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## TENNESSEE'S CAPITAL PUNISHMENT HISTORY AND TODAY'S MERITED REPRIEVE FOR ITS DEATH PENALTY

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### I. INTRODUCTION

This paper provides an overview of Tennessee's capital punishment history. It ends with the existence of the state's death penalty in a condition of reprieve due to its value for constitutional justice when properly put to use against the worst-of-the-worst and as a tool for plea bargainers. History shows that the state's death penalty resided at times of ebb on a "death row" of its own upon the pages of the Tennessee Code Annotated. Despite a lengthy evolution process spurred on by Tennessee's legislatures, governors, and courts over time, it is possible that the penalty is on "death row" because it is controversial, dark, and ugly. The death penalty may never again flow and may reach the day of ultimate ebb when its death warrant is signed. However, the death penalty has weathered many efforts toward reform, will likely never be considered "innocent," and may possibly be redeemed to provide for better future application. Although the death penalty has never quite lived up to its potential as a deterrent, today it remains a vital part of constitutional justice and an effective tool that merits reprieve from its own "death row."

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## II. BRIEF HISTORICAL HIGHLIGHTS

Although the precise origins of capital punishment remain unclear within the dark recesses of pre-history, "capital punishment has been used to penalize various forms of conduct"<sup>1</sup> since the dawn of civilization. "Simply put, capital punishment penalizes those convicted of certain crimes by killing them."<sup>2</sup>

"The United States inherited the bulk of its criminal law, including the tradition of capital punishment, primarily from England but also from other European countries."<sup>3</sup> As the states were forming, the newly created state sometimes adopted the law of the state from which it parted. Tennessee gained statehood in 1796, and its body of law derived from North Carolina of which it was originally a part.<sup>4</sup> A look at the history of the death penalty in Tennessee indicates the intent of the state to utilize the death penalty as a means of punishment and as a deterrent to specific criminal acts.<sup>5</sup> "Until 1829, the only penalty available for conviction of murder was death."<sup>6</sup> "An act passed in 1829 divided murder into first and second degree [and] provided a mandatory death sentence for those convicted of first degree murder.<sup>7</sup> The death penalty was not allowed for second degree murder, and a sentencing range of ten to twenty-one years was set instead.<sup>8</sup> Tennessee legislators enacted an important change in the state's homicide law in 1838 and the state became the first in the nation to give juries the discretion to sentence defendants to death or life for first degree murder.<sup>9</sup> If the trial jury found mitigating circumstances in the case, and stated so in its verdict, it became the

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<sup>1</sup> RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 3 (4th ed. 2012).

<sup>2</sup> *Id.*

<sup>3</sup> Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614 (1983).

<sup>4</sup> Margaret Vandiver & Michael Coconis, "Sentenced to the Punishment of Death": *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 867 (2001).

<sup>5</sup> Roy B. Morgan, Jr., Note, *The Death Penalty in Tennessee – Recent Developments*, 8 MEM. ST. U. L. REV. 107 (1977-1978).

<sup>6</sup> Vandiver & Coconis, *supra* note 4, at 870.

<sup>7</sup> *Id.* at 870-71.

<sup>8</sup> *Id.* at 871.

<sup>9</sup> *Id.*

statutory duty of the court to sentence the defendant to life.<sup>10</sup> This change lasted just twenty years. "By 1858, the punishment for first degree murder was again mandatory death."<sup>11</sup>

"Like other slave states, Tennessee had separate statutes for crimes committed by whites and those committed by slaves, and, often by free blacks."<sup>12</sup> The separate laws for black and whites show how the state's criminal justice system reflected the political and economic systems of the time.<sup>13</sup> In post-Civil War 1865, the Tennessee legislature rewrote many of the old laws and omitted "reference[s] to race . . ."<sup>14</sup>

Punishment by death is not ultimately effective as a penalty unless carried out or executed. The public nature of applying the penalty and methods of death have changed over time. "All executions in America were public until the 1830's."<sup>15</sup> A decade earlier, concerns began to be expressed about the propriety of such public spectacles.<sup>16</sup> "The crowds that gathered to witness public executions were large and often unruly, disrespectful, drunken and dangerous [attendees of] festivals of disorder [that] subverted morals, increased crimes, excited sympathy with the criminal, and wasted time."<sup>17</sup> The methods varied by state, but Tennessee chose public hanging as its first method of execution.<sup>18</sup> In response to an 1879 hanging in Morristown, Tennessee a local newspaper writer wrote:

[W]e would be glad indeed if we knew this was the last public execution that would ever occur in Tennessee. The whole scene here was demoralizing and in no respect did it in our opinion bring any good result. We favor hanging for deliberate murder, but we hope the law making power will speedily pass a law to require it done privately.<sup>19</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 872.

<sup>12</sup> *Id.* at 867.

<sup>13</sup> *Id.* at 918.

<sup>14</sup> *Id.* at 873-74.

<sup>15</sup> *Id.* at 875.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 877.

<sup>19</sup> *Hamblen's Only Hanging Took Place Sept. 26, 1879, DAILY GAZETTE & MAIL, Nov. 13, 1955, at 14 (reprint from Oct. 1, 1879, on file with author).*

Pennsylvania, the first northeastern state to abolish public executions, did so in 1834.<sup>20</sup> “[T]he South and southern border states maintain[ed] the old tradition of public executions longer than the rest of the country.”<sup>21</sup> As early as 1849, a resolution was introduced to require the Tennessee Senate Judiciary Committee to look into moving executions inside of prison walls, but it was rejected by that committee.<sup>22</sup> “[In] 1883, [Tennessee] executions were moved from public spaces to the relative privacy of prison yards, [and] those who could witness the execution were specified.”<sup>23</sup> The 1883 legislation that caused this change also contained an unfunded mandate that required each county to construct a private area for executions.<sup>24</sup> After a proposal by Governor Patterson in 1909, the Tennessee legislature moved executions from the county of conviction to the state prison.<sup>25</sup>

“Many states changed their methods of execution from hanging to electrocution in the late nineteenth and early twentieth centuries in an attempt to provide a quicker and more reliable method of imposing death.”<sup>26</sup> In 1911, Governor Hooper expressed to the legislature his desire to see Tennessee’s method of execution changed from hanging to electrocution as a progression of decency and humanity.<sup>27</sup> In 1913, the Tennessee General Assembly passed a bill changing the method of execution to the electric chair, and appropriated \$5,000 for the cost of the death chamber, apparatus, machinery, and appliances necessary to conduct electrocutions.<sup>28</sup> In 1916, the first electrocution in Tennessee took place.<sup>29</sup> Electrocution continued as the sole method of execution through 1960 when Tennessee entered a forty-year-long, self-imposed, unofficial moratorium.<sup>30</sup>

In 1999, Tennessee changed its method of execution from electrocution to lethal injection, but maintained electrocution as a

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<sup>20</sup> Vandiver & Coconis, *supra* note 4, at 875.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 876.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 876-77.

<sup>26</sup> *Id.* at 877.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 877-78.

<sup>29</sup> *Id.* at 878, 894.

<sup>30</sup> *Id.*

choice for those sentenced before the end of 1998.<sup>31</sup> In 2000, Tennessee carried out its first execution by lethal injection.<sup>32</sup> Since 2000, Tennessee executed four death row inmates by lethal injection and one who volunteered for electrocution.<sup>33</sup>

In 2011, Tennessee's supply of sodium thiopental was seized by the Drug Enforcement Agency because of improper import procedures of the foreign-made drug.<sup>34</sup> Sodium thiopental is used to induce general anesthesia as part of the state's multi-drug lethal injection protocol.<sup>35</sup>

In 2012, death row inmates in Tennessee and two other states sued the Food and Drug Administration (FDA) and others "for improperly allowing shipments of a misbranded and new drug [sodium thiopental] to enter the United States for use in state lethal injection protocols."<sup>36</sup> The district judge in the case agreed with the inmates' contention.<sup>37</sup> In addition, the judge found the FDA had acted contrary to law by not refusing such imports.<sup>38</sup> The judge made note that the FDA's mission is to ensure that all drugs are safe and effective, regardless of why the drug is being administered, and that the law does not create an exception for drugs purchased by a state to use in its lethal injection protocol.<sup>39</sup> Moreover, the judge felt the FDA "failed to provide a reasoned explanation for departing from [its] own regulations . . . to ensure illegal, foreign shipments of [sodium] thiopental were not admitted in to [sic] the United States."<sup>40</sup> Finally, the judge found the FDA's "seemingly callous indifference to the health consequences of those imminently facing the executioner's needle . . . utterly disappointing."<sup>41</sup> Two years after Tennessee's

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<sup>31</sup> Deborah Fins, *Death Row U.S.A.*, 57 (Fall 2012), available at

[http://www.naacpldf.org/files/publications/DRUSA\\_Fall\\_2012.pdf](http://www.naacpldf.org/files/publications/DRUSA_Fall_2012.pdf).

<sup>32</sup> Death Penalty Info. Ctr. Searchable Execution Database at Robert Coe, <http://www.deathpenaltyinfo.org/robert-coe>, (last visited Mar. 30, 2013); see *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983).

<sup>33</sup> Death Penalty Info. Ctr. Searchable Execution Database, <http://www.deathpenaltyinfo.org> (last visited Feb. 24, 2013).

<sup>34</sup> Bridgit Bowden, *Arkansas, Tennessee have Lethal Injection Drug Taken by the DEA*, WPLN NEWS, July 25, 2011, <http://wpln.org/?p=29072>.

<sup>35</sup> *Beaty v. Food & Drug Admin.*, 853 F. Supp.2d 30, 34 (D.C. Cir. 2012).

<sup>36</sup> *Id.* at 32.

<sup>37</sup> *Id.* at 37.

<sup>38</sup> *Id.*

<sup>39</sup> *Beaty*, 853 F. Supp.2d at 43 n.9.

<sup>40</sup> *Id.* at 43.

<sup>41</sup> *Id.*

supply of sodium thiopental was seized, the state experienced a lack of pancuronium bromide, a strong muscle relaxant also used in the multi-drug lethal injection protocol.<sup>42</sup> Before revising the state's choice of drugs, the Tennessee Department of Corrections is "monitoring steps taken by other states to carry out executions with other drugs."<sup>43</sup>

### III. ABOLITION?

Death penalty abolition efforts are a significant element of the history of Tennessee's death penalty. In 1807, Governor Sevier stated "[h]umanity and policy call aloud for a revisal of . . . our laws . . . to abolish the inhuman and prompt mode of punishing with death."<sup>44</sup> Similarly, in 1837, Governor Cannon proposed that the legislature should "entirely [abolish] punishment by death in our state, and . . . [substitute] in its stead confinement . . . during life."<sup>45</sup> In 1845, Governor Brown also stated his position in favor of the abolition of capital punishment to the legislature.<sup>46</sup> He expressed that a just and rational society should regard the ancient barbarities of the death penalty with the deepest level of abhorrence and that relaxation of such laws would not lead to increases in crime.<sup>47</sup> Despite the sentiments of these state executives, no immediate legislation was advanced.

"In 1915, Tennessee did something no other southern state has done before or since: it abolished the death penalty for murder by legislative vote."<sup>48</sup> The bill excluded murder committed by a prisoner serving a life term, and was vetoed by Governor Rye.<sup>49</sup> A motion to sustain the Governor's veto passed the House despite its previous vote in favor of the bill; however, the Governor had delayed his veto past the five-day period provided by the Tennessee Constitution, and the bill became law.<sup>50</sup> Tennessee's experiment with partial abolition of the death penalty was short-lived.<sup>51</sup> A week into his term in 1919,

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<sup>42</sup> Associated Press, *Tennessee Searches for Lethal Injection Drugs*, CITIZEN TRIBUNE, Jan. 14, 2013 at A3 (on file with author).

<sup>43</sup> *Id.*

<sup>44</sup> Vandiver & Coconis, *supra* note 4, at 888.

<sup>45</sup> *Id.* at 889.

<sup>46</sup> *Id.* at 890.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 878.

<sup>49</sup> *Id.* at 880-81.

<sup>50</sup> *Id.* at 881.

<sup>51</sup> *Id.* at 881-83.

Governor Roberts sent word to the legislature about his perceptions for the potential of lawless vigilantism and lynch mob vengeance taking the place of the state sanctioned death penalty for murderers.<sup>52</sup> Governor Roberts stated that “[t]he assassin now knows that he will not forfeit his life by commission of the most atrocious crime upon his innocent victim.”<sup>53</sup> He urged passage of a bill already introduced to reinstate the death penalty for first degree murder and the legislature responded quickly with majority votes from both bodies to pass the bill.<sup>54</sup>

After an approximate forty-year lull in death penalty abolition activity, in 1959, Governor Clement requested in an address to the legislature that it give abolition of capital punishment serious consideration.<sup>55</sup> After a failed legislative attempt to abolish the death penalty in 1961, a 1965 abolition bill with Governor Clement’s endorsement overwhelmingly passed the Senate only to be defeated by a single vote in the House.<sup>56</sup>

In 1972, as a result of the Supreme Court of the United States’ decision in *Furman v. Georgia*<sup>57</sup> finding the imposition of the death penalty as practiced nationwide violated the Eighth and Fourteenth Amendments of the United States Constitution, the punishment went on hiatus across the board.<sup>58</sup> In 1973, the Tennessee Legislature enacted new first degree murder and death penalty statutes in an attempt to remedy the former laws which *Furman* had rendered unconstitutional.<sup>59</sup> The new Tennessee death penalty statute<sup>60</sup> added aggravating and mitigating circumstances patterned after the Model Penal Code.<sup>61</sup> “After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*;

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<sup>52</sup> *Id.* at 881-82.

<sup>53</sup> *Id.* at 882.

<sup>54</sup> *Id.* at 882-83.

<sup>55</sup> *Id.* at 892-93.

<sup>56</sup> *Id.* at 893-94; S.B. 344/H.B. 293 84th Gen. Assemb. (Tenn. 1965).

<sup>57</sup> 408 U.S. 238 (1972).

<sup>58</sup> Am. Bar Ass’n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Tennessee Death Penalty Assessment Report; An Analysis of Tennessee’s Death Penalty Laws, Procedures, and Practices*, 8 (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport_authcheckdam.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Am. Bar Ass’n, *supra* note 58, at 9-10; Model Penal Code § 210.6(3)-(4) (Proposed Official Draft 1962).

many of the states turned to [Model Penal Code] § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts.”<sup>62</sup> The American Law Institute’s current position statement is, “the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”<sup>63</sup>

In 1974, the Tennessee Supreme Court found the 1973 statutes unconstitutional and the legislature responded with amendments.<sup>64</sup> In 1977, the Tennessee Supreme Court declared the 1974 death penalty statute unconstitutional and the legislature again responded with amendments.<sup>65</sup> The Tennessee murder and death penalty statutes faced no further declarations of unconstitutionality, and, with other changes discussed below, remain current.<sup>66</sup>

In 2007, the Tennessee Legislature created the Tennessee Committee to Study the Administration of the Death Penalty.<sup>67</sup> Its work continued for fourteen months, and it yielded several proposals to the legislature.<sup>68</sup> The committee recommended “the creation of an independent commission to oversee capital defense services in Tennessee to ensure that attorneys representing those charged with capital murder are competent, trained, monitored, and compensated adequately.”<sup>69</sup> The bill to enact this measure died in committee.<sup>70</sup> Another recommendation would

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<sup>62</sup> The Am. Law Inst., *Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty*, Annex B, 2 (2009), available at [http://www.ali.org/doc/Capital%20Punishment\\_web.pdf](http://www.ali.org/doc/Capital%20Punishment_web.pdf); see also *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>63</sup> The Am. Law Inst., *Publications Catalog; Model Penal Code*, available at <http://www.ali.org/index.cfm?fuseaction=publications.ppage&nodeid=92>, (last visited Feb. 24, 2013), (choosing to not endorse abolition of capital punishment per se).

<sup>64</sup> Am. Bar Ass’n, *supra* note 58, at 11; *State v. Hailey*, 505 S.W.2d 712 (Tenn. 1974).

<sup>65</sup> Am. Bar Ass’n, *supra* note 58, at 12; *Collins v. State*, 550 S.W.2d 643 (Tenn. 1977).

<sup>66</sup> TENN. CODE ANN. §§ 39-13-202, 204 (2012).

<sup>67</sup> Am. Civil Liberties Union, *The Tennessee Death Penalty Study Committee Considers Final Report: Committee Members Urge Action*, (Feb. 18, 2009), available at <http://www.aclu.org/capital-punishment/tennessee-death-penalty-study-committee-considers-final-report-committee-members>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

[r]equire . . . the district attorney general to make available to the defendant for inspection and copying all relevant documents, tangible objects and statements, together with complete files of all investigative agencies, [and] [r]equire...the district attorney general to give notice to the defendant of any expert witnesses that the state reasonably expects to call as a witness at trial, [and] specifies that the district attorney general is not required to disclose written materials drafted by the prosecuting attorneys or their legal staff for their own use at trial.<sup>71</sup>

The bill to enact this measure also died in committee.<sup>72</sup>

A third recommendation would “require . . . all statements made by a person during a custodial interrogation relating to a homicide . . . be electronically recorded and preserved.”<sup>73</sup> The bill to enact this measure received much more attention, but was also sent to die in committee.<sup>74</sup> The only recommendation of the committee enacted by the legislature “require[d] the administrative office of the court to propose a realistic time within which post-conviction relief petitions in capital cases are finally disposed of if it is determined the one-year statutory time limit is not realistic.”<sup>75</sup> The new law became sub-parts (e)(1)-(3) of Tennessee’s Final Disposition of [Post-Conviction] Petitions statute and went into effect July 8, 2009.<sup>76</sup> Two other states with similar study committees “found their death penalty

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<sup>70</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1679&ga=106>.

<sup>71</sup> Daniel Potter, *Death Penalty Study Committee Issues Recommendations*, WLPN NEWS, Feb. 19, 2009, available at <http://wpln.org/?p=4849>.

<sup>72</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1402&ga=106>.

<sup>73</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0261&ga=106> (follow “Summary for SB 0261/HB 0596” hyperlink).

<sup>74</sup> *Id.*

<sup>75</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0260&ga=106> (follow Summary for SB 0260/HB 0597” hyperlink).

<sup>76</sup> TENN. CODE ANN. § 40-30-111(e)(1)-(3) (2012).

systems so broken and rife with error that repeal of the death penalty was recommended."<sup>77</sup> A recommendation to abolish the death penalty was noticeably absent from the Tennessee committee's efforts.<sup>78</sup>

Regardless of the committee's lack of an abolition recommendation, legislation was proposed in 2010 that would "remove . . . the death penalty as a possible punishment for first degree murder."<sup>79</sup> This bill died in committee.<sup>80</sup> Abolition was revisited in 2011 with proposed legislation that would "remove...the jury's ability to sentence a defendant convicted of first degree murder to death."<sup>81</sup> This bill also met its demise in committee.<sup>82</sup>

In reviewing these ancient or recent efforts, the possibility of abolition of Tennessee's death penalty has remained a constant topic of concern. The drumbeat heartily stirring abolition efforts to a fevered frenzy may again resound in Tennessee, but for now THE status quo is maintained.

#### IV. OTHER TWEAKS IN DEATH PENALTY-RELATED LAW

Other tweaks in death penalty-related law from Tennessee's capital punishment history are important to note. In 1841, then Governor James K. Polk suggested to the legislature "that a law was needed to enable him to commute death sentences to life as well as to grant pardons."<sup>83</sup> In 1842, the legislature responded to his request with legislation allowing the governor to reduce a death sentence to life when he thought a full pardon was not warranted.<sup>84</sup> A law enacted in 1858 granted the Tennessee Supreme Court the power to recommend the commutation of death sentences to the governor

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<sup>77</sup> Am. Civil Liberties Union, *supra* note 67.

<sup>78</sup> Death Penalty Info. Ctr., *Tennessee; History of the Death Penalty; Milestones in Abolition Efforts*, <http://www.deathpenaltyinfo.org/tennessee-1#resources>.

<sup>79</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3111&ga=106>.

<sup>80</sup> *Id.*

<sup>81</sup> Tenn. Gen. Assemb. Legis. Archives, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2079&ga=107>.

<sup>82</sup> *Id.*

<sup>83</sup> Vandiver & Coconis, *supra* note 4, at 879.

<sup>84</sup> *Id.*

when in its opinion extenuating circumstances were found in particular cases.<sup>85</sup>

Some amendments to Tennessee's statutory scheme merit attention:

In 1988, the Tennessee Legislature amended the first degree murder statute by...classif[ying] as first degree murder the killing of a child less than thirteen years old if the child's death result[ed] from one...or more incidents of a protracted pattern or multiple incidents of *child abuse* committed by the defendant against such child or if such death result[ed] from the cumulative effects of such pattern or incidents.<sup>86</sup>

This amendment was referred to as the Scotty Trexler law.<sup>87</sup> Scotty was a twenty-one month-old child murdered in Hawkins County in 1987 by protracted and severe child abuse inflicted upon him by his mother's live-in boyfriend who babysat him.<sup>88</sup> Although initially charged with first degree murder, Scotty's abuser's charges had to be reduced because the statute required premeditation which could not be proved.<sup>89</sup> The presiding jurist, Judge James Beckner, impacted by Scotty's plight and the unavailability of harsher justice, stepped outside of the usual neutral cloak of the robe and advocated for the law's change with testimony before the committee that drafted the 1988 amendment.<sup>90</sup> Scotty's murderer is due to be released in March of 2015.<sup>91</sup> In 1995, an amendment "deleted all reference to the requisite age of a child abuse victim in order for the defendant to be convicted of first degree murder."<sup>92</sup>

Among other notable points, the Tennessee Legislature, in 1989, allowed a viable fetus to be considered a murder victim.<sup>93</sup> In 1990, the Legislature enacted "a new statute prohibiting defendants

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<sup>85</sup> *Id.*

<sup>86</sup> Am. Bar Ass'n, *supra* note 58, at 15-16, (emphasis in original)(quoting 1988 Tenn. Pub. Acts 802, §1).

<sup>87</sup> Bill Grubb, *Who Was Scotty Trexler?*, THE ROGERSVILLE REVIEW, Aug. 3, 2011, <http://therogersvillereview.com/story/11904>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Am. Bar Ass'n, *supra* note 58, at 16.

<sup>93</sup> TENN. CODE ANN. § 39-13-210(a) (1989).

with mental retardation from being subject to the death penalty."<sup>94</sup> A 1993 amendment added life imprisonment without the possibility of parole as a sentencing option for first degree murder.<sup>95</sup> In 2002, after the 9/11 terrorist attacks on homeland targets, "the . . . Legislature added 'act[s] of terrorism' to the list of offenses constituting first degree murder."<sup>96</sup> In 2011, the Legislature amended the provision related to a fetus as a victim to "include a human embryo or fetus at any stage of gestation in utero."<sup>97</sup>

## V. RACE AS AN ISSUE

Equal justice under law is such a lofty goal that the phrase is engraved on the west pediment of the United States Supreme Court Building in Washington, D.C.<sup>98</sup> The United States Constitution provides "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>99</sup> "[E]qual protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment."<sup>100</sup> Equal, as an adjective, does not hold its ground in an imperfect world. In an ideal state, equal numbers would be demonstrated in the racial demographics of death row inmates. However, a look at statistics readily shows racial disparity in demographic comparisons. Nationwide, as of fall 2012, the death row population was 43.17% white, 41.93% black, and 14.91% other.<sup>101</sup> Overall *estimated* nationwide prison population at the end of 2011 was 35.66 % white, 40.16% black, and 24.17% other.<sup>102</sup> Overall nationwide citizen population in 2010

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<sup>94</sup> Am. Bar Ass'n, *supra* note 58, at 17; *See also* TENN. CODE ANN. § 39-13-204 (1990).

<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.* at 17 (quoting 2002 Tenn. Pub. Acts 849, §2(a)).

<sup>97</sup> 2011 Tenn. Pub. Acts 408, § 2.

<sup>98</sup> Office of the Curator, Supreme Court of the United States, *The West Pediment Information Sheet*, (Updated: Aug. 28, 2003), available at <http://www.supremecourt.gov/about/westpediment.pdf>.

<sup>99</sup> U.S. CONST. amend. XIV, § 1.

<sup>100</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW*, 718 (3d ed. 2009).

<sup>101</sup> Fins, *supra* note 31, at 1.

<sup>102</sup> E. Ann Carson & William J. Sabol, *Prisoners in 2011*, 7 (Dec. 2012), available at <http://bjs.gov/content/pub/pdf/p11.pdf>.

was 72.4% white, 12.6% black, and 15% other.<sup>103</sup> Tennessee's death row population as of fall 2012 was 52% white, 43% black, and 5% other.<sup>104</sup> Tennessee's overall prison population as of mid-2012 was 52.08% white, 45.49% black, and 2.4% other.<sup>105</sup> Tennessee's overall citizen population in 2010 was 77.56% white, 16.66% black, and 5.78% other.<sup>106</sup> Even more disparate is the number of executions in Tennessee for the period of July 1916, through December 2, 2009, which show forty-five white individuals executed, or 34.35%, while eighty-six black individuals were executed, or 65.65%.<sup>107</sup>

While statistical disparity is evinced above based on racial classification, disparity does not mean inequity based on general murder suspect demographics. Statistics from 2001 through 2011 for national murder offenders based on crime occurrence data show racial demographics of 32.5% white, 37% black, 1.7% other, and 28.9% unknown.<sup>108</sup> Tennessee's encompassing murder arrest statistics from 2002 through 2011 show racial demographics of 39.1% white, 59.7% black, and 1.2% other.<sup>109</sup> Regarding statistics, some would say where there is smoke, there are mirrors. Others would say, based on the statistics regarding persons who actually commit murders in the United States and Tennessee, that where there is smoke, there is fire; and where there is fire, it should be fought. A defender of the death penalty wrote:

[S]tatistics of overrepresentation fail to prove racial bias. The relevant population for comparison is not the general population, but rather the population of murderers. If the death penalty is administered

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<sup>103</sup> Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin*, 4 (March, 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>104</sup> Fins, *supra* note 31, at 33.

<sup>105</sup> Tenn. Dep't of Corr., *FY 2012 Statistical Abstract*, 24 (Oct. 2012), available at <http://www.tn.gov/correction/pdf/StatisticalAbstract2012.pdf>.

<sup>106</sup> U.S. Census Bureau, *2010 Census Interactive Population Search-Tennessee*, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=47>.

<sup>107</sup> Tenn. Dep't of Corr., *Tennessee Executions*, available at <http://www.tn.gov/correction/media/tnexecutions.html>.

<sup>108</sup> See *infra* Table 1, Race of United States Murder Offenders Based on Crime Report Data, 2001-2011, (unknown category due to race being unknown at the time of the crime).

<sup>109</sup> See *infra* Table 2, Race of Tennessee Murder Arrestees Based on Arrest Data, 2002-2011.

without regard to race, the percentage of African American death row inmates found at the end of the process should not exceed the percentage of African American defendants charged with murder at the beginning. The available statistics indicate that is precisely what happens.<sup>110</sup>

In 1987, the Supreme Court of the United States, by a vote of five-to-four, decided a case on point regarding the "question [of] whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that [a defendant's] capital sentence is unconstitutional under the Eight or Fourteenth Amendment."<sup>111</sup> The Court stated a narrow and necessary burden of proof:

[A] defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. Thus, to prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers [sic] in *his* case acted with discriminatory purpose.<sup>112</sup>

The Court was asked to rely on historical evidence, and Justice Lewis Powell noted that "[a]lthough the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."<sup>113</sup> The Court found that a statistical study was clearly insufficient to support an inference that any of the decision-makers in the case acted with discriminatory purpose, and that the State as a whole did not act with a discriminatory purpose in selecting or reaffirming "a particular course of action at least in part 'because of', not merely 'in spite of', its

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<sup>110</sup> Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY* 183, 201 (Hugo Bedau & Paul Cassell eds., 2004).

<sup>111</sup> *McCleskey v. Kemp*, 481 U.S. 279, 282-83 (1987).

<sup>112</sup> *Id.* at 292 (emphasis in original) (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

<sup>113</sup> *Id.* at 298 n.20.

adverse effects upon an identifiable group.”<sup>114</sup> For the defendant’s claim to prevail, he “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect,” and there was no evidence that the Georgia Legislature enacted the capital punishment statute to “further a racially discriminatory purpose.”<sup>115</sup> The Court concluded this part of the case by holding the defendant failed to demonstrate the State maintained capital punishment because of its statistically suggested disproportionate impact, and, as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, it would not infer a discriminatory purpose on the part of the State of Georgia; the Court thus rejected the equal protection claims.<sup>116</sup> The Court also held, “[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”<sup>117</sup>

Along similar lines, a gender disparity claim by a male defendant would likely be seen as frivolous, yet grossly disproportionate statistics are available. The gender percentages for those on death row in the United States as of October 1, 2012, were 98% male and 2% female.<sup>118</sup> Those numbers for Tennessee were 98.88% male and 1.12% female.<sup>119</sup> The estimated gender percentages for those incarcerated for all crimes in the United States as of December 31, 2011, were 93.26% male and 6.74% female.<sup>120</sup> The gender percentages for those suspected of murder from 2001-2011 were 65.1% male, 7.2% female, and 27.7% unknown.<sup>121</sup> The gender percentages for those arrested for murder in Tennessee from 2002 through 2011 were 88.9% male and 11.1% female.<sup>122</sup> The overall citizen population gender demographics as of 2010 for the United

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<sup>114</sup> *Id.* at 297-98.

<sup>115</sup> *Id.* at 298 (emphasis in original).

<sup>116</sup> *Id.* at 298-99.

<sup>117</sup> *Id.* at 319.

<sup>118</sup> Fins, *supra* note 31, at 1.

<sup>119</sup> *Id.* at 57.

<sup>120</sup> Carson & Sabol, *supra* note 102, at 7.

<sup>121</sup> See *infra* Table 3, Sex of United States Murder Offenders Based on Crime Report Data, 2001-2011, (unknown category due to gender being unknown at the time of the crime).

<sup>122</sup> See *infra* Table 4, Sex of Tennessee Murder Arrestees Based on Arrest Data, 2002-2011.

States were 49.2% male and 50.8% female.<sup>123</sup> The overall citizen population gender demographics as of 2010 for Tennessee were 48.75% male and 51.25% female.<sup>124</sup>

No one would consider doing away with the death penalty because males are disproportionately represented on death row. This is because males disproportionately commit more murders in general as the statistics above show. Likewise, abolition, mitigation, or leniency should not be based on race if its members are disproportionately responsible for originating the crimes for which they are arrested, convicted, and imprisoned. Similarly, no one fathoms trying to narrow statutory language, sentencing guidelines, and aggravating factors to be more inclusive of females. Such language is gender neutral. Yet, the number of women in prison in general is growing at an alarming rate.<sup>125</sup> "The female prison population grew by 832% from 1977 to 2007, [while] the male prison population grew 416% during the same time period."<sup>126</sup> Nevertheless, as the statistics above demonstrate, females remain grossly underrepresented on death row and in prisons in comparison to males. This, like with race, is not inequity or discrimination, as fire is being fought where it burns.

## VI. TENNESSEE CAPITAL CASES REACH THE NATION'S CAPITAL

A few death penalty issue cases that merited the attention of the Supreme Court of the United States originated in Tennessee. In *Payne v. Tennessee*, the Court reconsidered whether the Eighth Amendment barred the admission of victim impact evidence during the penalty or sentencing phase of a capital trial.<sup>127</sup> Previous Court opinions had held "the harm . . . a capital defendant causes a victim's

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<sup>123</sup> Lindsay M. Howden & Julie A. Myer, *Age and Sex Composition: 2010*, 2 (May, 2011), available at <http://www.census.gov/2010census/popmap/ipmtext.php?fl=47>.

<sup>124</sup> *Id.* at 7.

<sup>125</sup> Women's Prison Ass'n Inst. on Women & Crim. Justice, <http://www.wpaonline.org/institute/index.htm> (last visited March 27, 2013).

<sup>126</sup> Women's Prison Ass'n Inst. on Women & Crim. Justice, *Quick Facts: Women & Criminal Justice-2009*, 1 (2009), available at <http://wpaonline.org/pdf/Quick%20Facts%20Women%20and%20CJ%202009.pdf>.

<sup>127</sup> *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

family do[es] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."<sup>128</sup> The Court held, "[w]e are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."<sup>129</sup> The Court rationalized that it wanted to return individualism back to victim families, give them a "face," allow the State the full moral force of its evidence, and allow the jury necessary information used to determine proper punishment.<sup>130</sup> The Court opined, "there is nothing unfair about allowing the jury to bear in mind harm [caused by the defendant to a victim's family] at the same time as it considers mitigating evidence introduced by the defendant."<sup>131</sup> The Court further held:

Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury . . . . [W]e now reject the view [of prior precedent] that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted . . . . "[J]ustice, though due to the accused, is due to the accuser also . . . ." We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.<sup>132</sup>

Another Tennessee case later reached the Supreme Court of the United States and was decided in 2006. Paul Gregory House (House) was convicted of a 1985 murder and sentenced to death, but new revelations raised doubts about his guilt.<sup>133</sup> The Court found

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<sup>128</sup> *Id.* at 819.

<sup>129</sup> *Id.* at 825.

<sup>130</sup> *Id.*

<sup>131</sup> *Payne*, 501 U.S. at 826.

<sup>132</sup> *Id.* at 826-27 (emphasis in original) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

<sup>133</sup> *House v. Bell*, 547 U.S. 518, 521 (2006).

House presented sufficient evidence to demonstrate actual innocence so as to allow “access to a federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law.”<sup>134</sup> As a result of evidence developed by House’s lawyers subsequent to his trial, the Court remanded the case for further proceedings with the federal district court ordering Tennessee to retry or release him.<sup>135</sup> After a stint on bail awaiting retrial, the State, in 2009, dropped all charges.<sup>136</sup>

A third case of interest of Tennessee origin was decided by the United States Supreme Court in 2009. The issue raised by Gary Cone (Cone) was whether his right to due process was violated when the State of Tennessee suppressed evidence supporting his claim of drug addiction that included witness statements and police reports which potentially corroborated his defense at trial and should have bolstered mitigation of the death penalty he then received.<sup>137</sup> “Cone asserted an insanity defense, contending that he had killed [an elderly couple in their home] while suffering from acute amphetamine psychosis, a disorder caused by drug addiction.”<sup>138</sup> The Court found that Cone had not procedurally defaulted his *Brady* claim, that it had been fully considered by the state courts, and that it was ripe for federal adjudication.<sup>139</sup> While the Court agreed that the withheld documents in violation of *Brady* were not material to Cone’s alleged insane mental state, it found the trial court failed to adequately consider whether that same evidence was material to mitigation efforts during sentencing.<sup>140</sup> The Court vacated the decision of the Court of Appeals and remanded the case to the District Court to determine in the first instance whether there was a reasonable probability that the withheld evidence would have altered at least one juror’s assessment of the appropriate penalty for Cone’s crimes.<sup>141</sup> Currently, Mr. Cone remains a resident of Tennessee’s Death Row.<sup>142</sup>

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<sup>134</sup> *Id.* at 521-22; *See also* COYNE & ENTZEROTH, *supra* note 1, at 41.

<sup>135</sup> COYNE & ENTZEROTH, *supra* note 1, at 41.

<sup>136</sup> *Id.* at 42.

<sup>137</sup> *Cone v. Bell*, 556 U.S. 449, 451 (2009); *see* *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 452-69.

<sup>140</sup> *Id.* at 452.

<sup>141</sup> *Id.*

<sup>142</sup> *Fins*, *supra* note 31, at 57.

## VII. THE REALITY OF CAPITAL PUNISHMENT TODAY

Within Tennessee's capital punishment history, not unlike the rest of the United States, one can observe the influences on death penalty jurisprudence through what Chief Justice Warren described as the "evolving standards of decency that mark the progress of a maturing society."<sup>143</sup> The ebb and flow of change regarding capital punishment in Tennessee was highlighted in previous sections of this paper. Reiterated from above, Tennessee did not execute anyone from 1960 through 2000.<sup>144</sup> From 2000 through 2012, Tennessee executed six people.<sup>145</sup> Eighty-nine people remain under the care of the Tennessee Department of Correction on Death Row.<sup>146</sup> I agree with what Justice Stewart opined over forty years ago that "the [death] penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."<sup>147</sup> However, "capital punishment, under contemporary standards, is not to be viewed as disproportionate to the severity of the crime of murder."<sup>148</sup> Accordingly, I disagree with Justice Stewart's statement "that [death] sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder . . . ."<sup>149</sup>

Supreme Court Justice Lewis Powell, a wise jurist in his sunset eighties, while elaborating on his then-held opinions about capital punishment, made statements that closely parallel my own beliefs on the subject. Justice Powell voted in favor of the death penalty during his term on the Court.<sup>150</sup> After his retirement in 1987, Justice Powell expressed concern about the problem of excessively repetitious litigation in capital cases, and felt that if death sentences could not be enforced even where innocence of the defendant and fairness of his or her trial was not seriously in doubt, then perhaps legislative bodies should reconsider whether it was in the public's interest to retain a

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<sup>143</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>144</sup> *Vandiver & Coconis*, *supra* note 4, at 887, 894.

<sup>145</sup> Death Penalty Info. Ctr. Searchable Execution Database, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 24, 2013).

<sup>146</sup> *Fins*, *supra* note 31, at 57.

<sup>147</sup> *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

<sup>148</sup> *Morgan*, *supra* note 5, at 108-09.

<sup>149</sup> *Furman*, 408 U.S. at 309.

<sup>150</sup> *COYNE & ENTZEROTH*, *supra* note 1, at 216.

punishment enforced so haphazardly.<sup>151</sup> He stated, "Capital punishment, though constitutional, is not being enforced, [and] . . . it reflects discredit on the law to have a major component . . . that is simply not enforced."<sup>152</sup> Justice Powell later unequivocally related he had come to think capital punishment should be abolished, not because it was intrinsically wrong, but because it could not be fairly and expeditiously enforced.<sup>153</sup> His sense of dignity and his conception of the majesty of the law were offended by the endless waiting, perpetual litigation, last-minute stays, and midnight executions.<sup>154</sup> Justice Powell felt the spectacle of non-enforcement bred cynicism about the law's announced purposes and contempt for courts that could not or would not carry those purposes to fruition.<sup>155</sup> He felt it better to bar the whole ugly mess rather than continue an indecent, embarrassing, and wasteful charade.<sup>156</sup> The totality of Justice Powell's views describe the perceived reality about capital punishment now, two decades later.

Furthermore, our country's think tank for model law utopia, The American Law Institute, recognized the dystopia of "the current intractable institutional and structural obstacles to ensur[e] a minimally adequate system for administering capital punishment,"<sup>157</sup> and withdrew the death penalty section of the Model Penal Code without unequivocally endorsing opposition to such penalties.<sup>158</sup>

### VIII. PLEA BARGAINING

While Justice Powell's sentiments, in total, are spot on for the current state of capital punishment jurisprudence, I disagree with the ideas that the death penalty is of no use at all or that it is completely unworkable. The threat of a death sentence is a great plea bargaining tool. When a defendant's life is "saved" by a plea bargained sentence

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<sup>151</sup> Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1046 (1989) reprinted in COYNE & ENZEROTH, *supra* note 1, at 216.

<sup>152</sup> Don J. DeBenedictis, *The Reasonable Man*, A.B.A.J., Oct. 1990, at 68-9 reprinted in COYNE & ENTZEROTH, *supra* note 1, at 216.

<sup>153</sup> JOHN C. JEFFERIES, JR., JUSTICE LEWIS POWELL, JR., (1994) reprinted in COYNE & ENTZEROTH, *supra* note 1, at 217.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> The Am. Law Inst., *supra* note 63.

<sup>158</sup> *Id.*

of life without the chance of parole or “death by imprisonment,” both sides can argue a win. My experience with the death penalty as a bargaining tool was influenced in particular by two cases that impacted the Tennessee judicial district where I have spent my career in law enforcement.

The first case involved the carjacking and execution style murder of three of the four members of the Lillelid family in Greene County in 1997.<sup>159</sup> The parents along with their six-year-old daughter and two-year-old son were carjacked by a group of six young Kentuckians at an Interstate 81 rest area, transported to a nearby rural road, and each of the family members were then shot.<sup>160</sup> The bodies of the children were ritualistically placed in an inverted-cross fashion atop the bodies of their parents before the Lillelids were run over with their own van.<sup>161</sup> The family was left for dead as the murderers fled; however, the two-year-old boy survived his injuries. Unfortunately, he was blinded in the eye where he had been shot and suffered impaired motor skills.<sup>162</sup> The Lillelid murders became a salient incident that sparked a growing outcry for execution of convicted killers.<sup>163</sup> Third Judicial District Attorney General, Berkeley Bell (General Bell), filed notice that the State would seek the death penalty for the four of the six defendants who were adults.<sup>164</sup> The defendants later agreed to enter guilty pleas after the State agreed not to seek the death penalty but life in prison without the chance of parole instead.<sup>165</sup> A newspaper reporter related General Bell’s rationale:

While many have said justice in the case could be obtained only through executing the killers, prosecutor

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<sup>159</sup> Robert Moore, *Court Rejects Lillelid Killer’s Appeal*, CITIZEN TRIBUNE, March 15, 2013, at A1.

<sup>160</sup>*Id.*

<sup>161</sup> *Id.* at A1, A6.

<sup>162</sup> *10 Years Ago Today...An Unforgettable Tragedy*, GREENEVILLE SUN, April 6, 2007, available at [http://www.greenevillesun.com/Local\\_News/article/10-Years-Ago-Today--An-Unforgettable-Tragedy-id-276122](http://www.greenevillesun.com/Local_News/article/10-Years-Ago-Today--An-Unforgettable-Tragedy-id-276122).

<sup>163</sup> *Outcry For Death Penalty*, WGRV 1340 LOCAL NEWS, April 20, 1997, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

<sup>164</sup> *Grand Jury Indicts-Death Penalty Sought*, WGRV 1340 LOCAL NEWS, Sept. 3, 1997, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

<sup>165</sup> *Lillelid Murder Suspects Plead Guilty*, WGRV 1340 LOCAL NEWS, Feb. 20, 1998, available at <http://www.greeneville.com/trial/>, (scroll down menu at left by date).

Bell said after the six entered guilty pleas . . . that Tennessee's death penalty is "in name only." With almost 40 years elapsed since an execution, Bell said a death sentence in Tennessee is an effective sentence of "life in prison without parole." Bell said he had concerns a jury would be torn at sentencing because an alleged shooter—Bryant—would be ineligible for execution because of juvenile status, yet the four adults would face execution regardless of their shooting a victim or not. "Credibility problems" for two key prosecution witnesses—one with an existing criminal history, the other with a just-discovered felony record—also helped swing a decision to offer the six removal of the death penalty from sentencing consideration in exchange for their complete admissions of guilt.<sup>166</sup>

Scattered appeals continue into 2013 as the defendants protest their plea deals.<sup>167</sup>

The second case involved the line-of-duty murder of Hawkins County Deputy Gerald Monroe Gibson in 2000.<sup>168</sup> Deputy Gibson had been part of the team effort to serve an arrest warrant for attempted burglary on a suspect who barricaded himself in his home.<sup>169</sup> Deputy Gibson stepped from cover to attempt to shoot a teargas canister into the suspect's home and was shot in the head by the suspect.<sup>170</sup> General Bell also sought the death penalty in this case.<sup>171</sup> A similar ensuing plea bargain was struck, the defendant entered a guilty plea, and he received a sentence of life without parole.<sup>172</sup> General Bell stated:

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<sup>166</sup> Gina Stafford, *Innocence Lost – Chance Encounter Led to Unthinkable Tragedy*, KNOXVILLE NEWS SENTINEL, Feb. 22, 1998, available at <http://www.angelfire.com/tn/finagen/web.html>.

<sup>167</sup> Moore, *supra* note 159, at A1, A6.

<sup>168</sup> *Wlodarz Pleads Guilty to Slaying Deputy Gibson, Receives Life in Prison Without Parole*, THE ROGERSVILLE REVIEW, Sept. 20, 2001, available at [http://www.therogersvillereview.com/news/article\\_b208d7d9-8634-59cd-8bdf-7b670c4c52c2.html](http://www.therogersvillereview.com/news/article_b208d7d9-8634-59cd-8bdf-7b670c4c52c2.html).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

All in all with the factors involved in the case, particularly for closure for the family [so] they can leave all of this behind and not have to relive it again, [w]e felt that the second alternative, that is death in the penitentiary by natural causes, was the appropriate course to take. It is very important for these types of cases to be over . . . . [A]fter our discussions with the family, we felt that putting it all behind us was very important and that is the basic reason that we decided to end it this way. [W]e reached an agreement . . . and proceeded as expeditiously as possible to close the matter out.<sup>173</sup>

These two cases evince the typical effectiveness of having the death penalty as a tool to sculpt a plea bargain to the mutual benefit of each party to the adversarial process. For my part, retention of capital punishment is preferred for the worst-of-the-worst to choose between the plea bargain or the gamble of a trial. Whether a defendant rolls the dice for trial and loses or takes the deal, the punishment fits the crime: death by execution or death by imprisonment.

#### IX. WHAT IF IT WERE YOUR FRIEND?

Most people have not personally known a murder victim or the members of the victim's immediate or impacted family, and it is my prayer that such remains a constant in as many lives as possible. Hawkins County Deputy Gerald Monroe Gibson was a colleague I considered a friend. We were acquainted as agents in the "war on drugs" who worked together on a few joint cases and who co-attended some advanced training. "Bubba," as Deputy Gibson was affectionately known, was a gifted conversationalist who made friends easily and who treated adversary criminals with respect. He was someone I looked up to as a mentor. I will always remember something that Bubba told me. During a war story swapping session, he was bemoaning the many hours spent building probable cause for a barely successful drug search warrant case. During the search, he had located only a few marijuana roaches from an ashtray. Not to be

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<sup>173</sup> *Id.*

dissuaded for too long, he commented, "At least, by God, they knew we were there!"<sup>174</sup>

I distinctly remember the gut-wrenching feeling I experienced in reaction to Bubba's murder. I was called out to travel to Hawkins County to offer critical incident stress peer support the night of his death, and the knot in my stomach was not from motion sickness due to traveling the winding rural roads to the top of the fog-covered mountain near where he died. The nausea did not leave for days after attending his funeral and honors burial. Yet I was many gradients away from the immense impact this line-of-duty murder inflicted onto his wife, his two daughters, his fellow team member in whose arms Bubba died, his other co-workers, his immediate family, friends, and community.

Aside from basal humanity, the defendant who executed Deputy Gibson exhibited no known redeeming qualities. A valuable life was sacrificed, and a likely remorseless, unrepentant life carries on at the taxpayers' expense. Such a murderer even gains royalty-like "cred" in prison ranks as a cop killer. A 2007 survey showed 68% of Tennessee voters endorse the death penalty for murder.<sup>175</sup> As a distant residual victim of this crime due to the loss of a friend, and even from that distance or more, something would be missing if the death penalty was *always* off the table as a potential term in the contract for proper treatment of each other we have as humans in a civilized society.

## X. CONCLUSION

In conclusion, it is my hope that we carry on utilizing a variation of Deputy Gibson's sage words: with God's help, let others know in a positive way that we are here. As for Tennessee's death penalty, today it remains a vital part of constitutional justice and an effective tool that merits reprieve.

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<sup>174</sup> Conversation with Gerald Monroe Gibson, Deputy, Hawkins Cnty. Sheriff's Dep't, in Morristown, Tenn. (Nov. 12, 1999).

<sup>175</sup> Mem. from Roy Occhiogrosso, James Delorey, & Gretchen Wagner, Global Strategy Group to Deborah T. Fleischaker, Dir., Death Penalty Moratorium Implementation Project, Am. Bar Ass'n 2 (Feb. 21, 2007), *available at* <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/survey.authcheckdam.pdf>.

TABLE 1: RACE OF UNITED STATES MURDER OFFENDERS BASED ON  
CRIME REPORT DATA, 2001-2011

YEAR	TOTAL	WHITE	%	BLACK	%	OTHER	%	UNKN	%
2011 <sup>176</sup>	14548	4729	32.5	5486	37.7	256	1.8	4077	28
2010 <sup>177</sup>	15094	4849	32.1	5770	38.2	251	1.7	4224	28
2009 <sup>178</sup>	15760	5286	33.5	5890	37.4	245	1.6	4339	27.5
2008 <sup>179</sup>	16277	5334	32.8	5943	36.5	273	1.7	4727	29
2007 <sup>180</sup>	17040	5278	31	6463	37.9	245	1.4	5054	29.7
2006 <sup>181</sup>	17399	5339	30.7	6843	39.3	295	1.7	4922	28.3

<sup>176</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2011, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2011 (2012), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-3>.

<sup>177</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, 2010, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2010 (2011), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl03.xls>.

<sup>178</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2009, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2009 (2010), *available at* [http://www2.fbi.gov/ucr/cius2009/offenses/expanded\\_information/data/shrtable\\_03.html](http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_03.html).

<sup>179</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2008, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2008 (2009), *available at* [http://www2.fbi.gov/ucr/cius2008/offenses/expanded\\_information/data/shrtable\\_03.html](http://www2.fbi.gov/ucr/cius2008/offenses/expanded_information/data/shrtable_03.html).

<sup>180</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2007, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2007 (2008), *available at* [http://www2.fbi.gov/ucr/cius2007/offenses/expanded\\_information/data/shrtable\\_03.html](http://www2.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_03.html).

<sup>181</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2006, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2006 (2007), *available at* [http://www2.fbi.gov/ucr/cius2006/offenses/expanded\\_information/data/shrtable\\_03.html](http://www2.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_03.html).

2005 <sup>182</sup>	17029	5452	32	6379	37.6	299	2	4899	28.8
2004 <sup>183</sup>	15935	5339	33.5	5608	35.2	271	1.7	4717	29.6
2003 <sup>184</sup>	16043	5132	32	5729	35.7	308	1.9	4874	30.4
2002 <sup>185</sup>	15813	5356	33.9	5579	35.3	274	1.7	4604	29.1
2001 <sup>186</sup>	15488	5174	33.4	5521	35.6	273	1.8	4520	29.2
TOTAL	176426	57268	32.5	65211	37	2990	1.7	50957	28.9

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<sup>182</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2005, EXPANDED HOMICIDE DATA TABLE 3, MURDER OFFENDERS BY AGE, SEX, & RACE, 2005 (2006), *available at* [http://www2.fbi.gov/ucr/05cius/offenses/expanded\\_information/data/shrtable\\_03.html](http://www2.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_03.html).

<sup>183</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2004, EXPANDED HOMICIDE DATA TABLE 2.5, MURDER OFFENDERS BY AGE, SEX, & RACE, 2004 (2005), *available at* [http://www2.fbi.gov/ucr/cius\\_04/documents/04tbl2-5a.xls](http://www2.fbi.gov/ucr/cius_04/documents/04tbl2-5a.xls).

<sup>184</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2003, EXPANDED HOMICIDE DATA TABLE 2.5, MURDER OFFENDERS BY AGE, SEX, & RACE, 2003 (2004), *available at* [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2003/table2-5\\_offenders03.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2003/table2-5_offenders03.xls)

<sup>185</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2002, EXPANDED HOMICIDE DATA TABLE 2.6, MURDER OFFENDERS BY AGE, SEX, & RACE, 2002 (2003), *available at* [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2002/table2-6\\_offendersage02.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2002/table2-6_offendersage02.xls).

<sup>186</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2001, EXPANDED HOMICIDE DATA TABLE 2.6, MURDER OFFENDERS BY AGE, SEX, & RACE, 2001 (2002), *available at* [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2001/table2-6\\_offendersage01.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2001/table2-6_offendersage01.xls).

TABLE 2: RACE OF TENNESSEE MURDER ARRESTEES BASED ON ARREST  
DATA, 2002-2011

YEAR	TOTAL	WHITE	%	BLACK	%	OTHER	%
2011 <sup>187</sup>	295	128	43.4	164	55.6	3	1
2010 <sup>188</sup>	272	114	41.9	154	56.6	4	1.5
2009 <sup>189</sup>	368	141	38.3	222	60.3	5	1.4
2008 <sup>190</sup>	327	119	36.4	201	61.5	7	2.1
2007 <sup>191</sup>	313	110	35.1	202	64.5	1	0.3
2006 <sup>192</sup>	342	113	33	224	65.5	5	1.5
2005 <sup>193</sup>	358	140	39.1	210	58.7	8	2.2
2004 <sup>194</sup>	329	132	40.1	192	58.4	5	1.5

<sup>187</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2011, 24, (2012), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/Crime%20in%20Tennessee%202011.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20Tennessee%202011.pdf).

<sup>188</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2010, 26, (2011), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/documents/2010CIT.pdf](http://www.tbi.state.tn.us/tn_crime_stats/documents/2010CIT.pdf).

<sup>189</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2009, 24, (2010), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/documents/CrimeinTN2009.pdf](http://www.tbi.state.tn.us/tn_crime_stats/documents/CrimeinTN2009.pdf).

<sup>190</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2008, 26, (2009), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/2008%20Crime%20in%20Tennessee.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/2008%20Crime%20in%20Tennessee.pdf).

<sup>191</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2007, 24, (2008), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/Crime%20in%20TN%202007.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202007.pdf).

<sup>192</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2006, 26, (2007), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/2006%20All%20Agencies%20Combined.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/2006%20All%20Agencies%20Combined.pdf).

<sup>193</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2005, 27, (2006), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/Crime%20in%20TN%202005%20Complete.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202005%20Complete.pdf).

<sup>194</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2004, 25, (2005), *available at* [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/Crime%20in%20Tennessee%202004.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20Tennessee%202004.pdf).

2003 <sup>195</sup>	316	137	43.4	177	56	2	0.6
2002 <sup>196</sup>	353	146	41.4	207	58.6	0	0
TOTAL	3273	1280	39.1	1953	59.7	40	1.2

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<sup>195</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2003, 25, (2004), available at [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/2003\\_CIT\\_Complete.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/2003_CIT_Complete.pdf).

<sup>196</sup> TENN. BUREAU OF INVESTIGATION, CRIME STATISTICS UNIT, CRIME IN TENN. 2002, 22, (2003), available at [http://www.tbi.state.tn.us/tn\\_crime\\_stats/publications/Crime%20in%20TN%202002.pdf](http://www.tbi.state.tn.us/tn_crime_stats/publications/Crime%20in%20TN%202002.pdf).

TABLE 3: SEX OF UNITED STATES MURDER OFFENDERS BASED ON  
CRIME REPORT DATA, 2001-2011

YEAR	TOTAL	MALE	%	FEMALE	%	UNKN.	%
2011 <sup>197</sup>	14548	9458	65.2	1138	7.8	3925	27
2010 <sup>198</sup>	15094	9972	66.1	1075	7.1	4047	26.8
2009 <sup>199</sup>	15760	10391	65.9	1197	7.6	4172	26.5
2008 <sup>200</sup>	16277	10568	64.9	1176	7.2	4533	27.8
2007 <sup>201</sup>	17040	10975	64.4	1206	7.1	4859	28.5
2006 <sup>202</sup>	17399	11508	66.1	1151	6.6	4740	27.2
2005 <sup>203</sup>	17029	11117	65.3	1246	7.3	4666	27.4
2004 <sup>204</sup>	15935	10262	64.4	1130	7.1	4543	28.5
2003 <sup>205</sup>	16043	10218	63.7	1123	7	4702	29.3
2002 <sup>206</sup>	15813	10285	65	1108	7	4420	28
2001 <sup>207</sup>	15488	10126	65.4	1086	7	4276	27.6
TOTAL	176426	114880	65.1	12636	7.2	48883	27.7

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<sup>197</sup> See *supra* note 176.

<sup>198</sup> See *supra* note 177.

<sup>199</sup> See *supra* note 178.

<sup>200</sup> See *supra* note 179.

<sup>201</sup> See *supra* note 180.

<sup>202</sup> See *supra* note 181.

<sup>203</sup> See *supra* note 182.

<sup>204</sup> See *supra* note 183.

<sup>205</sup> See *supra* note 184.

<sup>206</sup> See *supra* note 185.

<sup>207</sup> See *supra* note 186.

TABLE 4: SEX OF TENNESSEE MURDER ARRESTEES BASED ON ARREST  
DATA, 2002-2011

YEAR	TOTAL	MALE	%	FEMALE	%
2011 <sup>208</sup>	295	263	89.2	32	10.8
2010 <sup>209</sup>	272	241	88.6	31	11.4
2009 <sup>210</sup>	368	325	88.3	43	11.7
2008 <sup>211</sup>	327	299	91.4	28	8.6
2007 <sup>212</sup>	313	282	90.1	31	9.9
2006 <sup>213</sup>	342	302	88.3	40	11.7
2005 <sup>214</sup>	358	314	87.7	44	12.3
2004 <sup>215</sup>	329	290	88.1	39	11.9
2003 <sup>216</sup>	316	276	87.3	40	12.7
2002 <sup>217</sup>	353	317	89.8	36	10.2
TOTAL	3273	2909	88.9	364	11.1

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<sup>208</sup> See *supra* note 187.

<sup>209</sup> See *supra* note 188.

<sup>210</sup> See *supra* note 189.

<sup>211</sup> See *supra* note 190.

<sup>212</sup> See *supra* note 191.

<sup>213</sup> See *supra* note 192.

<sup>214</sup> See *supra* note 193.

<sup>215</sup> See *supra* note 194.

<sup>216</sup> See *supra* note 195.

<sup>217</sup> See *supra* note 196.