had done from 1977 to 1997), the [c]ourt limited the pool to “only those cases in which a capital sentencing hearing was actually conducted . . . regardless of the sentence actually imposed.” By narrowly construing “similar cases” in Tenn. Code Ann. § 39-13-

107 *Id.* at 633.
206(c)(1)(D), the court limited proportionality review to only a small subset of Tennessee’s murder cases—the small minority of cases in which a prosecutor actually sought the death penalty.

The second limiting feature of the State v. Bland proportionality analysis is found in the court’s change in the standard of review. The majority opinion held that a death sentence could be found disproportionate only when “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.” This change prevents the reviewing courts from determining whether the case under review exhibits the same level of shocking despicability that characterizes the bulk of our death penalty cases or, instead, whether it more closely resembles cases that resulted in lesser sentences.

The third limiting feature of the State v. Bland analysis is the seeming conflation of the consideration of the circumstances in Tenn. Code Ann. § 39-13-206(c)(1)(B) and Tenn. Code Ann. § 39-13-206(c)(1)(C) with the circumstance in Tenn. Code Ann. § 39-13-206(c)(1)(D). When reviewing a sentence of death for first[ ]degree murder, the courts must separately address whether “[t]he evidence supports the jury’s finding of statutory aggravating circumstance or circumstances;” whether “[t]he evidence supports the jury’s finding that the aggravating circumstance or
circumstances outweigh any mitigating circumstances;” and whether “[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.”

As applied since 1997, State v. Bland has tipped the scales in favor of focusing on the evidentiary support for the aggravating circumstances found by the jury and on whether these circumstances outweigh the mitigating circumstances. Instead of independently addressing the evidence regarding “the nature of the crime and the defendant,” Bland’s analysis has prompted reviewing courts to uphold a death sentence as long as the evidence substantiates the aggravating circumstance or circumstances found by the jury, as well as the jury’s decision that the aggravating circumstance or circumstances outweigh any mitigating circumstances.110

In an earlier case, Justice Birch pointedly summarized the problem with the court’s comparative proportionality jurisprudence: “Because our current comparative proportionality review system lacks objective standards, comparative proportionality analysis seems to be little more than a ‘rubber stamp’ to affirm whatever decision the jury reaches at the trial level.”111

V. Simplifying the Lottery: A Tale of Two Cases

110 Id. at 227–28 (footnotes omitted) (citations omitted).
As the legislature and the court have expanded the opportunity for arbitrariness by expanding the class of death eligible defendants, and as the court has removed a check against arbitrariness by declining to conduct meaningful comparative proportionality review, it is time to ask how Tennessee’s capital punishment system operates in fact. Returning to the lottery scenario, let us simplify the problem by considering just two cases and asking two questions: (i) which of the two cases is more deserving of capital punishment? and, (ii) which of the two cases actually resulted in a death sentence? 

A. Case #1

The two defendants were both convicted of six counts of first degree premeditated murder. They shot a man and a woman in the head. They strangled two women to death, one of whom was pregnant, thus also killing her unborn child. They also “stomped” a 16-month old child to death.

Both of the defendants had previously served time in jail or prison. When one of the defendants was released from prison, the two of them got together and dealt drugs including marijuana, cocaine, crack cocaine, and pills. Their drug business was successful, progressing from selling to “crack heads” and addicts to selling to other dealers. One of the defendants, the apparent leader of the two, was described as intelligent.

The defendants planned to rob WC, a male who also dealt drugs. On the night of the crime, WC and AM, a female, went to WC’s mother’s house. The defendants were together in Huntsville, Alabama, and one of them telephoned WC. After receiving the call, WC and AM left WC’s mother’s house and went to pick up the defendants. The four of them left Huntsville with one of the defendants driving the car. WC was sitting in the front passenger seat. The other defendant was sitting behind WC, and AM was sitting behind the driver. They drove to a house where the defendants kept their drugs. When the car pulled into the garage, the defendant in the back seat shot WC in the back of the head three times. The killer then shot AM in the head. The defendants pulled AM out of the back seat, dragged her into the utility room and put a piece of plywood over the doorway to conceal her body.

The defendants then went inside the house and found CC, a pregnant woman. They bound her hands behind her back and dunked her head in a bathtub to force her to reveal where WC kept his drugs and money. When CC was unwilling or unable to tell them, they strangled her to death. When the defendants killed CC, they also killed her unborn child. After killing CC and her unborn child, they stomped to death the sixteen-month-old child who was also in the house.

The defendants then drove to another house where WC kept drugs. WC’s body was still in the car. They found JB, a woman who was inside the house, and strangled her to death in the same manner that they had killed CC. After killing JB, the defendants ransacked the house, looking for money and drugs. They took drugs from one or both houses, and they took WC’s AK-47s from the second house. According to the prosecution’s theory, the defendants intended to “pin” the killing on WC, so they spared the lives of his two children and disposed of his body in the woods.

The aggravators that would support death sentences in these cases included: (i)(1) (murder against a person less than twelve years old); (i)(5) (the murders
were heinous, atrocious or cruel); (i)(6) (the murders were committed for the purpose of avoiding arrest or prosecution); (i)(7) (the murders were committed while the defendants were committing other felonies including first degree murder, robbery, burglary, theft, kidnapping, and aggravated child abuse); (i)(12) (mass murder); and (i)(16) (one of the victims was pregnant).

B. Case #2

The defendant was convicted of first degree felony murder for causing the death of an elderly man in the course of carjacking the victim’s car. There was no evidence that the defendant intended the victim’s death.

The defendant had prior convictions for aggravated burglary, robbery, criminal intent to commit robbery, and theft over $500. His I.Q. was tested at 66 and 68, which was within the intellectual disability range, but the court found that he was not sufficiently deficient in adaptive behavior to meet the legal definition of intellectual disability that would have exempted him from the death penalty.113

The defendant planned to rob a car. He went to the Apple Market and stood outside the store’s door. An older man, the victim, came out of the market with groceries in his arms and walked to his car. As the man reached the driver’s side door, the defendant ran up behind him, and there ensued a short scuffle lasting about 15 seconds. The defendant threw the man into the car and/or the pavement, causing severe injuries including brain trauma, fractured bones, and internal bleeding. The defendant slammed the car door and drove away. The man was taken to the hospital where he died of his head injuries the following day.

The aggravators that would support a death sentence in this case were: (i)(2) (prior violent felonies);


[127]
(i)(7) (felony murder); and (i)(14) (victim over 70 years old).

C. Analysis

We submit that the majority of persons presented with these two case scenarios, without any further information about the operation of Tennessee’s death penalty system, would choose Case #1 as the more appropriate and likely candidate for the death penalty. In fact, however, in Case #1 neither defendant received a death sentence—one received six consecutive life sentences, 114 and the other received four concurrent and two consecutive life sentences. 115 On the other hand, the defendant in Case #2, who did not premeditate or intend the victim’s death, was sentenced to death. 116

These cases are not comparable. How could the single felony murder case result in a death sentence while the premeditated multi-murder case resulted in life sentences? They are both fairly recent cases. The multi-victim premeditated murder case was in a rural county in the Middle Grand Division of the state, where no death sentences have been imposed since 2001. By contrast, the single-victim felony murder case, involving a borderline intellectually disabled defendant, was in Shelby County which has accounted for 52% of all new Tennessee death sentences since mid-2001, of which 86% involved black defendants. 117 These may not be the only factors that could explain the disparity between these cases, but they stand out.

116 Pruitt, 415 S.W.3d at 186.
117 See infra Appendix 1.
These cases may represent an extreme comparison—although 90% of all multi-murder cases resulted in life or LWOP sentences\(^\text{118}\)—but this comparison most clearly illustrates a problem with our death penalty system. Geographic location, differing prosecutorial attitudes, and the prejudicial influences of defendants’ mental impairments are arbitrary factors that, along with other arbitrary factors discussed below, too often determine the application of capital punishment. In the next part, we review Mr. Miller’s survey of first degree murder cases since 1977, which we believe supports the proposition that arbitrariness permeates the entire system.

VI. Mr. Miller’s Survey of First Degree Murder Cases

A. The Survey Process

Given the Tennessee Supreme Court’s abandonment of the original purpose behind Rule 12 data collection, how can we systematically evaluate the manner by which Tennessee has selected, out of more than 2,500 convicted first degree murderers, only 86 defendants to sentence to death—and only 6 defendants to execute—during the 40 years the system has been in place? Is there a meaningful distinction between death-sentenced and life-sentenced defendants? Are we imposing the death penalty only upon those criminals who are the “worst of the bad”? Does our system meet the constitutional demand for heightened reliability, consistency, and fairness? Or is our system governed by arbitrary factors that should not enter into the sentencing decision?

To test the degree of arbitrariness in Tennessee’s death penalty system, attorney H. E. Miller, Jr.,

\(^{118}\) See infra Appendix 1.
undertook a survey of all Tennessee first degree murder cases decided during the 40-year period beginning July 1, 1977, when the current system was installed. Mr. Miller devoted thousands of hours over several years in conducting his survey.

Mr. Miller began his survey by reviewing the filed Rule 12 reports. He soon discovered, however, that in close to one-half of first degree murder cases, trial judges failed to file Rule 12 reports—and for those cases, there is no centralized data collection system. Further, many of the filed Rule 12 reports were incomplete or contained errors.119

Mr. Miller found that Rule 12 reports were filed in 1,348 adult first degree murder cases. He identified an additional 1,166 first degree murder cases for which Rule 12 reports were not filed, bringing the total of adult first degree murder cases that he has been able to find to 2,514.120 Thus, trial judges failed to comply with Rule 12

119 Office of Research, Tenn. Comptroller of the Treasury, Tennessee’s Death Penalty: Costs and Consequences (2004) https://deathpenaltyinfo.org/documents/deathpenalty.pdf [https://perma.cc/3RDX-VCUT]. In 2004, the Tennessee Comptroller of the Treasury noted: “Office of Research staff identified a considerable number of cases where defendants convicted of first [ ] degree murder did not have a Rule 12 report, as required by law. . . . Rule 12 reports are paper documents, which are scanned and maintained on CD-ROM. The format does not permit data analysis.” Id. at 46–47. The situation with Rule 12 reports has not improved since the Comptroller’s report.

120 There undoubtedly exist additional first degree murder cases for which Rule 12 reports were not filed and that Mr. Miller did not find. For example, some cases are settled at the trial court level and are never taken up on appeal; and without filed Rule 12 reports, these cases are extremely difficult to find. Certainly, a fair number of recent cases were not found because of the time it takes for a case to proceed from trial to the Court of Criminal Appeals before an appellate court record is created. It also is possible that cases decided on appeal were inadvertently overlooked, despite great effort to be thorough.
in at least 46% of adult first degree murder cases.\footnote{See infra Appendix 1. The Rule 12 noncompliance rate is 50% in juvenile first degree murder cases.} This astounding statistic is perhaps explainable by the fact that Rule 12 data has never been used by the court in a meaningful way and has become virtually obsolete since \textit{Bland v. State}\footnote{See supra notes 102–105, and accompanying text.} when the Tennessee Supreme Court decided to limit its comparative proportionality review only to other capital cases that it had previously reviewed.\footnote{The perpetuation of Rule 12 on the books gives rise to two unfortunate problems. First, Rule 12 creates a false impression of meaningful data collection, which clearly is not the case when we realize the 46% noncompliance rate and the lack of evidence that Rule 12 data has served any purpose under the current system. Second, the 46% noncompliance rate among trial judges who preside over first degree murder cases tends to undermine an appearance of integrity. We should expect judges to follow the court’s rules.}

Because of problems with the Rule 12 reports, Mr. Miller found it necessary to greatly broaden his research to find and review the first degree murder cases for which Rule 12 reports were not filed, and to verify and correct information contained in the Rule 12 reports that were filed. As described in his Report, Mr. Miller researched numerous sources of information including cases reported in various websites and databases, Tennessee Department of Correction records, Tennessee Administrative Office of the Courts reports, and original court records, among other sources.

Mr. Miller compiled information about each case—to the extent available—including: name, gender, age, and race of defendant; date of conviction; county of conviction; number of victims; gender, age, and race of
victims (to the extent this information was available); and results of appeals and post-conviction proceedings—information that should have been included in Rule 12 reports.

**B. Factors Contributing to Arbitrariness**

Mr. Miller’s survey reveals that Tennessee’s capital sentencing scheme fails to fulfill *Furman’s* basic requirement to avoid arbitrariness in imposing the ultimate penalty. Capital sentencing in Tennessee is not “regularized” or “rationalized.” The statistics and the experiences of attorneys who practice in this area demonstrate a number of factors that contribute to system’s capriciousness.

1. Infrequency and Downward Trend

As stated previously, frequency of application is the most important factor in assessing the constitutionality of the death penalty. As the death penalty becomes less frequently applied, there is an increased chance that capital punishment becomes “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”¹²⁴ Infrequency of application sets the foundation for analysis of the system.

Since July 1, 1977, only 192 defendants received death sentences among the 2,514 Tennessee defendants who were convicted of first degree murder. Among those 192 defendants, only 86 defendants’ death sentences have been sustained as of June 30, 2017, while the death sentences imposed on 106 defendants have been vacated or reversed. Accordingly, over the span of the past 40 years only approximately 3.4% of convicted first degree murderers have received sustained death sentences—and most of those cases are still under review. Of those

86 defendants whose death sentences have been sustained, only six were actually executed, representing less than 0.2% of all first degree murder cases—or less than one out of every 400 cases. In other words, the probability that a defendant who commits first degree murder is arrested, found guilty, sentenced to death, and executed is miniscule. Even if Tennessee were to hurriedly execute the approximately dozen death row defendants who are currently eligible for execution dates, the percentage of executed defendants as compared to all first degree murder cases would remain extremely small.

Additionally, over the past twenty years there has been a sharp decline in the frequency of capital cases. Table 23 from Mr. Miller’s Report tells the story:

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125 Tennessee Supreme Court Rule 12.4 provides that an execution date will not be set until the defendant’s case has completed the “standard three tiers” of review (direct appeal, post-conviction, and federal habeas corpus), which occurs when the defendant’s initial habeas corpus proceeding has run its full course through the U.S. Supreme Court. The Tennessee Administrative Office of the Courts lists eleven “capital cases that have, at one point, neared their execution date.” Capital Cases, TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, http://www.tsc.state.tn.us/media/capital-cases [https://perma.cc/QD4Y-929R]. At the time of publication, execution dates had been set to occur in the latter part of 2018 in three cases: Billy Ray Irick (on death row for close to 32 years), Edmund Zagorski (on death row for over 34 years), and David Earl Miller (on death row for close to 37 years).
Table 1: Frequency of Tennessee Death Sentences in 4-Year Increments

<table>
<thead>
<tr>
<th>4-Year Period</th>
<th>Trials Resulting in Death Sentences</th>
<th>New Death Sentences (i.e., Initial Capital Trials)</th>
<th>Sustained Death Sentences(^{126})</th>
<th>Ave. New Death Sentences per Year</th>
<th>1st Degree Murder Cases(^{127})</th>
<th>% “New” Death Sentences / 1st Degree Murders</th>
<th>% Sustained Death Sentences / 1st Degree Murders</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/77 – 6/30/81</td>
<td>25</td>
<td>25</td>
<td>6</td>
<td>6.25/year</td>
<td>155</td>
<td>16%</td>
<td>4%</td>
</tr>
<tr>
<td>7/1/81 – 6/30/85</td>
<td>37</td>
<td>33</td>
<td>12</td>
<td>8.25/year</td>
<td>197</td>
<td>17%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/85 – 6/30/89</td>
<td>34</td>
<td>32</td>
<td>15</td>
<td>8.00/year</td>
<td>238</td>
<td>13%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/89 – 6/30/93</td>
<td>38</td>
<td>37</td>
<td>18</td>
<td>9.25/year</td>
<td>282</td>
<td>13%</td>
<td>6%</td>
</tr>
<tr>
<td>7/1/93 – 6/30/97</td>
<td>21</td>
<td>17</td>
<td>9</td>
<td>4.45/year</td>
<td>395</td>
<td>4%</td>
<td>2%</td>
</tr>
<tr>
<td>7/1/97 – 6/30/01</td>
<td>32</td>
<td>24</td>
<td>14</td>
<td>6.00/year</td>
<td>316</td>
<td>8%</td>
<td>4%</td>
</tr>
<tr>
<td>7/1/01 – 6/30/05</td>
<td>20</td>
<td>16</td>
<td>5</td>
<td>4.00/year</td>
<td>283</td>
<td>6%</td>
<td>2%</td>
</tr>
<tr>
<td>7/1/05 – 6/30/09</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td>1.00/year</td>
<td>271</td>
<td>1.5%</td>
<td>1.4%</td>
</tr>
<tr>
<td>7/1/09 – 6/30/13</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>1.50/year</td>
<td>284</td>
<td>2%</td>
<td>1.7%</td>
</tr>
<tr>
<td>7/1/13 – 6/30/17</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>0.25/year</td>
<td>Incomplete Data(^{128})</td>
<td>Incomplete Data</td>
<td>Incomplete Data</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>221</strong></td>
<td></td>
<td></td>
<td><strong>4.88 per year (40 years)</strong></td>
<td><strong>&gt;2,514</strong></td>
<td><strong>&lt;8%</strong></td>
<td><strong>&lt;3.5%</strong></td>
</tr>
</tbody>
</table>

\(^{126}\) Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.

\(^{127}\) Counted by defendants, not murder victims.

\(^{128}\) Thus far Mr. Miller has found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record of cases from the most recent years. According to Tennessee Bureau of Investigation statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. See infra Appendix 1, Table 25.
Graph of New Death Sentences in Tennessee by 4-Year Increments

129 One defendant had three separate “new” trials each resulting in “new” and “sustained” death sentences, while another defendant had two such trials. See Furman v. Georgia, 408 U.S. 238 (1972). Accordingly, there were 195 “new” trials involving a total of 192 defendants and 89 “sustained” death sentences involving a total of 86 defendants.

130 See supra note 128. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.

131 This graph includes all original capital trials resulting in “new” death sentences, including those that were subsequently reversed or vacated.
As we can see, disregarding cases that were subsequently reversed or vacated, the frequency of new death sentences has fallen from a high of 9.25 per year from 1989 to 1993, to a low of 0.25 per year during the most recent 4-year period of 2013 to 2017—a 97% reduction in the rate of new death sentences. Moreover, no new death sentence was imposed in Tennessee over the three-year period from July 2014 through June 2017, and over the 16-year period from February 2001 through June 2017, no death sentence had been imposed in the Middle Grand Division of the State (which includes Nashville-Davidson County and 40 other counties,
representing more than one-third of the state’s population).\textsuperscript{132}

Mr. Miller broke down the statistics into two groups—cases originally tried during the first 24 years, before June 30, 2001, and those originally tried during the most recent 16 years, through June 30, 2017. Mr. Miller used 2001 as a dividing line because it was during the period leading up to that year when Tennessee began experiencing its steep decline in the frequency of new death sentences. Also, 2001 was the year when the Office of the District Attorney General for Davidson County issued its Death Penalty Guidelines,\textsuperscript{133} setting forth the procedure and criteria that the Office would use in determining when to seek a death sentence.

During the initial 24-year period, Tennessee imposed sustained death sentences on 5.8\% of the defendants convicted of first degree murder, at the average rate of 4 sustained death sentences per year. Since 2001, the percentage of first degree murder cases resulting in death sentences has dropped to less than 2\%, at a rate of less than 1 sustained death sentence per year.

At this level of infrequency, it is impossible to conceive how Tennessee’s death penalty system is serving any legitimate penological purpose. No reasonable scholar could maintain that there is any

\textsuperscript{132} See infra Appendix 2. In April 2018, which falls outside the timeframe of Mr. Miller’s survey, a new death sentence was imposed in Madison County on defendant Urshawn Miller. At the time of publication, this case was still in the trial court pending an expected motion for new trial. As of the date of this article, this is the only new death sentence in Tennessee since June 2014.

\textsuperscript{133} Office of the Dist. Att’y Gen. for the 20th Judicial Dist. of Tenn., Death Penalty Guidelines (Oct. 18, 2001) (On file with authors). The current Davidson County District Attorney confirmed to one of the authors that the guidelines remain in effect. Based on our inquiries, no other district attorney general office has adopted written guidelines or standards for deciding when to seek death.
deterrence value to the death penalty when it is imposed with such infrequency.\textsuperscript{134} There is minimal retributive value when the overwhelming percentage of first degree murder cases (now more than 98%) end up with life or LWOP.\textsuperscript{135} Any residual deterrent or retributive value in Tennessee’s sentencing system is further diluted to the point of non-existence by the other factors of arbitrariness listed below. As Justice White stated in \textit{Furman}, “[T]he death penalty could so seldom be imposed that it would cease to be a credible deterrent or

\begin{footnote}{134} Although a small minority of studies have purported to document a deterrent effect, none have documented such an effect in a state like Tennessee where the vast majority of defendants get life or LWOP sentences, and where those who do receive death sentences long survive their sentencing date, usually until they die of natural causes, and are rarely executed. In fact, “the majority of social science research on the issue concludes that the death penalty has no effect on the homicide rate.” Donald L. Beschle, \textit{Why Do People Support Capital Punishment? The Death Penalty as Community Ritual}, 33 CONN. L. REV. 765, 768 (2001); \textit{see also Nat’l Research Council of the Nat’l Acads., Deterrence and the Death Penalty} 2 (Daniel S. Nagin & John V. Pepper Eds., 2012) ("[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.").
\end{footnote}

\begin{footnote}{135} The role of retribution in our criminal justice system is a debatable issue. \textit{See Williams} v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law."). Over time, “our society has moved away from public and painful retribution toward ever more humane forms of punishment.” Baze v. Rees, 553 U.S. 35, 80 (2008) (Stevens, J., concurring). The United States Supreme Court has cautioned that, of the valid justifications for punishment, “retribution . . . most often can contradict the law’s own ends. This is of particular concern . . . in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” \textit{Kennedy} v. Louisiana, 554 U.S. 407, 420 (2008).
\end{footnote}
measurably to contribute to any other end of punishment in the criminal justice system.”136

The decline in the frequency of new death sentences in Tennessee also evidences Tennessee’s evolved standard of decency away from capital punishment. As further explained below, in the vast majority of Tennessee counties, including all counties within the Middle Grand Division, the death penalty is essentially dead.137

2. Geographic Disparity

Death sentences are not evenly distributed throughout the state. Whether it is a function of differing crime rates, political environment, racial tensions, the attitude of prosecutors, the availability of resources, the competency of defense counsel, or the characteristics of typical juries, a few counties have zealously pursued the death penalty in the past, while others have avoided it altogether. Over the 40-year period, only 48 of Tennessee’s 95 counties (roughly one-half) have conducted trials resulting in death sentences,138 but as indicated above, the majority of death sentences were reversed or vacated. More significantly, only 28 counties, representing 64% of Tennessee’s population, have imposed sustained death sentences;139 since 2001, only eight counties, representing just 34% of Tennessee’s

137 The decline in new death sentences in Tennessee mirrors a nationwide trend. According to the Death Penalty Information Center, the nationwide number of death sentences has declined from a total of 295 in 1998 to a total of just 31 in 2016—a 90% decline. See Death Penalty Info. Ctr., Facts About the Death Penalty, https://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/HU36-8PC5].
138 See infra Appendix 2.
139 See infra Appendix 1, Table 21.
population, have imposed sustained death sentences.\footnote{140} In the most recent five-year period, from July 1, 2012, to June 30, 2017, Shelby County was the only county to impose death sentences.

The decline in the number of counties resorting to the death penalty is illustrated by the following table taken from Mr. Miller’s report, which gives the number of counties that conducted capital trials (i.e., trials resulting in death sentences) during each of the ten 4-year increments during the 40-year period:\footnote{141}

<table>
<thead>
<tr>
<th>4-Year Period</th>
<th>Number of Counties Conducting Capital Trials During the Indicated 4-Year Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/1981 – 6/30/1985</td>
<td>18</td>
</tr>
<tr>
<td>7/1/1989 – 6/30/1993</td>
<td>18</td>
</tr>
<tr>
<td>7/1/1993 – 6/30/1997</td>
<td>11</td>
</tr>
<tr>
<td>7/1/1997 – 6/30/2001</td>
<td>12</td>
</tr>
<tr>
<td>7/1/2001 – 6/30/2005</td>
<td>11</td>
</tr>
<tr>
<td>7/1/2005 – 6/30/2009</td>
<td>3</td>
</tr>
</tbody>
</table>

\footnote{140}{Id. at Table 22. See also infra Appendix 2.}\footnote{141}{Id. at Table 24.}\footnote{142}{These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.}
It is costly to maintain a capital punishment system. As the number of counties that impose the death penalty declines, an increasing majority of Tennessee’s taxpayers are subsidizing the system that is not being used on their behalf, but instead is being used only by a diminishingly small number of Tennessee’s counties.

Shelby County stands at one end of the spectrum. Since 1977, it has accounted for 37% of all sustained death sentences; over the past 10 years, it has accounted for 57% of Tennessee death sentences during that period; and, as mentioned above, it has accounted for all of Tennessee’s death sentences during the most recent 5-year period.

Lincoln County is one of the many counties that stand at the other end of the spectrum. In Lincoln County over the past 39 years, there have been ten first-degree

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143 There has been no study of the costs of Tennessee’s system. See Office of Research, Tenn. Comptroller of the Treasury, supra note 119, at i–iv (concluding that capital cases are substantially more expensive than non-capital cases, but itemizing reasons why the Comptroller was unable to determine the total cost of Tennessee’s capital punishment system). Studies from other states, however, have concluded that maintaining a death penalty system is quite expensive, costing millions of dollars per year. For a general discussion of costs, see Brandon L. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, 95–100 (2017) (citing studies from several states). See also Costs of the Death Penalty, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/costs-death-penalty [https://perma.cc/AY2D-PMNB].

144 See infra Appendix 2 at 244. This does not account for the most recent new death sentence in Tennessee that was imposed in Madison County in April 2018, which was outside the timeframe of Mr. Miller’s survey. See supra note 132.
murder cases involving eleven defendants and 22 victims (an average of 2.2 victims per case). No death sentences were imposed, even in two mass murder cases. For example, in the recent case of State v. Moss, discussed in Part V above, the defendant and his co-defendant were each convicted of six counts of first degree premeditated murder; the murders were egregious; but the defendants received life sentences, not death.145 According to the Rule 12 reports, in another Lincoln County case, State v. Jacob Shaffer, on July 22, 2011, the defendant, who had committed a prior murder in Alabama, was convicted of five counts of first degree murder and was sentenced to LWOP, not death.146

Indeed, in the entire Middle Grand Division, over the past 25 years, since January 1, 1992, only six defendants received sustained death sentences—a rate of only one case every four years, and no cases since February 2001.

There is a statistically significant disparity between the geographic distribution of first degree murder cases, on the one hand, and the geographic distribution of capital cases, on the other. Mere geographic location of a case makes a difference, contributing an indisputable element of arbitrariness to the system.

3. Timing and Natural Death

To the consternation of many, capital cases take years to work through the three tiers of review—from trial and direct appeal through post-conviction and

federal habeas—and further litigation beyond that. Perhaps that is as it should be, given the heightened need for reliability in capital cases and the exceedingly high capital sentencing reversal rate due to trial errors, as discussed below. But the long duration of capital cases, combined with natural death rates among death row defendants, contributes an additional form of arbitrariness in determining which defendants are ultimately executed.

As of June 30, 2017, among the 56 surviving defendants on death row, the average length of time they had lived on death row was more than 21 years, and this average is increasing as the death row population ages while fewer new defendants are entering the population.¹⁴⁷ Only ten new defendants were placed on death row during the most recent ten years, equal in number to the ten surviving defendants who had been on death row for over 30 years. One surviving defendant had been on death row for more than 35 years. Mr. Miller’s Report breaks down the surviving defendants’ length of time on death row as follows:¹⁴⁸

<table>
<thead>
<tr>
<th>Length of Time on Death Row</th>
<th>Number of Defendants (as of 6/30/2017)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 30 Years</td>
<td>10</td>
</tr>
<tr>
<td>20 – 30 Years</td>
<td>20</td>
</tr>
<tr>
<td>10 – 20 Years</td>
<td>16</td>
</tr>
<tr>
<td>&lt; 10 Years</td>
<td>10</td>
</tr>
</tbody>
</table>

¹⁴⁷ See infra Appendix 1, Table 20.
¹⁴⁸ Id.
Of the six whom Tennessee has executed, their average length of time on death row was 20 years, and one had been on death row for close to 29 years.\textsuperscript{149}

The length of time defendants serve on death row facing possible execution further diminishes any arguable penological purpose in capital punishment to the point of nothingness. With the passage of time, the force of deterrence disappears, and the meaning of retribution is lost.\textsuperscript{150}

Moreover, during the 40-year period, 24 condemned defendants died of natural causes on death row. This means that, so far at least, a defendant with a sustained death sentence is four times more likely to die of natural causes than from an execution. Even if Tennessee hurriedly executes the approximately dozen death-sentenced defendants who have completed their “three tiers” of review,\textsuperscript{151} with the constantly aging death row population the number of natural deaths will continue to substantially exceed deaths by execution.

Given the way the system operates, a high percentage of natural deaths among the death row population is an actuarial fact affecting the carrying out

\textsuperscript{149} This includes Daryl Holton, who waived his post-conviction proceedings and was executed in 1999 when he had been on death row only 8 years.

\textsuperscript{150} See Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J., respecting denial of certiorari) (dissenting from the denial immediately before Tennessee’s execution of Cecil Johnson, who had been on death row for close to 29 years: “[D]elaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner’s death.”) (quoting Thompson v. McNeil, 129 S. Ct. 1299, 1300 (200) (Stevens, J., respecting denial of certiorari)).

\textsuperscript{151} See TENN. SUP. CT. R. 12.4(A) (describing the “standard three-tier appeals process” in capital cases to include trial and direct appeal, state post-conviction proceedings, and federal habeas corpus).
of the death penalty. Consequently, the timing of a case during the 40-year period, along with the health of the defendant, is an arbitrary factor determining not only whether a defendant will be sentenced to death, but also whether he will ever be executed. Furthermore, if a death-sentenced defendant is four times more likely to die of natural causes than by execution, then the death penalty loses any possible deterrent or retributive effect for that reason as well.

4. Error Rates

Of the 192 Tennessee defendants who received death sentences during the 40-year period, 106 defendants had seen their sentences or convictions vacated because of trial error, and only 86 defendants had sustained death sentences (of whom 56 were still living as of June 30, 2017)—and most of their cases are still under review.\textsuperscript{152} This means that during the 40-year period the death sentence reversal rate was 55%. Among those reversals, three defendants were exonerated of the crime, and a fourth was released upon the strength of new evidence that he was actually innocent.\textsuperscript{153}

If 55% of General Motors automobiles over the past 40 years had to be recalled because of manufacturing defects, consumers and shareholders would be outraged, the government would investigate, and the company certainly would go out of business. One of the fundamental principles under the Eighth Amendment is

\textsuperscript{152} See infra Appendix 1 at 213. During the 40-year period, 24 defendants died of natural causes while their death sentences were pending. These are counted as “sustained” death sentences, along with the six defendants who were executed and the 56 defendants on death row as of June 30, 2017.

\textsuperscript{153} Id.
that our death penalty system must be reliable.\textsuperscript{154} With a 55\% reversal rate, reliability is lacking.

The existence of error in capital cases and the prospect of reversal is a random factor that introduces a substantial element of arbitrariness into the system. Two causes of error—ineffective assistance of counsel and prosecutorial misconduct—are discussed below.\textsuperscript{155}

5. Quality of Defense Representation

We have identified 45 defendants whose death sentences or convictions were vacated by state or federal courts on grounds of ineffective assistance of counsel.\textsuperscript{156} In other words, courts have found that 23\% of the Tennessee defendants sentenced to death were deprived of their constitutional right to effective legal representation. This is an astounding figure, especially given the difficulty in proving both the “deficiency” and “prejudice” prongs under the \textit{Strickland} standard for determining ineffective assistance of counsel under the Sixth Amendment.\textsuperscript{157} In two additional cases affirmed by

\textsuperscript{154} \textit{See}, \textit{e.g.}, Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (“[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.”).

\textsuperscript{155} Other reversible errors have included unconstitutional aggravators, erroneous evidentiary rulings, improper jury instructions, and insufficient evidence to support the verdict among other grounds for reversals. \textit{See} THE TENN. JUSTICE PROJECT, TENNESSEE DEATH PENALTY CASES SINCE 1977 (June 15, 2008) (on file with authors).

\textsuperscript{156} These cases are listed \textit{infra} Appendix 3, \textit{List of Capital IAC Cases}.

\textsuperscript{157} \textit{Strickland} v. Washington, 466 U.S. 668, 689 (1984). The difficulty of proving ineffective assistance of counsel is embodied in the following oft-quoted passage from \textit{Strickland}: “Judicial scrutiny of counsel’s performance must be highly deferential. Because of the difficulties inherent in making the

[146]
the courts, Tennessee Governor Phil Bredesen commuted the death sentences based, in part, on his determination that the defendants suffered from “grossly inadequate defense representation” at trial and/or during the post-conviction process.\textsuperscript{158} These are findings of legal malpractice.\textsuperscript{159} If a law firm were judicially found to have committed malpractice in more than 23% of their cases over the past 40 years, the firm would incur substantial liability and dissolve. How can we tolerate a capital punishment system that yields these results?

The reasons for deficient defense representation in capital cases are not hard to locate. The problem begins with the general inadequacy of resources available to fund the defense in indigent cases. In a recently published report, the Tennessee Indigent Defense Task Force, appointed by the Tennessee Supreme Court, found:

There is a strongly held belief in the legal community that attorneys do not receive reasonable compensation when representing clients as counsel appointed by the State. The Task Force was repeatedly reminded that, in almost every trial situation, the attorney for the

\footnotesize{evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[].” Id.
\textsuperscript{158} See infra Appendix 1 at 214.
\textsuperscript{159} There are additional capital cases in which courts have vacated death sentences on grounds of ineffective assistance of counsel, only to be reversed on appeal. See, e.g., Morris v. Carpenter, 802 F.3d 825, 828 (6th Cir. 2015) (reversing by applying a strict standard of reviewing state court decisions); Abdur’Rahman v. Bell, 226 F.3d 696, 698 (6th Cir. 2000) (affirming a finding of deficient performance, but reversing on the prejudice prong). These cases illustrate differing judicial viewpoints on capital punishment, which is another arbitrary factor discussed below.}
defendant will be paid less than every other person with the trial associated in a professional capacity—less than the testifying experts, the investigators, and interpreters.

Attorneys and judges from across the state, in a variety of different roles and stages of their careers, as well as other officials and experts in the field were overwhelmingly in favor of increasing the compensation for attorneys in appointed cases. Concern regarding compensation is not new.160

According to the Task Force, there is a general consensus among lawyers and judges that “the current rates for paying certain experts . . . are below market rate.”161

Virtually all defendants in capital cases are indigent and must rely upon appointed counsel for their defense.162 A typical capital defendant has no role in choosing the defense attorneys who will represent him. Capital cases are unique in many respects and place peculiar demands on the defense: mitigation investigation, extensive use of experts, “death qualification” and “life qualification” in jury selection, and the sentencing phase of trial—the only kind of trial in the Tennessee criminal justice system in which a jury makes the sentencing decision. Thus, capital defense representation is regarded as a highly specialized area of

161 Id. at 52.
162 See infra note 176.
law practice. As noted by the American Bar Association:

[D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.

... “Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.”

163 Tennessee Supreme Court Rule 13 section 3 acknowledges the specialized nature of capital defense representation by imposing special training requirements on appointed capital defense attorneys. This is the only area of law in which the Tennessee Supreme Court imposes such a requirement. Unfortunately, the Tennessee training requirements for capital defense attorneys is inadequate. Cf. William P. Redick, Jr., et al., Pretend Justice—Defense Representation in Tennessee Death Penalty Cases, 38 U. MEM. L. REV. 303, 328–33 (2008).

Handling a death case is all consuming, requiring extraordinary hours and nerves. It is difficult for a private attorney to build and maintain a successful law practice while effectively defending a capital case at billing rates that do not cover overhead. Most public defender offices have excessive caseloads without having to take on capital cases. For these and other reasons, capital defense litigation is a surpassingly difficult, highly specialized field of law requiring extensive training, experience, and the right frame of mind—as well as sufficient time and resources. In Tennessee, especially with the sharp decline in the frequency of capital cases, few attorneys have acquired any meaningful experience in actually trying capital cases through the sentencing phase, and the training is sparse. Moreover, given the constraints on compensation and funds for expert services, Tennessee offers inadequate resources to properly defend a capital case, or to attract the better lawyers to the field.

On the other hand, some highly effective attorneys, willing to suffer the harsh economics and emotional stress of capital cases, do handle these kinds of cases, often with great success and at great personal and financial sacrifice. Unfortunately, there simply are not enough of these kinds of lawyers to go around.


165 See TENN. SUP. CT. R. 13, § 3(k) (setting maximum billing rates for appointed counsel and funding for investigators and experts).


167 For a thorough discussion of the problems with capital defense representation in Tennessee, see Redick, et al., *supra* note 163.

168 Effective capital defense representation requires defense counsel to expend their own funds to cover investigative services, because funding provided under Tennessee Supreme Court Rule 13 section 3(k) is grossly inadequate.
With a reversal rate based on inadequate defense representation exceeding 23%, Tennessee’s experience confirms the conclusion reached by the American Bar Association several years ago:

Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had “yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial” and that “people who are well represented at trial do not get the death penalty.” Similarly, Justice O’Connor expressed concern that the system “may well be allowing some innocent defendants to be executed” and suggested that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.” As Justice Breyer has said, “the inadequacy of representation in capital cases” is “a fact that aggravates the other failings” of the death penalty system as a whole.169

It goes without saying that the quality of defense representation can make a difference in the outcome of a case. A defendant’s life should not turn on his luck of the draw in the lawyers appointed to his case, but we know that it does—yet another source of arbitrariness in the system.

169 ABA Guidelines, supra note 164, at 928–29 (footnotes omitted).
6. Prosecutorial Discretion and Misconduct

Prosecutors vary in their attitude towards the death penalty. Some strongly pursue it, while others avoid it. In more sparsely populated districts, the costs and burdens of prosecuting a capital case may be prohibitive. In other districts (such as Shelby County), the political environment and other factors may encourage the aggressive pursuit of the death penalty.\(^{170}\) In a 2004 report on the death penalty, Tennessee’s Comptroller of the Treasury concluded:

Prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme cases, or the “worst of the worst.” However, prosecutors in other jurisdictions make it a standard practice on 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

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\(^{170}\) Although we have not collected the data on this issue, it is well known among the defense bar that in Shelby County, in a significant percentage of capital trials, juries do not return verdicts of first degree murder, suggesting a tendency on the part of the prosecution to over-charge. In Davidson County, by contrast, in capital trials, juries always return guilty verdicts for first degree murder, although they also are known occasionally (especially in recent years) to return life or LWOP sentences.
indicated that they consider the wishes of the victim’s family when making decisions about the death penalty.\footnote{Office of Research, Tenn. Comptroller of the Treasury, supra note 119, at 13.}

In 2001, the Office of the District Attorney General for Davidson County, Tennessee, issued a set of Guidelines that Office would follow in deciding whether to seek the death penalty in any case.\footnote{See Office of the Dist. Att’y Gen. for the 20th Judicial Dist. of Tenn., supra note 133; see also infra Appendix 2.} Unfortunately, other district attorneys general have not followed suit as they resist any written limitations on the exercise of their prosecutorial discretion. There are no uniformly applied standards or procedures among the different district attorneys general in deciding whether to seek capital punishment. The lack of uniform standards, combined with the differing attitudes towards the death penalty among the various district attorneys general throughout the state, injects a substantial degree of arbitrariness in the sentencing system.

In addition to the vagaries of prosecutorial discretion, the occurrence of prosecutorial misconduct adds another element of capriciousness. Prosecutorial misconduct is a thorn in the flesh of the death penalty system that can influence outcomes.\footnote{For a discussion of the prevalence of prosecutorial misconduct throughout the country, see Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson 8–10 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [https://perma.cc/V5XA-H8Q7]. In a recent study, the Fair Punishment Project found that the Shelby County district attorney’s office had the highest rate of prosecutorial misconduct findings in the nation. The Recidivists: New Report on Rates of Prosecutorial Misconduct, Fair Punishment Project (Aug. 9, 2017),} Sixth Circuit
Judge Gilbert Merritt has written: “[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit. The Supreme Court and the lower federal courts are constantly confronted with these so-called Brady exculpatory and mitigating evidence cases. . . . In capital cases, this malfeasance violates both due process and the Eighth Amendment.”

We have located at least six Tennessee capital cases in which either convictions or death sentences were set aside because of prosecutorial misconduct, and at least three other cases in which courts found prosecutorial misconduct but affirmed the death sentences notwithstanding. Presumably, capital cases are handled by the most experienced and qualified prosecutors, so there is no excuse for this level of


175 See Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) (improper closing argument); House v. Bell, No. 3:96-cv-883, 2007 WL 4568444 (E.D. Tenn. 2007) (Brady violation); Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) (Brady violation); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (improper closing argument); State v. Smith, 755 S.W.2d 757 (Tenn. 1988) (improper closing argument); State v. Buck, 670 S.W.2d 600 (Tenn. 1984) (improper closing argument and Brady violation). There are other cases of Brady violations which did not serve as grounds for reversal. See, e.g., Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017) (Brady violation); Abdur’Rahman v. Bell, 999 F. Supp. 1073, 1088–90, 1102 (M.D. Tenn. 1998), vacated in part, 226 F.3d 696 (6th Cir. 2000) (vacating the sentence on ineffective assistance of counsel (IAC) grounds and finding that Brady violations were not material); Order Granting Post Conviction Relief, Rimmer v. State, Nos. 98-010134, 97-02817, 98-01003 (Tenn. Shelby Co. Crim. Crt. Oct. 12, 2012) (vacating the conviction on IAC grounds although the prosecution has suppressed evidence).
judicially found misconduct. Also, we can reasonably assume that undetected misconduct, potentially affecting convictions and sentences, has occurred in other cases. Suppressed evidence is not always discovered. Although inexcusable, some degree of misconduct is explainable, because prosecutors are elected officials, and capital cases are fraught with emotion and often highly publicized. These kinds of circumstances can lead to excessive zeal.

7. Defendants’ Impairments

From our personal experiences, combined with our research, we submit that the vast majority of capital defendants are impaired due to mental illness and/or intellectual disability. On the one hand, these kinds of impairments can serve as powerful mitigating circumstances that reduce culpability in support of a life instead of death sentence, although too frequently defendants’ impairments are inadequately investigated and presented to the sentencing jury by defense counsel. On the other hand, a defendant’s impairments can create obstacles in effective defense representation and can further create, in subtle ways, an unfavorable appearance to the jury during the trial. Too often, a defendant’s impairments can unjustly aggravate the

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176 Poverty is another cause of mental impairment, which unfortunately is not discussed in the case law. According to a 2007 report, every Tennessee death-sentenced defendant who was tried since early 1990 was declared indigent at the time of trial and had to rely on court-appointed defense counsel; a large majority of those who were tried before then were also declared indigent. The Tenn. Justice Project, supra note 155. There is a growing body of social science research demonstrating the adverse psychological and cognitive effects of poverty. See, e.g., Sendhil Mullainathan & Eldar Shafir, Scarcity: The New Science of Having Less and How It Defines Our Lives (2013); William Julius Wilson, When Work Disappears 75–79 (1997).
jurors’ and the court’s attitude towards the defendant, which is another factor contributing to the arbitrariness of the system.

i. Mental Illness

Mental illness is rampant among criminal defendants. A study published in 2006 by the United States Department of Justice, Bureau of Justice Statistics, found that nationwide, 56% of state prisoners, 45% of federal prisoners, and 64% of those incarcerated in local jails suffered from a serious mental health problem.\(^\text{177}\) Other studies indicate that the percentage of mentally ill inmates is particularly high on death row.\(^\text{178}\) For example, one study found “that of the 28 people executed in 2015, seven suffered from serious mental illness, and another seven suffered from serious intellectual impairment or brain injury.”\(^\text{179}\) Another study concluded: “Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of severe mental illness.”\(^\text{180}\)

From examining Tennessee capital post-conviction cases, where evidence of mental illness among death-sentenced defendants is often investigated and developed in support of claims of ineffective assistance of


\(^{178}\) Position Statement 54: Death Penalty and People with Mental Illnesses, Mental Health Am. (June 14, 2016), http://www.mentalhealthamerica.net/positions/death-penalty [https://perma.cc/K9MY-BURJ].

\(^{179}\) Id. at n.9 (citing Report: 75% of 2015 Executions Raised Serious Concerns About Mental Health or Innocence, Death Penalty Info. Ctr. (2016), https://deathpenaltyinfo.org/node/6331 [https://perma.cc/QQJ8-DDQD]).

\(^{180}\) Id. at n.9 (quoting Robert J. Smith et al., The Failure of Mitigation?, 65 Hastings L.J. 1221, 1245 (2014)).
counsel, we can conclude that a significant number of defendants on Tennessee’s death row suffer from severe mental disorders. The following cases illustrate the issue.

*Cooper v. State* was the first Tennessee case in which a death sentence was vacated on grounds of ineffective assistance of counsel.¹⁸¹ Trial counsel inadequately investigated the defendant’s social history and mental condition. ¹⁸² In post-conviction, expert testimony was presented that the defendant suffered from an affective disorder with recurrent major depression over long periods of time, and at the time of the homicide his condition had deteriorated to a full active phase of a major depressive episode. ¹⁸³

In *Wilcoxson v. State*, the defendant had been diagnosed at different times with schizophrenia, schizoaffective disorder, and bipolar disorder.¹⁸⁴ The Tennessee Court of Criminal Appeals found trial counsel’s performance to be deficient in failing to raise the issue of the defendant’s competency to stand trial, and in failing to present evidence of the defendant’s psychiatric problems to the jury as mitigating evidence in sentencing.¹⁸⁵ While the court found that post-conviction counsel failed to carry their burden of retrospectively proving the defendant’s incompetency to stand trial, the court vacated the death sentence on grounds of ineffective assistance of counsel for their failure to present social history and mental health mitigation evidence at sentencing.¹⁸⁶

In *Taylor v. State* the post-conviction court set aside the defendant’s conviction and death sentence on the ground that his trial counsel were deficient in their

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¹⁸² Id. at 524–25.
¹⁸³ Id. at 526.
¹⁸⁵ Id. at 311, 314.
¹⁸⁶ Id. at 293.
investigation and presentation of the defendant’s psychiatric disorders pre-trial in connection with his competency to stand trial, and during the trial in connection with his insanity defense and his sentencing hearing. The evidence included an assessment by a forensic psychiatrist for the state, who was not discovered by defense counsel and therefore did not testify at trial, that the defendant was psychotic.

In Carter v. Bell, according to expert testimony presented in federal habeas, the defendant suffered from psychotic symptoms involving hallucinations, paranoid delusions, and thought disorders consistent with paranoid schizophrenia or an organic delusional disorder. His death sentence was vacated on grounds of ineffective assistance of counsel because his trial lawyers failed to investigate his social and psychiatric history.

In Harries v. Bell, the federal habeas court found that the defendant’s trial counsel failed to investigate and develop evidence of the defendant’s abusive childhood background; his frontal lobe brain damage, which impaired his mental executive functions; and his mental illness, which had been variously diagnosed as bipolar mood disorder, anxiety disorder, and post-traumatic stress disorder. The federal court vacated the death sentence on the basis of ineffective assistance of counsel.

Adverse childhood experiences and severe mental illness can profoundly affect cognition, judgment, impulse control, mood and decision-making. Unfortunately, these cases are typical in the death

188 Id. at *4–5.
189 Carter v. Bell, 218 F.3d 581 (6th Cir. 2000).
190 Id. at 596, 608.
191 Harries v. Bell, 417 F.3d 631 (6th Cir. 2005).
192 Id. at 642.
penalty arena.\textsuperscript{193} A defendant’s mental illness, if not fully realized by defense counsel, and if not properly presented and explained to the jury at trial, can prejudice the defendant both in his relationship with his defense counsel and in his demeanor before the jury.\textsuperscript{194}

Regarding the effect of mental illness on the attorney-client relationship, the ABA Guidelines explain:

Many capital defendants are . . . severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that “[i]t must be assumed that the client is emotionally and intellectually impaired.”\textsuperscript{195}

Regarding the potential effect of a defendant’s mental illness at trial, Justice Kennedy’s comment in

\textsuperscript{193} One of the authors, Mr. MacLean, has worked on a number of capital cases in state post-conviction and federal habeas proceedings. In every case he has worked on, the defendant has been diagnosed with a severe mental disorder.

\textsuperscript{194} For a discussion of the potential effects of a defendant’s impairments on his legal representation, see Bradley A. MacLean, \textit{Effective Capital Defense Representation and the Difficult Client}, 76 Tenn. L. Rev. 661 (2009).

Riggins v. Nevada, involving the side-effects of antipsychotic medication in a capital case, is instructive:

It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. At all stages of the proceedings, the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, . . . his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant’s demeanor may also be relevant to his confrontation rights.196

ii. Intellectual Disability

In Atkins v. Virginia, decided in 2000, the United States Supreme Court declared that if a defendant fits a proper definition of intellectual disability (or “mental retardation,” as the term was used at the time), he is ineligible for the death penalty under the Eighth Amendment Cruel and Unusual Punishments Clause.197 The Court left it to the states to formulate an appropriate

definition and procedure for determining intellectual disability.\footnote{Atkins, 536 U.S. at 317 (citing Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).}

Before \textit{Atkins} was decided, in 1990 the Tennessee General Assembly enacted Tennessee Code Annotated section 39-13-203 to exempt from the death penalty those defendants who fit the statutory definition of “mental retardation.”\footnote{1990 Tenn. Pub. Acts 1038 (codified as amended in \textsc{Ten}. \textsc{Cod}e \textsc{Ann.} \textsection 39-13-203 (2010)).} The statute has since been amended to change the label from “retardation” to “intellectual disability,” but the three statutory elements to the definition remain the same: “(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.”\footnote{State v. Pruitt, 415 S.W.3d 180, 202 (Tenn. 2013) (quoting \textsc{Ten}. \textsc{Cod}e \textsc{Ann.} \textsection 39-13-203(a)); \textit{see also} Van Tran v. Colson, 764 F.3d 594, 605 (6th Cir. 2014).} Many Tennessee capital defendants have low intellectual functioning, and a number of them can make viable arguments that they fit within the statutory definition of intellectual disability and therefore should be exempt from capital punishment, although often they do not prevail on this issue.\footnote{A number of capital defendants have reported I.Q.’s in the borderline range of intellectual disability, even if many of them did not qualify for the intellectual disability exemption. \textit{See}, \textit{e.g.}, Nesbit v. State, 452 S.W.3d 779, 794 (Tenn. 2014) (reported I.Q. of 74); \textit{Pruitt}, 415 S.W.3d at 202–03 (reported I.Q. of 66 and 68); Keen v. State, 398 S.W.3d 594, 617 (Tenn. 2012) (Wade, J., dissenting) (reported I.Q. of 67); State v. Strode, 232 S.W.3d 1, 4 (Tenn. 2007) (reported I.Q. of 69); State v. Rice, 184 S.W.3d 646, 660 (Tenn. 2006) (reported I.Q. of 79); Howell v. State, 151 S.W.3d 450, 463 (Tenn. 2004) (reported I.Q. of between 62 and 73, with a high score of 91); State v. [161]}
A defendant’s low intellectual functioning can lead to two additional avenues of arbitrariness in Tennessee’s capital punishment system.

First, the statutory category of intellectual disability is arbitrarily and vaguely defined. Intellectual disability is determined on a multi-dimensional set of sliding or graduated scales, and the condition can manifest itself in a multitude of ways. How are we to measure those scales, and how are we to draw a fine line in identifying those who fall within the category of defendants who shall be exempted from capital punishment? For example, what is the practical difference between a functional I.Q. of 71 versus 69? In many cases, the defendant has been administered several I.Q. tests at different points in his life yielding different scores. How are those scores to be reconciled? Moreover, the measure of each scale cannot be ascertained strictly from raw test scores but requires the application of an expert witness’s “clinical judgment.”


Coleman v. State, 341 S.W.3d 221, 242 (Tenn. 2011). In Coleman, the Tennessee Supreme Court held that the statutory definition “does not require that raw scores on I.Q. tests be accepted at their face value and that the courts may consider competent expert testimony showing that a test score does not accurately reflect a person’s functional I.Q. . . . .” Id. at 224.
testifying experts, whose clinical judgment are we to trust? As the Tennessee Supreme Court has acknowledged, “Without question, mental retardation is a difficult condition to accurately define. The United States Supreme Court, in Atkins v. Virginia, admitted as much, stating: ‘[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.’” With reference to the I.Q. element of the statutory definition, the Howell Court went on to say, “The statute does not provide a clear directive regarding which particular test or testing method is to be used.” Consequently, the proper interpretation of the definition, and its application to specific cases, has generated considerable litigation. These cases involve a battle of the experts, and whether a defendant is found to be intellectually disabled under the statutory definition and therefore exempt from the death penalty may well depend on the quality of his defense counsel, the personality and persuasiveness of the expert testimony, and the disposition and receptivity of the judge making the ultimate determination. In close cases, the issue has a markedly subjective aspect, leaving room for arbitrary decision-making.

The second factor contributing to arbitrariness relates to one of the reasons for disqualifying the intellectually disabled from capital punishment—their

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203 Howell, 151 S.W.3d at 457 (quoting Atkins, 536 U.S. at 317).
204 Id. at 459.
205 See, e.g., Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017) (reflecting years of litigation in a case involving a broad range of I.Q. scores); Van Tran, 764 F.3d 594 (vacating the state court’s judgment after years of litigation and ruling that defendant was intellectually disabled and therefore exempt from execution); Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) (discussing a line of Tennessee intellectual disability cases illustrating the court’s struggle in interpreting the meaning of the statutory elements).
reduced capacity to assist in their defense. In *Atkins*, the United States Supreme Court explained:

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . Moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.\(^{206}\)

In this respect, intellectual disability and mental illness similarly affect the reliability of capital sentencing, by impairing, through no fault of the defendant, both the defendant’s capacity to work with defense counsel and the defendant’s capacity to present himself to the court and the jury in a favorable way.

\(^{206}\) *Atkins*, 536 U.S. at 320–21 (footnote omitted) (citations omitted).
With regard to sentencing, this problem may be partially resolved when the defendant is found to fall within the statutory definition of intellectual disability, but there are several other cases in which the defendant’s intellectual functioning is compromised yet the defendant is not declared intellectually disabled. Too often it is simply a matter of degree and subjective evaluation by the judge in the face of conflicting expert testimony. Even if a defendant is held not to be exempt from capital punishment, his reduced intellectual functioning can nevertheless impair his capacity to assist in his defense and to present himself in the courtroom, which contributes to the arbitrariness of the system.

8. Race

African Americans represent 17% of Tennessee’s population, according to the U.S. Census Bureau, but they represent 44% of Tennessee’s current death row population207 (only 51% of the current death row population is non-Hispanic White).208 While a number of factors may account for this discrepancy, it cannot be ignored, and it suggests a pernicious form of arbitrariness.

No one can doubt the existence of implicit racial bias in our criminal justice system, and this bias inevitably infects the capital punishment system.209 The

207 See infra Appendix 1.
208 See infra Appendix 2.
209 For general discussions of implicit racial bias, see generally Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 CAL. L. REV. 969 (2006); Jennifer L. Eberhardt et al., Seeing Black: Race, Crime, and Visual Processing, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004). The presence of racial bias in our criminal justice system—whether explicit or implicit—has been well established. See, e.g., NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS (Samuel R. Gross et al, eds., 2017); MICHELLE ALEXANDER, THE NEW JIM
exercise of discretion permeates a capital case—from the time of arrest through the charging decision, the district attorney’s decision to seek the death penalty, innumerable decisions by all of the parties and the judiciary throughout the proceedings, and the ultimate jury decision of life versus death. Where there is discretion, there is room for implicit racial bias.

In 1997, the Tennessee Supreme Court’s Commission on Racial and Ethnic Fairness issued its Final Report at the conclusion of its two-year review of the state’s judicial system. Among other things, the Commission concluded that while no “explicit manifestations of racial bias abound” in the Tennessee judicial system, “institutionalized bias is relentlessly at work.” While our society continually attempts to eradicate the effects of implicit bias from our institutions, there is no indication that it has been eliminated from our capital sentencing system.

The American Bar Association commissioned a study of racial bias in Tennessee’s capital punishment system that was published in 2007. The study

CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); see also UNITED STATES SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING (2017), https://www.ussc.gov/research/research-reports/demographic-differences-sentencing [https://perma.cc/5QPE-6AJK] (concluding based on several studies that “Black male offenders continue[] to receive longer sentences than similarly situated White male offenders” by a substantial margin).


211 Id. at 5.

concluded that the race of the defendant and the victim influences who receives the death sentence, “even after the level of homicide aggravation is statistically controlled.”

The recent trend regarding race is disturbing. Over the past ten years, from July 1, 2007, to June 30, 2017, there were nine trials resulting in new death sentences; in all but one of those cases (i.e., in 89% of the cases), the defendant was African American. It appears that as the death penalty becomes less frequently imposed, it is imposed on African Americans in an increasing percentage of cases.

9. Judicial Disparity

While judges are presumed to be objective and impartial, from our experience in capital cases we know that different judges view these cases differently, and the predisposition of a judge can influence his or her decisions in capital cases. We can begin by looking at the deeply divided death penalty opinions issued by the Supreme Court on a yearly basis, from the nine differing opinions issued in Furman v. Georgia in 1972 through the five conflicting opinions issued in Glossip v. Gross in 2015 and in cases since then. For example, Justices Brennan and Marshall categorically opposed the death penalty and always voted to reverse or vacate death sentences, while Justices Rehnquist and Scalia consistently voted to uphold death sentences. This split continues with the current members of the Court.

We see similarly opposing views expressed on the United States Court of Appeals for the Sixth Circuit.

moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf [https://perma.cc/43LZ-QRRH].

213 Id. at R.

See infra Appendix 2. These numbers exclude retrials.

These judges, persons of integrity and intelligence, acting in good faith, and looking at the same cases involving the same legal principles, often come to opposing conclusions about what the proper outcomes should be. Among the defense bar, and probably within the Attorney General’s office, we know that in many federal habeas cases, the judge or panel that we draw will likely determine the outcome of the case.

Our review of the voting records of Sixth Circuit judges in capital habeas cases arising out of Tennessee emphasizes the point. The Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases, published as Appendix 4, breaks down the Sixth Circuit votes according to political party affiliation—i.e., according to whether the judges were appointed by Republican or Democrat administrations. We found 37 Sixth Circuit decisions in which the court finally disposed of capital habeas cases from Tennessee. In those cases, Republican-appointed judges cast 88% of their votes to deny relief and only 12% of their votes to grant relief. By contrast, Democrat-appointed judges cast only 22% of their votes to deny relief, and 78% of their votes to grant relief. In other words, the voting records for Republican-appointed judges were the opposite from the voting records for Democrat-appointed judges; Republican-appointed judges were significantly more favorable to the prosecution, whereas Democrat-appointed judges were significantly more favorable to the defense.\footnote{See infra Appendix 4.}

The political skewing of the voting records is greater in the twenty cases that were decided by split votes, which represent a majority of the Sixth Circuit cases. In those cases, Republican-appointees voted against the defendant 93% of the time, and for defendant only 7% of the time; whereas Democrat-appointees voted exactly the opposite way—against the defendant only 7% of the time, and for the defendant 93% of the time. Similarly, in the six Tennessee capital cases that were
decided by the full en banc court, Republican-appointed judges cast 91% of their votes against the defendants, whereas Democrat-appointed judges cast 97% of their votes in favor of the defendants. In five of the six en banc cases, the court’s decision was determined strictly along party lines.\textsuperscript{216}

Without pointing to individual members of the Tennessee judiciary, it is reasonable to believe that different state court judges also differ in their exercise of judgment in these kinds of cases. All practicing attorneys know that a judge’s worldview can shape his or her attitude towards the death penalty, towards criminal defendants, and towards the criminal justice system in general. These attitudes can affect decisions ranging from the final judgment in a post-conviction case to rulings on evidentiary and procedural issues during the course of pre-trial and trial proceedings.

That is to be expected in the highly controversial and emotionally charged arena of capital punishment. It is human nature. Everyone approaches these kinds of issues with certain cognitive biases shaped by differing worldviews.\textsuperscript{217} Trial judges are elected officials, and we know from the experience of Justice Penny White that the politics of the death penalty can even influence the

\textsuperscript{216} Id. at 5–6.

court’s composition.\textsuperscript{218} It goes without saying that liberal judges tend to be somewhat more sympathetic to defense arguments and conservative judges tend to be somewhat more sympathetic to prosecution arguments. This is not necessarily a criticism, for in our society, diversity of viewpoint is a good thing. However, in highly charged death penalty cases where divergent points of view are more likely to come to the fore and where arbitrariness is not to be tolerated, differences in judicial disposition contribute to the capriciousness of the capital punishment system. From our study, this is obviously true to a remarkable degree in the federal court system, and there is good reason to believe it is true at least to some degree in the state court system as well.

C. Comparative Disproportionality: Single vs. Multi-Murder Cases

It is beyond the scope of this article to identify the many extremely egregious cases resulting in life or LWOP sentences, or to compare them to the many significantly less egregious cases leading to death sentences or executions. Yet the statistics concerning one simple metric make the point—number of victims. Mr. Miller has identified 339 defendants convicted of multiple counts of first degree murder since 1977. Of

\textsuperscript{218} In 1996, Justice White became the only Tennessee Supreme Court Justice who was removed from office in a retention election. She was the political victim of a campaign to remove her from the court because of her concurring vote to reverse the death sentence in a single death penalty case—\textit{State v. Odom}, 928 S.W.2d 18 (Tenn. 1996). Justice White’s experience was discussed in a recent study regarding the effects of political judicial elections on judicial decision-making in capital cases. \textit{See} Dan Levine & Kristina Cooke, \textit{Uneven Justice: In States With Elected High Court Judges, a Harder Line on Capital Punishment}, \textit{REUTERS} (Sept. 22, 2015), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/[https://perma.cc/7XGW-2AYT].
those, only 33 (or 10%) received sustained death sentences, whereas 306 (or 90%) received life or LWOP.\footnote{See infra Appendix 1 at 209.} Several in the life/LWOP category were convicted of three or more murders. These numbers can be broken down as follows:


Multi-Murder Cases - Breakdown By Number of Victims & Sentences

<table>
<thead>
<tr>
<th>Number of Victims</th>
<th>Life or LWOP Sentences</th>
<th>Sustained Death Sentences</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>259 (92% of 2-Victim cases)</td>
<td>24 (8% of 2-Victim cases)</td>
<td>283</td>
</tr>
<tr>
<td>3</td>
<td>32 (82% of 3-Victim cases)</td>
<td>7 (18% of 3-Victim cases)</td>
<td>39</td>
</tr>
<tr>
<td>4</td>
<td>11 (92% of 4-Victim cases)</td>
<td>1 (8% of 4-Victim cases)</td>
<td>12</td>
</tr>
<tr>
<td>5</td>
<td>1 (100% of 5-Victim cases)</td>
<td>0 (0% of 5-Victim cases)</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>3 (75% of 6-Victim cases)</td>
<td>1 (25% of 6-Victim cases)</td>
<td>4</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>306 (90% of Multi-Murder Cases)</td>
<td>33 (10% of Multi-Murder Cases)</td>
<td><strong>339</strong></td>
</tr>
</tbody>
</table>

Virtually all of these defendants were found guilty of premeditated murder (as opposed to felony murder). Thus, from these statistics, if a defendant deliberately killed two or more victims, he was nine times more likely to be sentenced to life or LWOP than death; and the sentence he received most likely depended on extraneous factors such as the geographic location of the crime, the

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220 Table 13A, Miller Report.
prosecutor, quality of defense counsel, timing of the case, and the other factors described above.

On the other hand, compared to the 306 multiple murder defendants who were sentenced to life or LWOP instead of death, a majority of the defendants with sustained death sentences (53 out of a total of 86, or 62%) committed single murders, and several of them were found guilty of felony murder and not premeditated murder.221

This comparative disproportionality demonstrates a lack of rationality in Tennessee’s system. The evidence of such inconsistent results, of sentencing decisions that cannot be explained solely on the basis of individual culpability, indicates that the system operates arbitrarily, contrary to the requirements of the Eighth Amendment.

VII. Conclusion

A. U.S. Supreme Court Dissenting Opinions

We are not alone in claiming that the historical record shows that capital sentencing systems like Tennessee’s fail Furman’s commandment against arbitrariness and capriciousness. The death penalty has hung by a thin thread since it was reinstated in Gregg. The vote to uphold the guided discretion scheme in Gregg

221 We have identified ten cases resulting in sustained death sentences in which the defendants were convicted of felony murder and not premeditated murder: State v. Bell, 480 S.W.3d 486 (Tenn. 2015); State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013); State v. Carter, 114 S.W.3d 895 (Tenn. 2003); State v. Powers, 101 S.W.3d 383 (Tenn. 2003); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000); State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); and State v. Barnes, 703 S.W.2d 611 (Tenn. 1985).
was seven-to-two.\textsuperscript{222} Justices Powell, Blackmun, and Stevens were among the seven in the majority.\textsuperscript{223} However, after years of observing the application of guided discretion sentencing schemes in the real world, each of these Justices have changed his mind. These three Justices, combined with the dissenting Justices in \textit{Gregg},\textsuperscript{224} would have constituted a majority going the other way.

Justice Powell dissented in \textit{Furman}, voting to uphold discretionary death penalty statutes, and also authored the Court’s decision in \textit{McCleskey v. Kemp}, which upheld Georgia’s death penalty against a challenge based upon demonstrated racial bias.\textsuperscript{225} Shortly after his retirement, however, his biographer published the following colloquy:

In a conversation with the author [John C. Jeffries, Jr.] in the summer of 1991, Powell was asked if he would change his vote in any case:

“Yes, \textit{McCleskey v. Kemp}.”

“Do you mean you would now accept the argument from statistics?”

“No, I would vote the other way in any capital case.”

“In \textit{any} capital case?”

“Yes.”

“Even in \textit{Furman v. Georgia}?”

“Yes, I have come to think that capital punishment should be abolished.”

Capital punishment, Powell added, “serves no useful purpose.” The United States was “unique among the industrialized nations

\textsuperscript{223} Id.
\textsuperscript{224} Justices Brennan and Marshall cast the dissenting votes. \textit{Id.}
of the West in maintaining the death penalty,” and it was enforced so rarely that it could not deter.226

Justice Blackmun, who also dissented in Furman and voted to uphold discretionary sentencing statutes, and voted with the majority in Gregg, first expressed his changed view in 1992:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the States and the Court to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.227

Justice Stevens, who was relatively new to the Court when he joined the Gregg majority, followed suit in 2008:

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and

unusual punishment violative of the Eighth Amendment.”

With reference to current Justices who were not on the Court when *Gregg* was decided, in the case of *Glossip v. Gross*, Justices Breyer and Ginsburg recently looked at the historical record. In a careful analysis, they explained why a system such as Tennessee’s can no longer be sustained. They summarized their analysis as follows:

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

The *Glossip* dissent is significant because it represents a shifting view and eloquently reflects on the failed effort over forty years to apply guided discretion capital punishment.

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sentencing schemes that were supposed to address the problem of arbitrariness. The historical record in Tennessee, as well as in other states that have attempted to maintain capital sentencing systems, speaks to how this kind of system simply has not been able to accomplish that goal.

B. Opinions From the ALI and the ABA Tennessee Assessment Team

The opinions of the dissenting Supreme Court Justices are echoed by other leading authorities.

As mentioned above, Tennessee’s capital punishment scheme was patterned after the Georgia scheme approved in Gregg, which in turn was patterned in part after section 210.6 of the American Law Institute’s (ALI) Model Penal Code. In 2009, the ALI withdrew section 210.6 from the Model Penal Code because of its concerns about whether death penalty systems can be made fair. In recommending withdrawal of this section from the Model Penal Code, the ALI Council issued a Report to its membership stating, “Section 210.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it. . . . [O]n the whole the section has not withstood the tests of time and experience.” The Report went on to describe the ALI Council’s reasons for its concerns about fairness in death penalty systems, as follows:

232 Id. at 4.
These [concerns] include (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks conscientiously—candidate statements of personal views on the death penalty and incumbent judges’ actions in death-penalty cases become campaign issues.\(^{233}\)

In a similar vein and focusing on Tennessee, the American Bar Association appointed a Tennessee Death Penalty Assessment Team to assess fairness and accuracy in Tennessee’s death penalty system. The Assessment Team conducted an extensive study of Tennessee’s system and issued its lengthy report in March 2007. The Team concluded that “Tennessee’s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures.” The Report identified the following areas “as most in need of reform”:

- Inadequate procedures to address innocence claims
- Excessive caseloads of defense counsel
- Inadequate access to experts and investigators
- Inadequate qualification and performance standards for defense counsel
- Lack of meaningful proportionality review
- Lack of transparency in the clemency process
- Significant capital juror confusion

234 The members of the Assessment Team were Professor Dwight L. Aarons, Chair, Associate Professor of Law at The University of Tennessee College of Law; W.J. Michael Cody, former Tennessee Attorney General; Kathryn Reed Edge, former President of the Tennessee Bar Association; Jeffrey S. Henry, Executive Director of the Tennessee District Public Defenders Conference; Judge Gilbert S. Merritt, former Chief Judge of the United States Court of Appeals for the Sixth Circuit; attorney Bradley A. MacLean; and attorney William T. Ramsey.


236 Id. at iii.
• Racial disparities in Tennessee’s capital sentencing
• Geographical disparities in Tennessee’s capital sentencing
• Death sentences imposed on people with severe mental disability

C. Final Remarks

It is clear from the statistics and our experience over the past 40 years that Tennessee’s death penalty system “fails to provide a constitutionally tolerable response to Furman’s rejection of unbridled jury discretion in the imposition of capital sentences.” The system is riddled with arbitrariness.

A person of compassion and empathy cannot deny that the death penalty is cruel. “Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.” “The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity.”

When over the past 40 years Tennessee has executed fewer than one out of every 400 defendants (less than 1/4 of 1%) convicted of first degree murder; when Tennessee sentences 90% of multiple murderers to life or life without parole and only 10% to death; when the

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237 Id. at iii–vi.
239 Spaziano v. Florida, 468 U.S. 446, 469 n.3 (Stevens, J., concurring) (citing Furman v. Georgia, 408 U.S. 238, 290 (Brennan, J., concurring)).
240 Furman, 408 U.S. at 306 (Stewart, J., concurring).
majority of capital cases are reversed or vacated because of trial error; when the courts have found that in over 23% of capital cases, defense counsel’s performance was constitutionally deficient; when the number of death row defendants who die of natural causes is four times greater than the number Tennessee actually executed; when we have seen only one new capital case in Tennessee since mid-2014; when we have not seen any death sentences in the Middle Grand Division since early 2001—then, it must also be said that the death penalty is an “unusual” and unfair punishment. The statistics make clear that Tennessee’s system is at least as arbitrary and capricious as the systems declared unconstitutional in Furman—and that is without accounting for the exorbitant delays and costs inherent in Tennessee’s system, which far exceed the delays and costs inherent in the pre-Furman era.

The lack of proportionality and rationality in our selection of the few whom we decide to kill is breathtakingly indifferent to fairness, without justification by any legitimate penological purpose. The death penalty system as it has operated in Tennessee over the past 40 years, and especially over the past ten years, is but a cruel lottery, entrenching the very problems that Furman sought to eradicate.
APPENDIX 1

REPORT ON SURVEY OF TENNESSEE FIRST DEGREE MURDER CASES AND CAPITAL CASES DURING THE 40-YEAR PERIOD FROM JULY 1, 1977, TO JUNE 30, 2017
DATED: FEB. 7, 2018

H. E. Miller, Jr.

Forty years ago, the Tennessee legislature enacted the state's current capital sentencing scheme to replace prior statutes that had been declared unconstitutional. Although the current scheme has been

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1 This report is subject to updating as additional first degree murder cases are found.
2 See State v. Hailey, 505 S.W.2d 712 (Tenn. 1974); Collins v. State, 550 S.W.2d 643 (Tenn. 1977) (invalidating Tennessee’s then-existing death penalty statutes).
amended in certain of its details, its essential features remain in place.³

In Tennessee, a death sentence can be imposed only in a case of “aggravated” first degree murder upon a “balancing” of statutorily defined aggravating circumstances⁴ proven by the prosecution and the mitigating circumstances presented by the defense.⁵ The Tennessee Supreme Court is statutorily required to review each death sentence “to determine whether: (A) [t]he sentence of death was imposed in any arbitrary fashion; (B) [t]he evidence supports the jury’s finding of statutory aggravating circumstance or circumstances; (C) [t]he evidence supports the jury’s finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) [t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.”⁶ The court’s consideration of whether a death sentence is “excessive or disproportionate to the penalty imposed in similar cases” is referred to as “comparative proportionality review.”⁷

In 1978, the court promulgated Tennessee Supreme Court Rule 12 (formerly Rule 47), requiring that “in all cases . . . in which the defendant is convicted of first[ ]degree murder,” the trial judge shall complete and file a report (the “Rule 12 Report”) to include

⁴ Aggravating circumstances are defined in Tennessee Code Annotated section 39-13-204(i).
⁵ See TENN. CODE ANN. § 39-13-204(g) To impose a death sentence, the jury must unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; if a single juror votes for life or life without parole, then the death sentence cannot be imposed. Id.
information about the case.\textsuperscript{8} Rule 12 was intended to create a database of first degree murder cases for use in comparative proportionality review.\textsuperscript{9}

The modern history of Tennessee’s death penalty system raises questions that go to the heart of constitutional issues: How have we selected the “worst of the bad”\textsuperscript{10} among convicted first degree murderers for imposition of the ultimate sanction of death? Is there a meaningful distinction between those cases resulting in death sentences and those resulting in life (or life without parole) sentences? Does Tennessee’s capital punishment

\textsuperscript{8} T\textsc{enn}. S\textsc{up}. C\textsc{t}. R. 12.

\textsuperscript{9} In \textit{State v. Adkins}, 725 S.W.2d 660, 663 (Tenn. 1987), the court stated that “our proportionality review of death penalty cases since Tennessee Supreme Court Rule 12 (formerly Rule 47) was promulgated in 1978 has been predicated largely on those reports and has never been limited to the cases that have come before us on appeal.” See also the court’s press release issued January 1, 1999, announcing the use of CD-ROMs to store copies of Rule 12 reports, in which then Chief Justice Riley Anderson was quoted as saying, “The court’s primary interest in the database is for comparative proportionality review in these cases, which is required by court rule and state law[. . .]. The [Tennessee] Supreme Court reviews the data to ensure rationality and consistency in the imposition of the death penalty and to identify aberrant sentences during the appeal process.” Press Release, Tenn. Admin. Office of the Courts, Court Provides High-Tech Tool for Legal Research in Murder Cases, (Jan. 1, 1999), http://tncourts.gov/press/1999/01/01/court-provides-high-tech-tool-legal-research-murder-cases [https://perma.cc/K48E-E27V]. \textit{But cf.} State v. Bland, 958 S.W.2d 651 (Tenn. 1997) (changing the comparative proportionality review methodology by limiting the pool of comparison cases to capital cases that previously came before the court on appeal).

\textsuperscript{10} The expression “the worst of the bad” has been used by the court to refer to those defendants deserving of the death penalty. \textit{See}, e.g., State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994); State v. Branam, 855 S.W.2d 563, 573 (Tenn. 1993) (Drowota, J., concurring).
system operate rationally, consistently, and reliably; or does it operate in an arbitrary and unpredictable fashion? Is there meaning to comparative proportionality review?

To assist in addressing these questions, I undertook a survey of all Tennessee cases resulting in first degree murder convictions since implementation of the state’s current death penalty system—covering the 40-year period from July 1, 1977, through June 30, 2017.

I. The Survey Process

My starting point was to review all Rule 12 Reports on file with the Administrative Office of the Courts and the Office of the Clerk of the Tennessee Supreme Court. I quickly encountered a problem. In close to half of all first degree murder cases, trial judges failed to file the required Rule 12 Reports, and in many other cases, the filed Rule 12 Reports were incomplete or inaccurate, or were not supplemented by subsequent case developments such as reversal or retrial. I found that because many first degree murder cases are reviewed on appeal, appellate court decisions are an essential source of the information that cannot be found in the Rule 12 Reports. But many cases are resolved by plea agreements at the trial level without an appeal, leaving no record with the appellate court; and many appellate court decisions are not published in the standard case reporters.

Accordingly, over the past three years I have devoted untold hours searching various sources to locate and review Tennessee’s first degree murder cases. I have had the assistance of Bradley A. MacLean and other attorneys who handle first degree murder cases. I have also received generous help from officials with the Tennessee Administrative Office of the Courts and the Tennessee Department of Correction, along with numerous court officials throughout the state. I would

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11 I have spent well in excess of 3,000 hours on this project.
like to specifically acknowledge the tremendous assistance offered by the staff of the Tennessee State Library.

In conducting this survey, I have reviewed the following sources of information:

- All Rule 12 Reports as provided by the Tennessee Administrative Office of the Courts and the Office of the Clerk for the Tennessee Supreme Court;
- Reports on capital cases issued by the Administrative Office of the Courts;
- The report, *Tennessee Death Penalty Cases Since 1977*, published by The Tennessee Justice Project;\(^\text{12}\)
- Tennessee Court of Criminal Appeals and Tennessee Supreme Court decisions in first degree murder cases, as published on the Administrative Office of the Courts’ website;
- Cases published in Fastcase on the Tennessee Bar Association website;
- Cases published in Westlaw and Google Scholar;
- Data furnished by the Tennessee Department of Correction;
- Information found in the Tennessee Department of Correction’s TOMIS system as published on its website, and information separately provided by officials at the Tennessee Department of Correction;
- Information found in the Shelby County Register of Deeds’ Listing of Tennessee Deaths (the statewide “Death Index” maintained by Tom Leatherwood, the Register of Deeds, has been very helpful in obtaining information regarding victims);
- Original court records;

• News publications.

I have attempted to compile the following data regarding each first degree murder case, to the extent available from the sources I reviewed:

• Name and TOMIS number of the defendant;
• Date of the offense;
• Defendant’s date of birth and age on the date of the offense;
• Defendant’s gender and race;
• Number, gender, race, and age(s) of first degree murder victim(s) in each case;
• Whether a notice to seek the death penalty was filed (if indicated in the Rule 12 Forms);
• County where the judgment of conviction was entered, and county where the offense occurred (if different);
• Sentence imposed for each first degree murder conviction; and
• Whether a Rule 12 Report was filed.
• In capital cases, whether the conviction or sentence was reversed, vacated or commuted, and the status of the case as of June 30, 2017.

The data I compiled is set forth in the following Appendices:

Appendix A: Master Chart of Adult Defendants with Sustained First Degree Murder Convictions from July 1, 1977 through June 30, 2017, in which Rule 12 Reports Were Filed.

Appendix B: Master Chart of Adult Defendants with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Not Filed.

[188]
Appendix C: Master Chart of Juvenile Defendants (tried and convicted as adults) with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Filed.

Appendix D: Master Chart of Juvenile Defendants (tried and convicted as adults) with Sustained First Degree Murder Convictions During the 40-Year Period, in which Rule 12 Reports Were Not Filed.

Appendix E: Chart Showing Numbers of Adult & Juvenile Defendants with Sustained First Degree Convictions.

Appendix F: Chart of Adult Cases Broken Down by County and Grand Division and Rule 12 Compliance.

Appendix G: Chart of Adult Multi-Murder Cases.

Appendix H: Chart of Tennessee Capital Trials During the 40-Year Period.

Ultimately all of this data can be derived from public court records.

A. Caveats

I am confident that I have found and reviewed all cases decided during the 40-Year Period in which death sentences have been imposed. This was a feasible task, for several reasons. The total number of capital trials that resulted in death sentences during this period (221) is relatively small compared to the total number of first degree murder cases (2,514)\(^\text{13}\) that I have been able to find. The Tennessee Supreme Court reviews on direct appeal all trials resulting in death sentences, creating a

\(^{13}\) This excludes cases of juvenile offenders who were not eligible for the death penalty.
published opinion in each case. There exist various sources of information that specifically deal with capital cases, including records maintained by public defender offices, The Tennessee Justice Project reports of 2007 and 2008, the monthly and quarterly reports on capital cases issued by the Tennessee Administrative Office of the Courts, and records maintained by the Tennessee Department of Correction concerning the death row population.

On the other hand, I am equally confident that I have not found all first degree murder cases. I have carefully studied all filed Rule 12 Reports, but in 46% of first degree murder cases, trial judges failed to file the required Rule 12 Reports. This Rule 12 noncompliance is especially problematic in regards to the most recent cases because of the time it typically takes for a first degree murder case to create a readily accessible record as it works through the trial and appellate processes.14

Consequently, the ratios presented in this report are distorted because the totals of first degree murder cases that I have found are lower than the totals of actual cases. For example, among the cases I have been able to find, 3.4% of defendants convicted of first degree murder convictions received Sustained Death Sentences. We can be sure that, in fact, the actual percentage of Sustained Death Sentences is lower, because I am certain that I have not found all first degree murder cases resulting in life or LWOP sentences that should be included in the totals.

I have spent considerable time verifying my data by double-checking and cross-referencing my research, and by consulting with others in the field. Due to the

14 For example, there were only 93 first degree murder cases from the past four years (2013–2017), as compared to an average of 269 cases for each of the nine preceding four-year periods, even though Tennessee’s murder rate over this most recent period was virtually the same as in prior periods. See infra Tables 23 and 25.
sheer volume of data involved, the absence of Rule 12 Reports in many cases, and the inaccuracies in the Rule 12 Reports that have been filed in several other cases, I am sure my data contain some errors. Notwithstanding, in my view any errors are relatively minor and statistically insignificant except as otherwise noted.

I have included two master charts reflecting Sustained First Degree Murder Convictions of juveniles—i.e., of defendants who were less than 18 years old at the time of the offense but were tried and convicted as adults. This report does not focus attention on juvenile cases because juvenile defendants are ineligible for the death sentence. Nonetheless, information about juvenile defendants may be helpful to indicate the scope of juvenile convictions and the degree of Rule 12 noncompliance in juvenile cases.

The percentages indicated in this report are rounded to the nearest 1% unless otherwise indicated.

II. Summary of Findings

A. Definitions

For purposes of this report and the Appendices, the following definitions apply:

40-Year Period: The period of this survey, from July 1, 1977, to June 30, 2017. This survey is based on the date of the crime. All data regarding defendants on Death Row are as of June 30, 2017, without taking account of subsequent developments in their cases.

Awaiting Retrial: A Capital Case in which the defendant received Conviction Relief or Sentence Relief and was awaiting a retrial as of June 30, 2017.

Capital Case: A case decided during the 40-Year Period in which the defendant received a death sentence
at the Initial Trial, including cases in which death sentences or the underlying convictions were subsequently reversed or vacated.

Capital Trial: An Initial Trial or a subsequent Retrial resulting in a death sentence.

Conviction Relief: A defendant receives Conviction Relief from a Capital Trial when a conviction from that Capital Trial is reversed on direct appeal or vacated in state post-conviction or federal habeas proceedings, even if the defendant is convicted on retrial.

Death Row consists of all defendants with Pending Death Sentences as of June 30, 2017. It does not include defendants not under death sentence while awaiting Retrial.

Death Sentence Reversal Rate: The percentage of Capital Trials that result in Conviction Relief or Sentence Relief. The Death Sentence Reversal Rate refers to Capital Trials, not capital defendants. A defendant’s Initial Capital Trial might be reversed, and on Retrial he might be resentenced to death. That would count as one reversal out of two trials.

Deceased: A defendant who died during the 40-Year Period while he was under a sentence of death.

Initial Capital Trial: In any Capital Case during the 40-Year Period, the Initial Capital Trial is the initial trial at which the defendant was sentenced to death. The Initial Capital Trial is to be distinguished from any Retrial.

LWOP: Life without parole sentence.

Multi-Murder Case: A Sustained Adult First Degree Murder Case in which the defendant was
convicted of two or more counts of first degree murder involving two or more murder victims.

**New Death Sentence:** Death sentence(s) imposed in the Initial Capital Trial. Except as otherwise indicated, multiple death sentences imposed in a single Multi-Murder Case are treated statistically as a single “death sentence.” If a Retrial results in a death sentence, it is not treated as a “New Death Sentence.”

**Pending Death Sentence:** Death sentence that was in place and pending as of June 30, 2017. If a defendant received Conviction Relief or Sentence Relief and was awaiting Retrial as of June 30, 2017, then the defendant did not have a Pending Death Sentence.

**Retrial:** In Capital Cases, a second or subsequent trial on the underlying criminal charge, or a second or subsequent sentencing hearing, following a remand after the original conviction or sentence from the Initial Capital Trial was reversed or vacated. (As of June 30, 2017, there were eight defendants who were not under death sentence but were awaiting Retrial.)

**Reversed versus Vacated:** The term “reversed” refers to the setting aside of a conviction or sentence on direct appeal, which may or may not be followed by a Retrial on remand. The term “vacated” refers to the setting aside of a conviction or sentence in collateral litigation such as state post-conviction or federal habeas corpus, which may or may not be followed by a Retrial.

**Rule 12 Report:** The report filed in a first degree murder case pursuant to Tennessee Supreme Court Rule 12.

**Rule 12 Noncompliance:** The failure of a trial judge to fill out and file a Rule 12 Report as required by
Tennessee Supreme Court Rule 12. Rule 12 Compliance indicates that a Rule 12 Report was filed in the case, but “Compliance” as used here does not indicate whether the Report was completely filled out in an accurate manner.

**Sentence Relief**: A defendant receives Sentence Relief from a Capital Trial when the death sentence from that Capital Trial is reversed on direct appeal, vacated in state post-conviction or federal habeas proceedings, or commuted by the Governor.\(^\text{15}\)

**Sustained Death Sentence**: Death sentence(s) imposed during the 40-Year Period that were in place as of June 30, 2017, or as of the date of the defendant’s death. If a conviction or sentence was vacated and the case remanded for Retrial, and if as of June 30, 2017, or as of the date of the defendant’s death, the case had not been retried and the defendant was not under a death sentence, then the case does not count as a Sustained Death Sentence.

**Sustained Adult First Degree Murder Cases**: Cases in which the defendant was age 18 or older on the date of the offense, the defendant was convicted of one or more counts of first degree murder, and the conviction was sustained on appeal and/or post-conviction review. In the master charts attached as Appendices A through D, the cases are dated as of the date of the offense and are listed according to the defendants convicted. In some cases, the same defendant was convicted of two or more

\(^{15}\) In one case, the federal court granted a conditional writ of habeas corpus barring execution until the state conducts a hearing on the defendant’s intellectual disability. See Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014). The state has not conducted the hearing within the time required, and therefore the state is barred from executing the defendant. For our purposes, this case is counted as Sentence Relief and Awaiting Retrial.
first degree murders in two or more separate proceedings involving different first degree murder charges. In those cases, the defendant is listed only once in the master charts and treated as one case, although the charts indicate if the defendant was involved in more than one separate case involving separate charges.

Sustained Juvenile First Degree Murder Cases are those in which the defendant was under 18 years of age at the time of the offense and was tried and convicted as an adult.

III. Sustained Adult First Degree Murder Cases

For the 40-Year Period, I have found at least 2,514 with Sustained Adult First Degree Murder Cases and 210 Sustained Juvenile First Degree Murder Cases. The numbers can be broken down as follows:
### TABLE 1
Breakdown of Sustained First Degree Murder Cases By Rule 12 Compliance

<table>
<thead>
<tr>
<th></th>
<th>Totals</th>
<th>Rule 12 Reports Filed</th>
<th>Rule 12 Reports Not Filed</th>
<th>Noncompliance Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sustained Adult First Degree Murder Cases</td>
<td>2,514</td>
<td>1,348</td>
<td>1,166</td>
<td>46%</td>
</tr>
<tr>
<td>Sustained Juvenile First Degree Murder Cases</td>
<td>210</td>
<td>104</td>
<td>106</td>
<td>50%</td>
</tr>
<tr>
<td>TOTALS of Adult + Juvenile Cases</td>
<td>2,724</td>
<td>1,452</td>
<td>1,272</td>
<td>47%</td>
</tr>
</tbody>
</table>

### TABLE 2
Breakdown of Sustained First Degree Murder Cases According to Sentences Statewide (Adult Cases)

<table>
<thead>
<tr>
<th>Sentences for First Degree Murder Convictions (Adult) — Statewide</th>
<th>Number of Defendants</th>
<th>% of the Total (rounded)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>2,090</td>
<td>83%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>332</td>
<td>13%</td>
</tr>
</tbody>
</table>
### TABLE 3
**Breakdown of Sustained First Degree Murder Cases According to Sentences Shelby County (Adult Cases)**

<table>
<thead>
<tr>
<th>Sentences for First Degree Murder Convictions (Adult) — Shelby County</th>
<th>Number of Defendants</th>
<th>% of the Total (rounded)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>476</td>
<td>80%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>85</td>
<td>14%</td>
</tr>
<tr>
<td>Awaiting Retrial</td>
<td>6</td>
<td>1%</td>
</tr>
<tr>
<td>Sustained Death Sentence</td>
<td>30</td>
<td>5%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>597</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

### TABLE 4

16 As explained in the *Caveats* section *supra*, the actual percentage of Sustained Death Sentences is almost certainly lower than 3.4%. While I am relatively certain that I have captured all cases resulting in death sentences, both sustained and unsustained, I am equally sure that I have not found all first degree murder cases because of the high rate of Rule 12 Noncompliance. As more first degree murder cases are found, the measured percentage of Sustained Death Sentence cases will decline.
Breakdown of Sustained First Degree Murder Cases According to Sentences Davidson County (Adult Cases)

<table>
<thead>
<tr>
<th>Sentences for First Degree Murder Convictions (Adult) — Davidson County</th>
<th>Number of Defendants</th>
<th>% of the Total (rounded)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>332</td>
<td>88%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>35</td>
<td>9%</td>
</tr>
<tr>
<td>Awaiting Retrial</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Sustained Death Sentence</td>
<td>11</td>
<td>3%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>378</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

**TABLE 5**

Breakdown of Sustained First Degree Murder Cases According to Sentences Knox County (Adult Cases)

<table>
<thead>
<tr>
<th>Sentences for First Degree Murder Convictions (Adult) — Knox County</th>
<th>Number of Defendants</th>
<th>% of the Total (rounded)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>149</td>
<td>86%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>17</td>
<td>10%</td>
</tr>
<tr>
<td>Awaiting Retrial</td>
<td>1</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>Sustained Death Sentence</td>
<td>6</td>
<td>&lt;4%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>173</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
IV. Breakdown of Sustained Adult First Degree Murder Cases According to Race and Rule 12 Compliance

**TABLE 6**
Statewide Sustained Adult First Degree Murder Cases

<table>
<thead>
<tr>
<th>Race (% Gen. Pop.)</th>
<th>Rule 12 Reports Filed(^{18}) (Compliance Rate)</th>
<th>Rule 12 Reports Not Filed(^{19}) (Non-Compliance Rate)</th>
<th>Total Cases</th>
<th>% of Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black (17%)</td>
<td>646 (54% Filed)</td>
<td>543 (46% Not Filed)</td>
<td>1,189</td>
<td>47%</td>
</tr>
<tr>
<td>White (78%)</td>
<td>665 (53% Filed)</td>
<td>602 (47% Not Filed)</td>
<td>1,267</td>
<td>50%</td>
</tr>
<tr>
<td>Other (5%)</td>
<td>37 (64% Filed)</td>
<td>21 (36% Not Filed)</td>
<td>58</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td><strong>1,348</strong></td>
<td><strong>1,166</strong></td>
<td><strong>2,514</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

\(^{17}\) In this column, the percentages designate the percentage of that race in the general population according to the 2010 Census. For example, according to the 2010 Census, 17% of Tennessee’s general population was black.

\(^{18}\) This column represents the numbers and percentages of cases in which Rule 12 Reports were filed in cases involving defendants in the designated races. For example, among the total of 1,189 cases involving black defendants, Rule 12 Reports were filed in 646 of those cases for a Rule 12 Compliance Rate of 54%.

\(^{19}\) This column represents the numbers and percentages of cases in which Rule 12 Reports were not filed in cases involving defendants in the designated races. For example, among the total of 1,166 cases involving black defendants, Rule 12 Reports were not filed in 543 of those cases for a Rule 12 compliance rate of 46%.

\(^{20}\) This column represents the percentage of defendants of the designated race. Thus, 47% of all Sustained Adult First Degree Murder Cases throughout the state during the 40-Year Period involved black defendants.
### TABLE 7
Shelby County Sustained Adult First Degree Murder Cases

<table>
<thead>
<tr>
<th>Race (% Gen’l Pop)</th>
<th>Rule 12 Reports Filed</th>
<th>Rule 12 Reports Not Filed</th>
<th>Total Cases</th>
<th>% of Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black (52%)</td>
<td>271 (52% Filed)</td>
<td>252 (48% Not Filed)</td>
<td>523</td>
<td>88%</td>
</tr>
<tr>
<td>White (41%)</td>
<td>38 (57% Filed)</td>
<td>29 (43% Not Filed)</td>
<td>67</td>
<td>11%</td>
</tr>
<tr>
<td>Other (7%)</td>
<td>5 (83% Filed)</td>
<td>1 (17% Not Filed)</td>
<td>6</td>
<td>1%</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>314 (53% Filed)</strong></td>
<td><strong>282 (47% Not Filed)</strong></td>
<td><strong>596</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>
# APPENDIX 1

## TABLE 8
**Davidson County Sustained Adult First Degree Murder Cases**

<table>
<thead>
<tr>
<th>Race (% Gen’l Pop.)</th>
<th>Rule 12 Reports Filed</th>
<th>Rule 12 Reports Not Filed</th>
<th>Total Cases</th>
<th>% of Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black (28%)</td>
<td>136 (62% Filed)</td>
<td>85 (38% Not Filed)</td>
<td>221</td>
<td>58%</td>
</tr>
<tr>
<td>White (61%)</td>
<td>81 (58% Filed)</td>
<td>59 (42% Not Filed)</td>
<td>140</td>
<td>37%</td>
</tr>
<tr>
<td>Other (11%)</td>
<td>12 (71% Filed)</td>
<td>5 (29% Not Filed)</td>
<td>17</td>
<td>5%</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>229 (60% Filed)</strong></td>
<td><strong>149 (40% Not Filed)</strong></td>
<td><strong>378</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

## TABLE 9
**Knox County Sustained Adult First Degree Murder Cases**

<table>
<thead>
<tr>
<th>Race (% Gen’l Pop.)</th>
<th>Rule 12 Reports Filed</th>
<th>Rule 12 Reports Not Filed</th>
<th>Total Cases</th>
<th>% of Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black (8%)</td>
<td>42 (58% Filed)</td>
<td>30 (42% Not Filed)</td>
<td>72</td>
<td>42%</td>
</tr>
<tr>
<td>White (86%)</td>
<td>56 (59% Filed)</td>
<td>39 (41% Not Filed)</td>
<td>95</td>
<td>55%</td>
</tr>
<tr>
<td>Other (6%)</td>
<td>4</td>
<td>2</td>
<td>6</td>
<td>3%</td>
</tr>
</tbody>
</table>
V. Multi-Murder Cases

Sentences imposed in the Multi-Murder Cases break down as follows:

**TABLE 10: Multi-Murder Cases—Statewide**

<table>
<thead>
<tr>
<th>Sentences for Multi-Murder Convictions During the 40-Year Period Statewide — Adult</th>
<th>Number of Defendants</th>
<th>% of the Total Multi-Murder Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>230</td>
<td>68%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>76</td>
<td>22%</td>
</tr>
<tr>
<td>Sustained Death Sentence</td>
<td>33</td>
<td>10%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>339</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

**TABLE 11: Multi-Murder Cases—Shelby County**

<table>
<thead>
<tr>
<th>Sentences for Multi-Murder Convictions During the 40-Year Period Shelby County — Adult</th>
<th>Number of Defendants</th>
<th>% of the Total Multi-Murder Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>30</td>
<td>54%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>14</td>
<td>25%</td>
</tr>
</tbody>
</table>
### TABLE 12: Multi-Murder Cases—Davidson County

<table>
<thead>
<tr>
<th>Sustained Death Sentence</th>
<th>12</th>
<th>21%</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL</td>
<td>56</td>
<td>100%</td>
</tr>
</tbody>
</table>

### TABLE 13: Multi-Murder Cases—Knox County

<table>
<thead>
<tr>
<th>Sentences for Multi-Murder Convictions During the 40-Year Period Knox County — Adult</th>
<th>Number of Defendants</th>
<th>% of the Total Multi-Murder Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>19</td>
<td>79%</td>
</tr>
<tr>
<td>Life Without Parole (LWOP)</td>
<td>4</td>
<td>27%</td>
</tr>
<tr>
<td>Sustained Death Sentence</td>
<td>1</td>
<td>4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>203</td>
<td></td>
</tr>
<tr>
<td>Number of Victims</td>
<td>Life or LWOP Sentences</td>
<td>Sustained Death Sentences</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>2</td>
<td>259 (92% of 2-Victim cases)</td>
<td>24 (8% of 2-Victim cases)</td>
</tr>
<tr>
<td>3</td>
<td>32 (82% of 3-Victim cases)</td>
<td>7 (18% of 3-Victim cases)</td>
</tr>
<tr>
<td>4</td>
<td>11 (92% of 4-Victim cases)</td>
<td>1 (8% of 4-Victim cases)</td>
</tr>
<tr>
<td>5</td>
<td>1 (100% of 5-Victim cases)</td>
<td>0 (0% of 5-Victim cases)</td>
</tr>
<tr>
<td>6</td>
<td>3 (75% of 6-Victim cases)</td>
<td>1 (25% of 6-Victim cases)</td>
</tr>
<tr>
<td>TOTALS</td>
<td>306 (90% of Multi-Murder Cases)</td>
<td>33 (10% of Multi-Murder Cases)</td>
</tr>
</tbody>
</table>
The total of single-murder cases during the 40-Year Period was 2,175. Among those, 53 (2.4%) received Sustained Death Sentences.

A. Pre-October 21, 2001, Multi-Murder Cases

On October 18, 2001, the Office of the District Attorney General for the 20th Judicial District issued its *Death Penalty Guidelines*. Since that date through June 30, 2017, no death sentences have been imposed in Davidson County. The breakdown of single and Multi-Murder Cases, before and after October 18, 2001, can be set forth as follows:

**TABLE 14**

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Shelby County</th>
<th>Davidson County</th>
<th>Knox County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>23</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>LWOP</td>
<td>6</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Sustained Death</td>
<td>9</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>38</strong></td>
<td><strong>29</strong></td>
<td><strong>10</strong></td>
</tr>
</tbody>
</table>

% Sustained Death Sentences  

<table>
<thead>
<tr>
<th></th>
<th>Shelby County</th>
<th>Davidson County</th>
<th>Knox County</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>24%</strong></td>
<td><strong>24%</strong></td>
<td><strong>0%</strong></td>
<td></td>
</tr>
</tbody>
</table>
## TABLE 15
Pre-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

<table>
<thead>
<tr>
<th>Sentence</th>
<th>West</th>
<th>Middle</th>
<th>East</th>
<th>Statewide Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>23</td>
<td>56</td>
<td>58</td>
<td>137</td>
</tr>
<tr>
<td>LWOP</td>
<td>11</td>
<td>10</td>
<td>13</td>
<td>34</td>
</tr>
<tr>
<td>Sustained Death</td>
<td>10</td>
<td>12</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>44</td>
<td>78</td>
<td>75</td>
<td>197</td>
</tr>
<tr>
<td>% Sustained Death Sentences</td>
<td>22%</td>
<td>15%</td>
<td>5%</td>
<td>13%</td>
</tr>
</tbody>
</table>

### B. Post-October 2001 Multi-Murder Cases

## TABLE 16
Post-October 2001 Multi-Murder Cases
By Largest Counties

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Shelby County</th>
<th>Davidson County</th>
<th>Knox County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>7</td>
<td>17</td>
<td>10</td>
</tr>
<tr>
<td>LWOP</td>
<td>8</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Sustained Death</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>18</td>
<td>24</td>
<td>14</td>
</tr>
<tr>
<td>% Sustained Death Sentences</td>
<td>17%</td>
<td>0%</td>
<td>7%</td>
</tr>
</tbody>
</table>

[206]
TABLE 17
Post-October 2001 Multi-Murder Cases
By Grand Divisions & Statewide

<table>
<thead>
<tr>
<th>Sentence</th>
<th>West</th>
<th>Middle</th>
<th>East</th>
<th>Statewide</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>18</td>
<td>37</td>
<td>29</td>
<td>84</td>
</tr>
<tr>
<td>LWOP</td>
<td>9</td>
<td>22</td>
<td>11</td>
<td>42</td>
</tr>
<tr>
<td>Sustained Death</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>31</strong></td>
<td><strong>59</strong></td>
<td><strong>42</strong></td>
<td><strong>132</strong></td>
</tr>
<tr>
<td>% Sustained Death</td>
<td>13%</td>
<td>0%</td>
<td>5%</td>
<td>5%</td>
</tr>
</tbody>
</table>

VI. Capital Cases

A. Basic Capital Case Statistics During the 40-Year Period

<table>
<thead>
<tr>
<th>TABLE 18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separate Capital Trials resulting in death sentences(^{21})</td>
</tr>
<tr>
<td>Defendants who received death sentences(^{22})</td>
</tr>
</tbody>
</table>

---

\(^{21}\) These include all Initial Trials and Retrials.

\(^{22}\) One defendant (Paul Reid) is listed with three Initial Capital Trials and another (Stephen Laron Williams) with Two Initial Trials, all on separate murder charges, which were not Retrials. Eighteen other defendants are listed with two trials on the same charges resulting in death sentences (i.e., an Initial Trial and a Retrial); and four are listed with three trials on the same charges (i.e., an Initial Trial and two Retrials), leaving a total of 26 Retrials. Of those Retrials, in 14 cases the death sentences were reversed or vacated (54%), and in 12
Defendants with Sustained Death Sentences 86 (45% of total Defs.)
Defendants whose death sentences were not Sustained 106 (55% of total Defs.)
Trials resulting in Conviction Relief 28 (13% of total trials)
Trials resulting in Sentence Relief 104 (47% of total trials)
Total Trials resulting in Relief 132 (60% of total trials)
Defendants with Pending Death Sentences 56 (29% of total Defs.)
Defendants who died of natural causes with Sustained Death Sentences 24 (12% of total Defs.)
Multi-Murder Defendants with Sustained Death Sentences 32 (37% of Sust. Death Sent.)
Single-Murder Defendants with Sustained Death Sentences 54 (63% of Sust. Death Sent.)
Awaiting Retrial 8 (4% of total Defs.)
Executions in Tennessee 6 (3% of total Defs.)

B. Exonerations

During the 40-Year Period, there have been three exonerations of death row inmates, as follows:

cases they were sustained (46%), which closely corresponds with the overall ratio of reversed vs. sustained death sentences.
23 This is the overall Death Sentence Reversal Rate among defendants who received death sentences, after accounting for Retrials. Commutations are counted here as reversals.
24 This is the overall reversal rate of trials resulting in death sentences.
25 This is the size of Death Row as of June 30, 2017, based on the definitions set forth in Part I, supra. Additionally, eight defendants whose convictions or sentences were vacated were awaiting retrial.
Michael Lee McCormick (acquitted in his retrial).
 - Sentenced in 1988; Exonerated in 2008; 20 years on death row.

Paul Gregory House (charges dismissed based on evidence of actual innocence)
 - Sentenced in 1986; Exonerated in 2009; 23 years on death row.

Gussie Willis Vann (charges dismissed based on evidence of actual innocence)
 - Sentenced in 1994; Exonerated in 2011; 17 years on death row.

Additionally, Ndume Olatushani (formerly Erskine Johnson), who was sentenced to death in 1985, was granted a new trial in his coram nobis proceeding, in which he claimed actual innocence. He was released in 2012 on an Alford plea after being incarcerated for 26 years.

C. Commutations

Governor Phil Bredesen commuted the death sentences of three defendants, as follows:

Michael Boyd (a.k.a. Mika’eel Abdullah Abdus-Samad) was granted a commutation of his sentence to life without parole on September 14, 2007, after being on death row for 19 1/2 years. The Certificate of Commutation stated:

[T]his appears to me an extraordinary death penalty case where the grossly inadequate legal representation received by the defendant at his post-conviction hearing, combined with procedural limitations, has prevented the judicial system from ever comprehensively...
reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial . . . .

Gaile K. Owens’ sentence was commuted to life on July 10, 2010, after being on death row for 2 1/2 years. The Certificate of Commutation stated:

[T]his appears to me an extraordinary death penalty case in which the defendant admitted her involvement in the murder of her husband and attempted to accept the district attorney’s conditional offer of life imprisonment. This acceptance was ineffective only because of her co-defendant’s refusal to accept such an agreement . . . . .

Edward Jerome Harbison’s sentence was commuted to life without parole on January 11, 2011, after being on death row for 26 years. The Certificate of Commutation stated:

[T]his appears to me an extraordinary death penalty case where grossly inadequate legal representation received by the defendant at the direct appeal phase, combined with procedural limitations, have prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial . . . .

D. Executions

During the 40-Year Period, six defendants were executed:

TABLE 19

[210]
**APPENDIX 1**

<table>
<thead>
<tr>
<th>Executed Defendant</th>
<th>Sentencing Date</th>
<th>Execution Date</th>
<th>Time on Death Row</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert Glenn Coe</td>
<td>Feb. 2, 1981</td>
<td>Apr. 19, 2000</td>
<td>19 years, 2 months</td>
</tr>
<tr>
<td>Sedley Alley</td>
<td>Mar. 18, 1987</td>
<td>June 28, 2006</td>
<td>19 years, 3 months</td>
</tr>
<tr>
<td>Philip Workman</td>
<td>Mar. 31, 1982</td>
<td>May 9, 2007</td>
<td>25 years, 1 month</td>
</tr>
<tr>
<td>Daryl Holton</td>
<td>June 15, 1999</td>
<td>Sept. 12, 2007</td>
<td>8 years, 3 months</td>
</tr>
<tr>
<td>Steve Henley</td>
<td>Feb. 28, 1986</td>
<td>Feb. 4, 2009</td>
<td>22 years, 11 months</td>
</tr>
</tbody>
</table>

**E. Residency on Death Row**

Among the 56 defendants with Pending Death Sentences, the lengths of time they resided on death row (from sentencing date in the Initial Capital Trial to June 30, 2017), can be summarized as follows:

---

26 Daryl Holton waived his rights to post-conviction and federal habeas review, which accounts for the shortened period between his sentencing and execution dates.
TABLE 20

<table>
<thead>
<tr>
<th>Length of Time on Death Row</th>
<th>Number of Defendants (as of 6/30/2017)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 30 Years</td>
<td>10</td>
</tr>
<tr>
<td>20 – 30 Years</td>
<td>20</td>
</tr>
<tr>
<td>10 – 20 Years</td>
<td>16</td>
</tr>
<tr>
<td>&lt; 10 Years</td>
<td>10</td>
</tr>
</tbody>
</table>

The median residency on Death Row (as of June 30, 2017) was 21 1/2 years.

The longest residency on Death Row (as of June 30, 2017) was 35 years, 3 months.

F. Geographic/Racial Distribution of Sustained Death Sentences

During the 40-Year Period, 48 of the 95 Tennessee counties (51%) conducted Capital Trials, although only 28 of the 95 (29%) counties imposed Sustained Death. The 28 counties that imposed Sustained Death Sentences represent 64% of Tennessee’s general population according to the most recent census estimates.
## APPENDIX 1

### TABLE 21
Sustained Death Sentences by County/Race During 40-Year Period

<table>
<thead>
<tr>
<th>County</th>
<th>Grand Division</th>
<th>Race of Def: Black</th>
<th>Race of Def: White</th>
<th>Race of Def: Other</th>
<th>Totals</th>
<th>Most Recent Crime Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dyer</td>
<td>West</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>1/2/00</td>
</tr>
<tr>
<td>Fayette</td>
<td>West</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>5/2/07</td>
</tr>
<tr>
<td>Hardeman</td>
<td>West</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1/17/02</td>
</tr>
<tr>
<td>Henderson</td>
<td>West</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2/5/97</td>
</tr>
<tr>
<td>Lake</td>
<td>West</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2/3/86</td>
</tr>
<tr>
<td>Madison</td>
<td>West</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>5</td>
<td>1/11/05</td>
</tr>
<tr>
<td>Shelby</td>
<td>West</td>
<td>18</td>
<td>10</td>
<td>2</td>
<td>30</td>
<td>1/19/12</td>
</tr>
<tr>
<td>Tipton</td>
<td>West</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>6/1/10</td>
</tr>
<tr>
<td>Weakley</td>
<td>West</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>9/7/79</td>
</tr>
<tr>
<td>Bedford</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>11/30/97</td>
</tr>
<tr>
<td>Cheatham</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3/3/85</td>
</tr>
<tr>
<td>Coffee</td>
<td>Middle</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1/1/85</td>
</tr>
<tr>
<td>Davidson</td>
<td>Middle</td>
<td>4</td>
<td>7</td>
<td>0</td>
<td>11</td>
<td>7/8/99</td>
</tr>
<tr>
<td>Jackson</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>7/24/85</td>
</tr>
<tr>
<td>Montgomery</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>7/8/96</td>
</tr>
<tr>
<td>Robertson</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>4/23/83</td>
</tr>
<tr>
<td>Stewart</td>
<td>Middle</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>8/20/88</td>
</tr>
<tr>
<td>Williamson</td>
<td>Middle</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>9/24/84</td>
</tr>
<tr>
<td>Blount</td>
<td>East</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2/2/92</td>
</tr>
<tr>
<td>Bradley</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>12/9/98</td>
</tr>
<tr>
<td>Campbell</td>
<td>East</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>8/15/88</td>
</tr>
<tr>
<td>Cocke</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>12/3/89</td>
</tr>
<tr>
<td>Hamilton</td>
<td>East</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>9/6/01</td>
</tr>
<tr>
<td>Knox</td>
<td>East</td>
<td>1</td>
<td>5</td>
<td>0</td>
<td>6</td>
<td>1/7/07</td>
</tr>
<tr>
<td>Morgan</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1/15/85</td>
</tr>
<tr>
<td>Sullivan</td>
<td>East</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>11/27/04</td>
</tr>
<tr>
<td>Union</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3/17/86</td>
</tr>
<tr>
<td>Washington</td>
<td>East</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>10/6/02</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td></td>
<td>30 (35%)</td>
<td>53 (62%)</td>
<td>3 (3%)</td>
<td>86 (100%)</td>
<td></td>
</tr>
</tbody>
</table>

Western Grand Division = 23 Blacks + 18 Whites + 2 Other = 43 (50% of statewide total)
Middle Grand Division = 5 Blacks + 15 Whites + 1 Other = 21 (24% of statewide total)
Eastern Grand Division = 2 Blacks + 20 Whites + 0 Other = 22 (26% of statewide total)

27 The “Most Recent Crime Date” is the date of the most recent offense in the county that resulted in a Sustained Death Sentence.
Since October 2001,\textsuperscript{28} 14 New Death Sentences, which have been sustained, were imposed in 8 counties—or in 8% of the counties representing 34% of Tennessee’s general population (according to the 2010 Census).

\textbf{TABLE 22}

\textit{Sustained Death Sentences by County/Race Since October 2001}

<table>
<thead>
<tr>
<th>County</th>
<th>Grand Division</th>
<th>Race of Def: Black</th>
<th>Race of Def: White</th>
<th>Race of Def: Other</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hardeman</td>
<td>West</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Madison</td>
<td>West</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Shelby</td>
<td>West</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Tipton</td>
<td>West</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Hamilton</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Knox</td>
<td>East</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Sullivan</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Washington</td>
<td>East</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td>10 (71%)</td>
<td>4 (29%)</td>
<td>0 (0%)</td>
<td>14 (100%)</td>
</tr>
</tbody>
</table>

Western Grand Division = 9 Blacks + 1 White = 10 Total (71% of statewide total)
Middle Grand Division = 0 Total
Eastern Grand Division = 1 Black + 3 Whites = 4 Total (29% of statewide total)

As indicated in Table 21, above, for each of the three Grand Divisions, the last murder resulting in a Sustained Death Sentence occurred on the following dates:
West Grand Division: Jan. 19, 2012 (Shelby County)

\textsuperscript{28} As mentioned previously, in October 2001, the Office of the District Attorney General for the 20th Judicial District issued its \textit{Death Penalty Guidelines}. Since then, no death sentences have been imposed in Davidson County, or the entire Middle Grand Division of Tennessee. Also, the frequency of death sentences throughout the state since October 2001 is markedly lower than during the prior 24-year period. Accordingly, it may be useful to compare certain statistics from the two different periods before and after October 2001.
Middle Grand Division: July 8, 1999 (Davidson County)
East Grand Division: January 7, 2007 (Knox County)

G. Frequency and Decline

During the 40-Year Period, the frequency of trials resulting in New Death Sentences reached a peak around 1990. Beginning around 2005, we have seen a steady and accelerating decline, as follows:

| TABLE 23 |
|---|---|---|---|---|---|---|---|
| 4-Year Period | Trials Resulting in Death Sentences | New Death Sentences (i.e., Initial Capital Trials) | Sustained Death Sentences 29 | Ave. New Death Sentences per Year | 1st Degree Murder Cases 30 | % “New” Death Sentences / 1st Degree Murders | % Sustained Death Sentences / 1st Degree Murders |
| 7/1/77 – 6/30/81 | 25 | 25 | 6 | 6.25/year | 155 | 16% | 4% |
| 7/1/81 – 6/30/85 | 37 | 33 | 12 | 8.25/year | 197 | 17% | 6% |
| 7/1/85 – 6/30/89 | 34 | 32 | 15 | 8.00/year | 238 | 13% | 6% |
| 7/1/89 – 6/30/93 | 38 | 37 | 18 | 9.25/year | 282 | 13% | 6% |
| 7/1/93 – 6/30/97 | 21 | 17 | 9 | 4.45/year | 395 | 4% | 2% |
| 7/1/97 – 6/30/01 | 32 | 24 | 14 | 6.00/year | 316 | 8% | 4% |
| 7/1/01 – 6/30/05 | 20 | 16 | 5 | 4.00/year | 283 | 6% | 2% |
| 7/1/05 – 6/30/09 | 5 | 4 | 4 | 1.00/year | 271 | 1.5% | 1.4% |
| 7/1/09 – 6/30/13 | 6 | 6 | 5 | 1.50/year | 284 | 2% | 1.7% |
| 7/1/13 – 6/30/17 | 3 | 1 | 1 | 0.25/year | Incomplete Data 31 | Incomplete Data |

29 Defendants who received Sustained Death Sentences based on dates of their Initial Capital Trials.
30 Counted by defendants, not murder victims.
31 Thus far I have found records for only 93 cases resulting in first degree murder convictions for murders occurring during the most recent 4-year period. Because of the time it takes for a case to be tried and appealed, we have an incomplete record
VII. Frequency of Tennessee Death Sentences in 4-Year Increments

Totals for the first 24 years, from July 1, 1977, to June 30, 2001:

168 “New” death sentences ≥
7 “New” death sentences per year (13.2% of First Degree Murder Cases)

74 “Sustained” death sentences ≥
4 “Sustained” death sentences per year (5.8% of First Degree Murder Cases)

Totals for the most recent 16 years, from July 1, 2001, to June 30, 2017:

27 “New” death sentences ≥
1.7 “New” death sentences per year (3.5% of First Degree Murder Cases)

of cases from the most recent years. According to Tennessee Bureau of Investigation (TBI) statistics, however, the annual number of homicides in Tennessee has remained relatively consistent over the period. See Table 25.

32 One defendant had three separate “new” trials each resulting in “new” and “sustained” death sentences; another defendant had two such trials. See supra note 1. Accordingly, there were 195 “new” trials involving a total of 192 defendants, and 89 “sustained” death sentences involving a total of 86 defendants.

33 See supra note 28. While 89 trials resulted in Sustained Death Sentences, only 86 defendants received Sustained Death Sentences.
15 “Sustained” death sentences ≥ 0.9 “Sustained death sentences per year (< 2.0% of First Degree Murder Cases)

Throughout the state, no new death sentences were imposed during the most recent three-year period (from June 15, 2014, to June 30, 2017).

The decline in death sentences is also reflected in the numbers of counties that have imposed death sentences, which can be broken down in 4-year increments as follows:


**TABLE 24**  
Number of Counties Conducting Capital Trials  
By 4-Year Increments

<table>
<thead>
<tr>
<th>4-Year Period</th>
<th>Number of Counties Conducting Capital Trials during the Indicated 4-Year Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/1981 – 6/30/1985</td>
<td>18</td>
</tr>
<tr>
<td>7/1/1989 – 6/30/1993</td>
<td>18</td>
</tr>
<tr>
<td>7/1/1993 – 6/30/1997</td>
<td>11</td>
</tr>
<tr>
<td>7/1/1997 – 6/30/2001</td>
<td>12</td>
</tr>
<tr>
<td>7/1/2001 – 6/30/2005</td>
<td>11</td>
</tr>
<tr>
<td>7/1/2005 – 6/30/2009</td>
<td>3</td>
</tr>
<tr>
<td>7/1/2009 – 6/30/2013</td>
<td>5</td>
</tr>
<tr>
<td>7/1/2013 – 6/30/2017</td>
<td>1</td>
</tr>
</tbody>
</table>

The annual rate of “New Death Sentences” has declined while the annual number of murder cases has remained relatively constant.

---

34 These include all 221 Initial Capital Trials and Retrials, whether or not the convictions or death sentences were eventually sustained. Obviously, several counties conducted Capital Trials in several of the 4-Year Periods. Shelby County, for example, conducted Capital Trials in each of these periods.
**TABLE 25
New Death Sentences Compared to Murders
2002–2016**

<table>
<thead>
<tr>
<th>Year</th>
<th>“Murders”</th>
<th>New Death Sentences</th>
<th>% New Death Sentences per Murders</th>
<th>Sustained New Death Sentences</th>
<th>% Sustained New Death Sentences per Murders</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>385</td>
<td>6</td>
<td>1.6 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2003</td>
<td>394</td>
<td>3</td>
<td>1.0 %</td>
<td>3</td>
<td>1.0 %</td>
</tr>
<tr>
<td>2004</td>
<td>350</td>
<td>4</td>
<td>1.1 %</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>2005</td>
<td>430</td>
<td>2</td>
<td>0.4 %</td>
<td>1</td>
<td>0.2 %</td>
</tr>
<tr>
<td>2006</td>
<td>409</td>
<td>1</td>
<td>0.3 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2007</td>
<td>395</td>
<td>1</td>
<td>0.3 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2008</td>
<td>408</td>
<td>1</td>
<td>0.3 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2009</td>
<td>461</td>
<td>1</td>
<td>0.4 %</td>
<td>1</td>
<td>0.4 %</td>
</tr>
<tr>
<td>2010</td>
<td>360</td>
<td>2</td>
<td>0.6 %</td>
<td>2</td>
<td>0.6 %</td>
</tr>
<tr>
<td>2011</td>
<td>375</td>
<td>2</td>
<td>0.6 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2012</td>
<td>390</td>
<td>1</td>
<td>0.3 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2013</td>
<td>333</td>
<td>0</td>
<td>0 %</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>2014</td>
<td>375</td>
<td>1</td>
<td>0.3 %</td>
<td>1</td>
<td>0.3 %</td>
</tr>
<tr>
<td>2015</td>
<td>406</td>
<td>0</td>
<td>0 %</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>2016</td>
<td>470</td>
<td>0</td>
<td>0 %</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>TOTALS</td>
<td>5,941</td>
<td>25</td>
<td>0.4 %</td>
<td>14 (0.9/year)</td>
<td>0.2 %</td>
</tr>
</tbody>
</table>

During the 10-year period 2003–2012:
- Total non-negligent homicides = 3,972 ≥ 397/year
- Total New Death Sentences = 18 ≥ 1.8/year
- % New Death Sentences per non-neg. homicides = 0.5%
- Total sustained New Death Sentences = 12 ≥ 1.2/year
- % sustained new death sentences per non-neg. homicides = 0.3%

The “Murders” statistics come from the TBI annual reports which date back to 2002. For statistical purposes, TBI defines “Murders” as non-negligent homicides.
During the 4-year period 2013–2016:
   Total non-negligent homicides = 1,584 \geq 396/\text{year}
   Total New Death Sentences = 1 \geq 0.25/\text{year}
   \% \text{New Death Sentences per non-neg. homicides} = 0.06\%

Of the 19 defendants who received New Death Sentences over this 14-year period, none have been executed, and six have had their sentences vacated. The remaining Pending Cases are under review and could ultimately result in reversals.
APPENDIX 2

TENNESSEE TRIALS IN WHICH DEATH SENTENCES WERE IMPOSED
DURING THE PERIOD 7/1/1977 THROUGH 6/30/2017

This chart identifies in chronological order, by the defendant’s name, each “Capital Trial” that resulted in the imposition of one or more death sentences. For purposes of this chart, the term Capital Trial includes a resentencing hearing.

The county listed is where the murder allegedly occurred, not necessarily where the case was tried.

A number in parentheses immediately following the defendant’s name in a multi-murder case indicates the number of murder victims for which death sentences were imposed.

Asterisks indicate cases that have had two or more Capital Trials arising from the same charges. A single asterisk indicates the result of the defendant’s first Capital Trial, a double asterisk indicates the result of the defendant’s second trial for the same murder(s), etc. The other Capital Trials involving the same defendant and charges are cross-referenced in the far right column.

A Capital Trial is “Pending” if it has not been reversed or vacated—i.e., if the defendant is still under a...
sentence of death from that Capital Trial. Because capital cases typically are challenged until a defendant is executed, a case remains Pending as long as the defendant is alive.

If a case is ultimately resolved by plea agreement or by the prosecution’s withdrawal of the death notice (e.g., while the defendant is awaiting retrial or resentencing), that fact is not reflected in the chart.

<table>
<thead>
<tr>
<th>Capital Trial No.</th>
<th>Defendant</th>
<th>County Where Offense Occurred</th>
<th>Sentence Date (of instant sentencing proceeding)</th>
<th>Defendant Race and Gender</th>
<th>Type of Relief</th>
<th>Other Capital Trial(s) for Same Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Richard Hale Austin*</td>
<td>Shelby</td>
<td>10/22/77</td>
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³ This case was tried after June 30, 2017—i.e. after the 40-year period.
APPENDIX 3

LIST OF TENNESSEE CAPITAL CASES GRANTED RELIEF ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE 40-YEAR PERIOD 7/1/1977–6/30/2017

Tennessee capital cases granted relief in state court for IAC:


3. Cooper v. State, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (grant of sentence relief from PC court aff’d) (resentenced to less than death)


9. Goad v. State, 938 S.W.2d 363 (Tenn. 1996) (sentence relief) (resentenced to life)


27. Smith v. State, 357 S.W.3d 322 (Tenn. 2011) (sentence relief) (settled for life)


32. Davidson v. State, 453 S.W.3d 386 (Tenn. 2014) (sentence relief) (settled for LWOP)

Tennessee capital cases granted relief in federal court for IAC:

1. Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (sentence relief) (resentenced to death)

2. Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) (conviction relief) (resentenced to life)

3. Groseclose v. Bell, 131 F.3d 1161 (6th Cir. 1997) (conviction relief) (resentenced to life)


5. Caruthers v. Carpenter, 3:91-CV-0031 Docket (Doc) #287 and #288 (June 6, 2001) (order granting sentencing relief) (on appeal)


8. King v. Bell, No. 1:00-cv-00017 (M.D. Tenn. July 13, 2007) (sentence relief) (resentenced to life)


10. Cauthern v. Colson, 736 F.3d 465 (6th Cir. 2013) (sentence relief) (sentenced to life)

# Appendix 4

## Chart of Sixth Circuit Voting in Tennessee Capital Habeas Cases

### Republican Appointed Judges

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<tr>
<th>Republican Appointed Judges</th>
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<th>Votes to Grant Relief (or remand)</th>
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<td><strong>45 (78%)</strong></td>
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### Sixth Circuit Capital Habeas Cases from Tennessee

#### Final Dispositions in the Court of Appeals

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<td>Coe v. Bell</td>
<td>Boggs (R) Norris (R)</td>
<td>Moore (D)</td>
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<tr>
<td>161 F.3d 320 (6th Cir. 1998)</td>
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<td>Carter v. Bell</td>
<td>Clay (D) Gilman (D) Nelson (R)</td>
<td>Clay (D) Cole (D) Daughtrey (D) Gilman (D)</td>
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<tr>
<td>218 F.3d 581 (6th Cir. 2000)</td>
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<tr>
<td>Workman v. Bell</td>
<td>Batchelder (R) Boggs (R) Nelson (R) Norris (R)</td>
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</tbody>
</table>

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1 The cases included in this chart are the final Sixth Circuit Court of Appeals dispositions of Tennessee capital habeas cases. This chart does not include other decisions that addressed collateral issues or that were superseded by subsequent Sixth Circuit Court of Appeals decisions.

[249]
<table>
<thead>
<tr>
<th>Case</th>
<th>Republican Appointees</th>
<th>Democratic Appointees</th>
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</thead>
<tbody>
<tr>
<td>227 F.3d 331 (6th Cir. 2000) (en banc)²</td>
<td>Ryan (R) Siler (R) Suhrheinrich (R)</td>
<td>Martin (D) Merritt (D) Moore (D)</td>
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<tr>
<td>Abdur’Rahman v. Bell 226 F.2d 696 (6th Cir. 2000)</td>
<td>Batchelder (R) Siler (R)</td>
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<td>Caldwell v. Bell 288 F.3d 838 (6th Cir. 2002)</td>
<td>Norris (R)</td>
<td>Clay (D) Merritt (D)</td>
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<td>Hutchison v. Bell 303 F.3d 720 (6th Cir. 2002)</td>
<td>Cole (D) Moore (D) Siler (R)</td>
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<td>Alley v. Bell 307 F.3d 380 (6th Cir. 2002)</td>
<td>Batchelder (R) Boggs (R) Ryan (R)</td>
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<tr>
<td>Thompson v. Bell 315 F.3d 566 (6th Cir. 2003)</td>
<td>Moore (D) Suhrheinrich (R)</td>
<td>Clay (D)</td>
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<tr>
<td>Donnie Johnson v. Bell 344 F.3d 567 (6th Cir. 2003)</td>
<td>Boggs (R) Norris (R)</td>
<td>Clay (D)</td>
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<tr>
<td>House v. Bell 386 F.3d 668 (6th Cir. 2004) (en banc)³</td>
<td>Batchelder (R) Boggs (R) Cook (R) Gibbons (R)</td>
<td>Clay (D) Cole (D) Daughtrey (D) Gilman (D)</td>
</tr>
</tbody>
</table>

² In Workman v. Bell, 160 F.3d 276 (6th Cir. 1998), Judges Nelson, Ryan, and Siler, all Republican appointees, voted to affirm the district court’s denial of habeas relief. In Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (en banc), the seven Democrat appointees voted to remand the case for further proceedings, while the seven Republican appointees voted to affirm the district court. Because the vote was evenly split, the district court’s denial of habeas relief was affirmed. Mr. Workman was executed.

³ The United States Supreme Court overturned the Sixth Circuit’s en banc decision. House v. Bell, 547 U.S. 518 (2006).
On remand from the Supreme Court, the district court granted relief on Mr. House’s claims relating to actual innocence, and the state then dismissed the charges—resulting in Mr. House’s exoneration.

Republican appointees, either voted to deny rehearing en banc or acquiesced in the denial. (These opposing positions on the en banc petition are counted as votes in the chart.) Then, again the Supreme Court overturned the Sixth Circuit, Cone v. Bell, 556 U.S. 449 (2009), and remanded the case to the district court. Mr. Cone died on death row while his case was pending.
<table>
<thead>
<tr>
<th>Case Details</th>
<th>Judges</th>
<th>Appointments</th>
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<tr>
<td>726 F.3d 465 (6th Cir. 2013)</td>
<td>Cole (D)</td>
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<td>Hodges v. Colson 727 F.3d 517 (6th Cir. 2013)</td>
<td>Batchelder (R)</td>
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<td>Cook (R)</td>
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<tr>
<td>Van Tran v. Colson 764 F.3d 594 (6th Cir. 2014)</td>
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<td>Rogers (R)</td>
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<td>White (R)</td>
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<td>Middlebrooks v. Bell 619 F.3d 526 (6th Cir. 2010)</td>
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<td>Middlebrooks v. Carpenter 843 F.3d 1127 (6th Cir. 2016)</td>
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<td>Mogure (D)</td>
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<td>White (R)</td>
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<tr>
<td>Miller v. Colson 694 F.3d 691 (6th Cir. 2012)</td>
<td>Gibbons (R)</td>
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<td>Siler (R)</td>
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<tr>
<td>Morris v. Carpenter 802 F.3d 825 (6th Cir. 2015)</td>
<td>Boggs (R)</td>
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<td>Siler (R)</td>
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<td>GSutton v. Carpenter 617 F. App’x 434 (6th Cir. 2015)</td>
<td>Boggs (R)</td>
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<td>Gibbons (R)</td>
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<td>Thomas v. Westbrooks 849 F.3d 659 (6th Cir. 2017)</td>
<td>Siler (R)</td>
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<td>Donald (D)</td>
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<td>Black v. Carpenter 866 F.3d 734 (6th Cir. 2017)</td>
<td>Boggs (R)</td>
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<td>Griffin (R)</td>
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Further notes:

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Split Decisions: Of the 37 cases charted above, 21 (or 57%) resulted in split decisions. In these split decision cases, 92% of the Republican appointee votes were against relief, while 92% of the Democrat appointee votes were for relief. The votes according to party affiliation of the judges were:

- Republican Appointee Votes Against Relief = 50 (93%)
- Republican Appointee Votes For Relief = 4 (7%)
- Democrat Appointee Votes Against Relief = 3 (7%)
- Democrat Appointee Votes For Relief = 37 (93%)

Since 2005, no Republican appointee majority has voted for relief.

En Banc Opinions: We have identified six Sixth Circuit en banc opinions in capital cases from Tennessee. Three are included in the chart because those en banc decisions resulted in final disposition of the petitioners’ habeas claims in the Sixth Circuit Court of Appeals. The other three are not included in the chart because they decided collateral issues that were not dispositive of the petitioners’ habeas claims. The en banc opinions are as follows:

O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996) (en banc) (per curiam) (7-6 decision resulting in a remand to state court, in which 4 Democrat appointees and 3 Republican appointees voted favorably for the petitioner; while 5 Republican appointees and 1 Democrat appointee voted unfavorably against the petitioner) (not included in the chart);
Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (en banc) (a tie 7-7 vote strictly along party lines, effectively denying habeas relief) (included in the chart);

Abdur’Rahman v. Bell, 392 F.3d 174 (2004) (en banc) (in a 7-6 decision on a habeas procedural issue, all 6 Democrat appointees and 1 Republican appointee voted in favor of the petitioner, and 6 Republican appointees and no Democrat appointees voted against the petitioner—i.e., the single swing Republican appointee vote enabled the case to continue) (not included in the chart);

House v. Bell, 386 F.3d 668 (6th Cir. 2004) (en banc) (8-7 vote, strictly along party lines, denying habeas relief) (included in the chart);

Alley v. Little, 452 F.3d 620 (6th Cir. 2006) (en banc) (8-5 vote rejecting method-of-execution claim, in which 7 Republican appointees and 1 Democrat appointee voted against the petitioner, and 5 Democrat appointees voted for the petitioner) (not included in the chart);

Cone v. Bell, 505 F.3d 610 (6th Cir. 2007) (all 7 Democrat appointees dissented from denial of en banc review, while all 9 Republican appointees supported denial of en banc review—resulting in denial of habeas relief) (included in the chart).

Among these en banc opinions, Republican appointees cast 42 of their 46 votes (91%) against the petitioners, while Democrat appointees cast 36 of their 37 votes (97%) in favor of the petitioners.
APPENDICES A–H

DIGITAL APPENDICES

Appendices A–H are digital Excel spreadsheets of the data used in Appendix 1. These appendices are available for download on the Tennessee Journal of Law and Policy’s website at:
https://tennesseelawandpolicy.org/volumes/volume-13/.

The individual archival links are to the direct download.


App. E: Adult and Juvenile Defendants with Sustained First Degree Murder by Grand Division County During Period of July 1, 1977, to June 30, 2017 [https://perma.cc/W8ZF-LSQD]

App. F: Adult Defendants Convicted of Sustained First Degree Murder Convictions (7/1/1977–6/30/2017) By Grand Division, County, Rule 12 or NO Rule 12 Report [https://perma.cc/6H8T-6639]

App. G: Defendants With Sustained First Degree Murder Convictions of Multiple Victims With Number and Age of Victims (7/1/1977–6/30/2017) Plus Rule 12 Report Filed (Yes/No) [https://perma.cc/RKL9-5YQW]
