

**TENNESSEE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION**

**REPORT TO THE BOARD OF GOVERNORS
AND THE HOUSE OF DELEGATES
OF THE STUDY COMMITTEE ON
EFFECTIVE ASSISTANCE OF COUNSEL
IN CAPITAL CASES**

December 31, 2004

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I. Executive Summary

The Committee was charged with studying the assistance of counsel in death penalty cases in Tennessee. It has endeavored to review as much information as feasible within its eighteen-month charge.

The Committee has concluded that effective assistance of counsel is neither uniformly nor consistently provided to individuals facing the death penalty in this state. Concerns over budget have often trumped the need for competent, well-compensated and adequately prepared counsel. There must be uniform standards for appointing counsel to assure that counsel in capital cases are well-versed in law and procedure. And, counsel must be given the resources to assure that they are able to provide competent representation.

The Committee recommends that the state follow the American Bar Association Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.

The ABA Guidelines set forth the objective in Guideline 1.1 (A) as: “To set forth a national standard of practice for the defense of capital cases in order to insure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” The commentary to this guideline explains: “The quality of counsel’s ‘guiding hand’ in modern capital cases is crucial to insuring a reliable determination of guilt and the imposition of an appropriate sentence.” Both the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit have recognized that the ABA Guidelines are the authoritative national standard for death penalty cases.

Tennessee's provision of defense services in death penalty cases is currently based on an entirely different model than that endorsed by the American Bar Association. The ABA Guidelines create the model for providing high quality representation for defendants.

The cornerstone for providing high quality representation is the creation of a jurisdiction-wide appointing authority that is independent from the judiciary and that sets up a procedure to review the performance of attorneys appointed in capital cases and to remove those who fail to demonstrate sufficient skill and zealous advocacy. In contrast, the Tennessee Statute and Rule places the appointing authority in locally elected judges and has no provisions for monitoring performance other than post-conviction claims for ineffective assistance of counsel.

The TBA has consistently spearheaded efforts to improve the quality of representation of indigent defendants. In 2003, it brought together a group of organizations which made suggestions for the amendment of Rule 13 of the Tennessee Supreme Court. Those proposals would have brought Rule 13 into closer accord with ABA Standards. An overwhelming 85% of the Board of Governors approved the proposals made to the Supreme Court regarding Rule 13.

Consistent with the TBA's endorsement of effective counsel in capital cases, the Committee recommends that there be ongoing evaluation of the death penalty in Tennessee which includes accurate and consistent monitoring of death penalty cases. The Committee also recommends that the TBA continue studying the issue of the constitutional imposition of the death penalty, including issues of reliability; and that the study of the death penalty include all voices: defenders, prosecutors and judges.

II. The Committee's Assignment

On September 26, 2002, Senior Judge Gilbert Merritt of the United States Court of Appeals for the Sixth Circuit presented a speech to a Federal-State Judicial Conference

sponsored by the Tennessee Bar Association. That speech focused upon what Judge Merritt referred to as “one major problem for all of us, [which is] the administration of our system of capital punishment.” He noted that almost one-half of the 156 death sentences imposed in Tennessee over the last 25 years have been reversed on appeal. In explaining these reversals, Judge Merritt noted that ineffective assistance of counsel at the trial level is widespread, that prosecutors and police, tending to be “extremely zealous,” failed to turn over exculpatory evidence, and that there is a great tendency after the trial to find that any error that did occur was “harmless.”¹

The very next day, Albert Harvey, President of the Tennessee Bar Association, wrote a letter of thanks to Judge Merritt and stated that he was going to ask the Tennessee Bar Association Criminal Justice Section and the House of Delegates “to examine and assure that the Bar is doing all it can to provide the most effective representation available.”

On October 18, 2003, Jim Ramsey, Chair of the Criminal Justice Section, along with Professor Don Hall, presented observations and suggestions to the Board of Governors of the Tennessee Bar Association regarding “the study committee’s inquiry. . . focused upon the issues raised by Judge Merritt.” Ultimately, the Board charged the Committee² “to look into the issues

¹ Judge Merritt is not the only federal appellate judge to find fault with the current application of the death penalty. Judge Alex Kozinski, a proponent of capital punishment, argues that it has become so expensive and all-consuming that it is choking institutions. He recommends that legislatures constrict the crimes punishable by death so that only the most heinous crimes are subject to that punishment.

First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would ensure that the few who suffer the death penalty really are the worst of the very bad--mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random.

Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995).

² Names of members, including biographical information, are attached as Appendix A.

of effective assistance of counsel raised by Judge Merritt.” On October 21, John Tarpley, President of the Tennessee Bar Association, charged the Committee more precisely “to explore whether our system is providing effective assistance of counsel” [and] “to make recommendations on ways in which representation can be improved.”

After establishment of the Committee, District Attorney General John Gill submitted a letter of resignation as co-chair of the Committee. Shortly thereafter, District Attorney General William Whitesell, President of the Tennessee District Attorney’s General Conference, declined to appoint a co-chair for the Committee. Jim Ramsey, the former chair of the Criminal Justice Section, remained on the Committee.

In light of these developments, on December 31, 2003, Katie Edge, Chair of the Committee, notified Mr. Tarpley as follows:

“Members of the Committee and the Executive Council of the Criminal Justice Section have worked diligently to recruit prosecutors and former prosecutors to assist in the study. Toward that end, we have largely been turned away, both by organized groups of prosecutors and individuals. However, we are pleased to note that Theresa Jones, a former public defender and now the Chief City Prosecutor for Memphis, as well as former District Attorney General Gary Gerbitz, have become members of the Committee. We have talked with former State Attorney General Knox Walkup and former United States Attorney John Roberts, both of whom declined for reasons other than the scope of the study. It is not impossible to conduct a fair and balanced study without the input of

sitting prosecutors, but no one disagrees that the process will be enhanced by their participation.”

The Committee has had nine formal meetings since its initial meeting October 23, 2003. Assignments were made for subcommittees, breaking the study into its essential components. They were (1) Subcommittee on Resources for Defenders and Prosecutors in Capital Cases, (2) Subcommittee on Professional Standards for Effective Assistance of Counsel, (3) Subcommittee on Statistics and Reporting, and (4) Subcommittee on Professional Responsibility. While each member of the Committee worked on a specific subcommittee, this final report reflects the considered judgment of, and is endorsed by, all members.

III. Death Penalty Law and Procedure

A. General Overview³

1. Constitutionality

The death penalty survived most constitutional attacks until 1972 when the United States Supreme Court decided *Furman v. Georgia*.⁴ In a 5-4 decision, the *Furman* majority was able to agree only on a one paragraph *per curiam* decision that held simply that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” At stake were the death sentences of approximately 600 prisoners in various states. Five Justices wrote concurring opinions (Douglas, Brennan, Stewart, White, and Marshall) and four wrote dissents (Burger, Blackmun, Powell and

³ Most of this section is excerpted from N. Cohen and D. Hall, CRIMINAL PROCEDURE THE POST-INVESTIGATIVE PROCESS, 763-69, 2d.ed. (2000).

⁴ 408 U.S. 238 (1972)

Rehnquist.) The nine opinions totaled about 250 pages and constituted the longest set of opinions in the history of the Court.

Proponents of the death penalty read the opinions carefully and noted that the majority was comprised of at least three justices whose votes could change in certain circumstances. Since the vote was 5-4, a change in even one vote could reverse the *Furman* decision and restore the death penalty as a constitutionally permissible punishment. Among the *Furman* majority, it was clear that Justices Brennan and Marshall were unlikely to change their votes because they believed that the death penalty itself was cruel and unusual punishment in violation of the eighth amendment.

Three other justices in the majority, however, were not as adamant. Justices Douglas, Stewart, and White focused on the process of determining who receives the death penalty rather than on the death penalty itself. All three were concerned that juries had so much untrammelled discretion that this crucial decision could be made in an arbitrary manner. They felt that this element of arbitrariness violated the eighth amendment's ban on cruel and unusual punishment. Justice Stewart summarized these views when he noted in an often-quoted phrase that the death penalty is cruel and unusual "in the same way that being struck by lightning is cruel and unusual." He continued, "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 freakishly imposed."

After *Furman*, a number of state legislatures enacted new death penalty provisions designed to appeal to at least one of the three majority Justices who were concerned with the arbitrary manner in which death sentences were imposed. One approach was to enact a mandatory death penalty so that everyone convicted of certain offenses would receive a death

sentence. Under this approach, it was argued, neither the jury nor judge could be “arbitrary” since neither had the discretion to depart from the mandatory sentence. The other approach also attempted to minimize arbitrariness by establishing criteria for the sentencing authority (usually a jury) to use in determining which offenders were sentenced to death. These standards somewhat confined the sentencer’s discretion.

Four years later, in 1976, the Supreme Court decided several cases that reversed *Furman’s* ban on the death penalty. Both Justices White and Stewart, who had joined the majority in *Furman*, voted to uphold the death penalty in certain circumstances. In *Gregg v. Georgia*,⁵ the Court upheld Georgia’s death penalty statute and decided that the eighth amendment does not bar the death penalty for the crime of murder. Irrespective of its value as a deterrent, the death penalty was a permissible method of serving the goal of retribution. Georgia’s death penalty statute provided the sentencing authority with sufficient guidance to overcome *Furman’s* concern with the possibility of an arbitrary and capricious death sentence. The Georgia provision, later adopted in some form by many other states, included a bifurcated procedure. During the first trial, the trier of fact determined the issue of guilt or innocence. If the defendant was found guilty of a capital offense, a second hearing was held to determine whether the sentence should be life imprisonment or death. The death penalty was permissible only if one of ten listed aggravating circumstances specified by statute was found to be present beyond a reasonable doubt. The trier of fact also considered any mitigating circumstances. After a death sentence was imposed, the Georgia statute authorized a direct review by the Georgia Supreme Court. Part of the review was to determine whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases. Justices Brennan and

⁵ 428 U.S. 153 (1976)

Marshall, on the other hand, rejected the Georgia provision and repeated their *Furman* view that the death penalty violated the eighth amendment's cruel and unusual punishment ban.

The same day as *Gregg*, the Supreme Court decided four other capital cases that answered a number of questions raised by *Furman*. The Court was particularly concerned with whether the statutory scheme at issue imposed sufficient restraints to protect against the arbitrary use of the death penalty. In *Jurek v. Texas*,⁶ the Court upheld the Texas death penalty statute which authorized the death penalty only if the trier of fact found beyond a reasonable doubt that the homicide was deliberate with the reasonable expectation that death would result, that there was a probability that the defendant would commit criminal acts of violence in the future, and that the killing, if provoked, was an unreasonable response. The Court found that these questions sufficiently narrowed the decisionmaker's discretion. In what could be considered a departure from its concern with restricted discretion, the *Jurek* Court also held that the eighth amendment mandated that the death sentencing decision be individualized so that the jury could consider any evidence in mitigation of death.

Proffitt v. Florida,⁷ decided with *Gregg*, upheld the Florida death penalty statute, which required the judge to consider specific aggravating and mitigating factors before imposing a death sentence. The judge was required to give written findings about these factors when imposing a death sentence. A jury issued an advisory opinion on the issue and the Florida Supreme Court automatically reviewed each death sentence. The United States Supreme Court rejected the argument that some of the statutory aggravating circumstances were so vague that they did not provide adequate restrictions on sentencing discretion. Thus, the *Proffitt* Court

⁶ 428 U.S. 262 (1976).

⁷ 428 U.S. 242 (1976).

upheld aggravating circumstances that the killing was “especially heinous, atrocious, or cruel” as defined by the Florida courts.

Woodson v. North Carolina,⁸ and *Roberts v. Louisiana*,⁹ were different from the other three cases decided that day. Both involved mandatory death penalty statutes enacted in an effort to satisfy *Furman*’s concern with arbitrary sentencing decisions. These two cases involved statutes that imposed the death penalty for all first degree murders. Justice Stewart’s plurality opinion in both cases (he was joined by Justices Powell and Stevens) found the provisions unconstitutional because they failed to help guide the jury’s decision whether to convict the defendant of first or second degree murder and also failed to permit the jury to consider the particular relevant aspects of the character and record of each convicted defendant. Justices Brennan and Marshall wrote separate concurring decisions holding that the death penalty itself was unconstitutional. The dissenters argued that the mandatory death penalty was constitutional because it did not make the sentencing decision arbitrary.

After 1976, it was clear that the United States Supreme Court would uphold the death penalty in homicide cases. Subsequent death penalty cases refined the 1976 cases and, because of personnel changes on the Court, gradually produced a solid majority. Many of the decisions focused on a particular jurisdiction’s procedures. A common theme in the cases is that “death is different.” Because of a death sentence’s impact on both the defendant and the community, the procedures used to impose it must be more reliable than those required for ordinary criminal cases.

⁸ 428 U.S. 280 (1976).

⁹ 428 U.S. 325 (1976).

2. “Death Eligible” Offenses

Historically in America, the death penalty was authorized for a large number of offenses, including blasphemy, adultery, and a youth’s sassing his or her parents. Over time it became clear that the eighth amendment’s cruel and unusual punishment clause contained a proportionality limitation that restricted the use of the gravest penalty to crimes that merited society’s ultimate condemnation. The plurality opinion in *Coker v. Georgia*¹⁰ held that the death penalty for rape of an adult woman was grossly disproportionate to the gravity of the offense and therefore violated the cruel and unusual punishment clause.

After *Coker*, it was likely that the death penalty was permissible only for homicide (and perhaps treason), and state death penalty statutes were so limited. Nevertheless, it was still unclear exactly what participation in a homicide was necessary before a death penalty was permissible. What about the situation in which the defendant did not kill intentionally? Perhaps the defendant was an accomplice, such as the getaway car driver, or was the killer but did not intend for death to result, yet was legally responsible for the murder because of the felony murder rule. Can the death penalty be applied constitutionally in these cases?

In *Enmund v. Florida*,¹¹ the defendant Enmund was in the car near the scene of a double robbery-murder. Apparently the jury found that he was waiting to help in the robbers’ escape and therefore was an aider and abetter in the robbery. There was no evidence that he was present at the killing, or knew or intended that a death would occur. Nevertheless, under Florida law he was considered a principal and received the death penalty. The death sentence was challenged as violating the eighth amendment. In a 5-4 decision, Justice White’s majority opinion reversed the

¹⁰ 422 U.S. 584 (1977).

¹¹ 458 U.S. 782 (1982).

sentence, holding that it violated the eighth amendment's cruel and unusual punishment clause. He first reviewed state capital statutes and found virtually none that authorized the death penalty simply because a person participated in a robbery where a death resulted. The eighth amendment, he reasoned, bars penalties that are disproportionate to the crime. In assessing proportionality, the focus must be on the individual defendant's own conduct, "not on that of those who committed the robbery and shot the victims." "Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just desserts."

Enmund was refined in *Tison v. Arizona*,¹² a case in which the defendants assisted their father's escape from prison, then helped him detain and rob a family of four. They were also present when their father shot all four family members, but claimed surprise at the father's violence. After the homicides, they escaped with their father and others involved in the killings. Although the *Tison* Court refused to "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty," it held that "major participation in the felony committed, combined with reckless indifference to human life," satisfied *Enmund's* proportionality concerns.

3. Weighing Aggravating and Mitigating Factors

Since the 1976 decisions, death penalty statutes routinely include a list of as many as ten aggravating or limiting factors or questions. Typically, a defendant is eligible for the death penalty only if at least one of the circumstances is present. Aggravating circumstances focus on the nature of the offense (was it especially cruel or did it involve torture); the nature of the victim (was the victim very young, old, disabled, a police officer, a public official); or the status of the

¹² 481 US. 137 (1987)

defendant (on bail, parole, probation; a repeat violent offender). Ordinarily, the jury considers the aggravating circumstances at the sentencing hearing. In some jurisdictions these limiting factors are used at the guilt phase of the trial when the jury is asked whether certain facts are present. If so, the defendant is then eligible for the state's death penalty. A later sentencing proceeding will determine whether the death penalty should be imposed in this case.

According to the United States Supreme Court, aggravating circumstances serve two functions. First, they limit the application of the death penalty to the most serious crimes. An aggravating circumstance would be unconstitutional if it were present in virtually every homicide because it would not assist in restricting the death penalty to the most egregious killings. Second, they channel the jury's discretion and therefore minimize the discretion and arbitrariness found lacking in *Furman*. Some aggravating factors have been invalidated because they do not serve these purposes. For example, an aggravating factor that is too vague is invalid because it does not channel the jury's discretion by providing principled guidance for the choice between death and a lesser penalty.

Although it may appear that *Furman's* concern with too much discretion would lead the Supreme Court to severely limit the issues a capital jury may consider, the Court has actually increased jury discretion as to evidence used to suggest that the penalty *not* be imposed. In *Lockett v. Ohio*,¹³ a four-justice plurality struck Ohio's death penalty statute because it did not permit the trier of fact to consider relevant mitigating factors such as the defendant's character, prior criminal record, age, lack of specific intent to cause death, and minor role in the crime. A number of cases after *Lockett* have held that the cruel and unusual punishment clause of the eighth amendment mandates that the jury in a capital case must be permitted to consider any

¹³ 438 U.S. 586 (1978)

aspect of a defendant’s character and background and any of the circumstances of the offense that the defendant offers to convince the jury to impose a sentence other than death. This “individualized” approach is necessary, according to the Court, in order to treat offenders as unique people and to provide respect for humanity’s value of compassion.¹⁴

State legislatures have authorized a variety of formulas for taking comparative account of aggravating and mitigating circumstances. One formulation, based upon the Model Penal Code, provides that the death penalty may not be imposed unless the jury determines that one of the aggravating circumstances exists and that there are no mitigating circumstances sufficiently substantial to call for lenience. In another variation, some jurisdictions require that the sum of all mitigating circumstances should be weighed against each individual aggravating circumstance in order to give the defendant a stronger presumption of life. Finally, it should be noted that a few state death penalty statutes do not use the language of comparative weighing at all. In Georgia, for example, the jury is instructed that it should consider any mitigating or aggravating circumstances and that the sentence of death shall not be imposed unless it finds at least one statutory aggravating circumstance and makes a recommendation that such sentence of death be imposed.

B. Tennessee Death Penalty Law and Procedure

1. Brief History of the Death Penalty in Tennessee

Tennessee has had a checkered history with the death penalty, involving “periods of apparent rejection” and “times in which the ultimate criminal sanction was fervently supported

¹⁴ In *Callins v. Collins*, 510 U.S. 1141 (1994), in his dissent from the denial of certiorari, Justice Blackmun recognized the inevitable and fundamental conflict between the two court-imposed limitations on death penalty sentences : that the sentencer’s discretion be narrowed and that the sentencer be allowed to consider all relevant mitigating evidence. Because he felt that these two requirements could never exist simultaneously, Justice Blackmun wrote that he would never again vote to uphold a death sentence.

and promoted.”¹⁵ The death penalty was authorized when Tennessee became a state in 1796. In 1829, the State’s first penal law codified homicide provisions into a single statute. This statute divided murder into degrees and mandated the death penalty for first degree murder convictions. In so doing, it also eliminated the death penalty for such offenses as larceny and arson. In 1838, the Tennessee Supreme Court was authorized to make a recommendation to the governor that “due to extenuating circumstances,” a death sentence should be commuted to life in prison. The Court’s recommendation, if made, was binding on the Governor, although this provision was changed in 1857 to give the Governor discretion in deciding whether or not to follow the court’s recommendation. Also in 1838, Tennessee became the first state in the Union to give juries unguided sentencing authority in first-degree murder cases. In 1842, the Governor was given full discretion to commute death sentences.

The next major changes to the death penalty came in 1913, the result of another capital punishment reform movement.¹⁶ Tennessee’s method of execution was changed from hanging to electrocution. In 1915, in a “progressive era of increasing support for feminism, prohibition, and prison reform,” Tennessee’s death penalty was partially abolished.¹⁷ Nonetheless, from 1915-1917, the penalty was allowed for the crimes of rape and for prisoners serving a life sentence imprisonment who were convicted of a crime that was previously death-eligible. After a series of lynchings, the Legislature reinstated the death penalty in 1917, this time applying it to all

¹⁵ Dwight Aarons, *Reflections on the Killing State: A Cultural Study of the Death Penalty in the Twentieth Century United States?*, 70 TENN. L.REV. 394, 444 (2002-03).

¹⁶ *Id.*

¹⁷ William J. Bowers, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, 10 (2d ed. 1984).

murders and rapes.¹⁸ One factor in reinstating the death penalty was the belief on the part of some legislators that “the death penalty assuaged mob violence.”¹⁹

The next wave of reform came in the late 1960’s and 1970’s. During this period, the United States Supreme Court “became sensitive to defendants’ rights in capital cases and responsive to appeals under the ‘due process’ clause of the Fourteenth Amendment.”²⁰ In 1967, the General Assembly passed the Post-Conviction Procedure Act which provided a mechanism for prisoners to challenge their appeals and sentence and which created the Court of Criminal Appeals to adjudicate those claims. Because of the United States Supreme Court decision in *Furman v. Georgia*²¹, invalidating capital punishment in all state systems, the Tennessee Supreme Court invalidated Tennessee’s death penalty system. In 1974 and again in 1977, the Tennessee Supreme Court found the state’s capital punishment statutory schemes unconstitutional, but eventually upheld the law in 1979.²² Notwithstanding the fact that Tennessee has had a constitutional penalty since 1979, the state did not execute any person until April, 2000, when Robert Coe was executed after a 1979 conviction for rape and murder of a young girl.²³

2. An Overview of Tennessee Death Penalty Law and Procedure²⁴

Tennessee permits imposition of the death penalty only upon a conviction for first-degree murder. First-degree murder is defined as a premeditated and intentional killing of another;

¹⁸ Id at 446.

¹⁹ Id.

²⁰ See Bowers, supra note 16, at 15.

²¹ 408 U.S. 238 (1972).

²² See *State v. Hailey*, 505 S.W. 2d 712 (Tenn. 1974); *Collins v. State* 550 S.W. 2d 643 (Tenn. 1977) and *Cozzolino v. State*, 584 S.W. 2d 765 (Tenn. 1979).

²³ See *Aarons*, supra Note 15 at 478.

²⁴ See Lee Davis and Bryan Hoss, *Tennessee’s Death Penalty: An Overview of the Procedural Safeguards*, 31 U. MEM. L. REV. 779 (2001).

killing of another in the perpetration of or attempt to perpetrate any first-degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, aircraft piracy; or killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.²⁵

Upon the prosecutor's decision to seek the death penalty,²⁶ the defendant must be notified at least thirty days prior to trial of the state's intention to seek the death penalty.²⁷ The notice specifies the intention of the state to seek the death penalty and any aggravating circumstances (discussed later) that it will rely upon at the sentencing hearing. If notice is not given within the thirty-day period, the trial judge is required to grant the defendant's request for a reasonable continuance.²⁸

If a jury finds a defendant guilty of first-degree murder, and if the state intends to seek the death penalty, Tennessee provides for a bifurcated sentencing hearing to determine a

²⁵ Tenn. Code Ann. § 39-13-202 (2004).

²⁶ As discussed in Section V of this report, the Office of the District Attorney General for the 20th Judicial District (Davidson County), adopted written guidelines pertaining to death penalty cases. These guidelines include provisions designed to limit the exercise of discretion with respect to the initial decision to seek the death penalty in a particular case. It is also noteworthy that the Comptroller's Report, discussed in Section VI, concludes that "prosecutors are not consistent in their pursuit of the death penalty." According to surveys and interviews, the authors explained:

"Some prosecutors...indicated that they seek the death penalty only in extreme cases, or the 'worst of the worst.' However, [others] make it a standard practice in every first-degree murder case that [has] at least one aggravating factor. Still...others use the death penalty 'bargaining chip' to secure plea bargains for lesser sentences."

Similarly, Justice Birch noted in *State v. Godsey*, 60 S.W. 3d 759, 795 (Tenn. 2001) that "...a cursory review [of Rule 12 reports] seems to suggest that prosecutors in some counties frequently seek the death penalty in cases for which prosecutors of other counties do not seek the death penalty."

With respect to plea bargaining and the death penalty, the Tennessee Supreme Court held in *State v. Mann*, 959 S.W. 2d 503 (Tenn. 1997) that after Mann rejected a proposed plea agreement of life imprisonment, the defendant was properly convicted of first-degree murder and sentenced to death. Noting that the initial charging decision was not binding upon the state with respect to the future course of the prosecution, the Court held that the state's action in seeking the death penalty after the rejection of the proposed plea offer did not burden the defendant's exercise of his constitutional right to a jury trial.

²⁷ Tenn. Code Ann. § 39-13-208(b) (2004).

²⁸ *Id.*

defendant's fate.²⁹ At this second proceeding, the jury's sole purpose is to decide if the defendant should receive life imprisonment, life without parole or death, for his commission of first-degree murder. The defendant is allowed considerable latitude to present to the jury items that are "irrelevant to the case" but which may cause the jury to feel that "the defendant is a human being whose life should be spared."³⁰ Such proof may include background information including education, social history, employment, family, friends, and other relationships, or "a history of child abuse or sexual abuse by another," or any number of additional factors.³¹

At the sentencing phase, several requirements must be satisfied before death can be imposed on a defendant. First, the state must prove at least one aggravating factor beyond a reasonable doubt. Currently, fifteen aggravating factors are available.³² Second, the jury must unanimously agree on the presence of the specified aggravated circumstance or circumstances. Third, the jury must unanimously agree that the presence of all aggravated factors outweighs all of the mitigating evidence presented by the defense. Currently, there are eight specified mitigating circumstances in addition to the general command that the jury may find "any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing."³³ Unlike the state, the defendant does not have to prove mitigating circumstances beyond a reasonable doubt, nor does the jury have to adopt the same

²⁹ Tenn. Code Ann. § 39-13-204(a) (2004).

³⁰ Davis and Hoss, *supra* note 24 at 787.

³¹ *Id.* at 787, 791.

³² Tenn. Code Ann. § 39-13-204(i) (2004). The list includes such things as the defendant's criminal history, whether the murder was "especially heinous, atrocious or cruel," and whether the murder victim was a specified government official. For a review of each aggravator, including how they have been applied in specific cases, see David Raybin, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE §32.33-43.

³³ Tenn. Code Ann. § 39-13-204(j) (2004). The list includes such things as whether the defendant was under extreme mental or emotional disturbance at the time of the murder, the youth or advanced age of the defendant and whether the defendant's conduct occurred at a time when he was impaired as a result of mental illness or intoxication. For a brief discussion of each mitigator, see David Raybin, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE §32.45.

mitigating circumstance or circumstances. Thus, “jurors can be persuaded by different mitigating factors...one juror could rely on one mitigating circumstance while a second juror could rely on a different mitigating circumstance.”³⁴ Lastly, if the state has previously proved beyond a reasonable doubt at least one aggravating factor and the jury has unanimously voted to find the presence of the specified aggravating factor, and the jury has unanimously voted that the aggravating factors outweigh any mitigating factors, the jury must impose the death penalty.

At the sentencing hearing, several outcomes are possible. If the jury unanimously determines that no statutory aggravating circumstance has been proved by the state beyond a reasonable doubt, “the sentence shall be imprison for life,” which means serving at least 51 years before eligibility for parole.³⁵ If the jury unanimously finds the presence of an aggravating circumstance beyond a reasonable doubt, but that it was not proved by the state to outweigh mitigating circumstances beyond a reasonable doubt, the jury can sentence the defendant either to life or life without parole.³⁶ If the jury unanimously finds the presence of at least one aggravating circumstance beyond a reasonable doubt, and also unanimously finds that it outweighs any mitigating evidence beyond a reasonable doubt, “the sentence shall be death.” If the jury “is divided over imposing a sentence of death,” then the judge must order the jury to consider life or life without parole.³⁷ If the jury still does not agree on a sentence, the judge must impose a life sentence.³⁸

³⁴ Davis and Hoss, *supra* note 24 at 791.

³⁵ Although Tenn. Code Ann. § 39-13-204(f)(1) (2004) states that one with a life sentence is eligible for parole after serving 25 years, Tenn. Code Ann. § 40-35-501(i)(1) requires service of 100% of a sentence for first degree murder. It is also determined that the state could not deny a prisoner his or her 15% credit for good behavior. Consequently, a person convicted of first degree murder must serve no less than 85% of his or her sentence. Since a life sentence is computed as 60 years, 85% is 51 years.

³⁶ Tenn. Code Ann. § 39-13-204(f)(2) (2004).

³⁷ Tenn. Code Ann. § 39-13-204(h) (2004).

³⁸ *Id.*

If charged with first-degree murder, the defendant “with the advice of [his] attorney and the consent of the court and District Attorney General,” may waive his right to a jury trial to determine guilt.³⁹ In such cases, the trial judge determines guilt. If the defendant is adjudged guilty, again “with the advice of [his] attorney and the consent of the Court and District Attorney General,” the defendant may waive his right to a sentencing hearing in front of a jury.⁴⁰ In such case, the trial judge determines the appropriate penalty in accordance with the rules applicable to the sentencing jury.

Upon receiving a sentence of death, the defendant has a right to a direct appeal to the Court of Criminal Appeals.⁴¹ If the Court of Criminal Appeals affirms the conviction, the defendant has an automatic right of appeal to the Tennessee Supreme Court. Such an appeal extends both to the conviction for first-degree murder as well as the sentence of death and such an appeal is given “priority over all other case.”⁴² Both the Court of Criminal Appeals and the Tennessee Supreme Court have broad powers of review in death penalty cases, extending to “(1) whether the death penalty imposed was arbitrary, (2) whether there was sufficient evidence to support the jury’s finding of an aggravating circumstance, (3) whether there was sufficient evidence to support the jury’s finding of a mitigating circumstance, and (4) whether the sentence of death was either excessive or disproportionate to the penalties that have been imposed in similar case.”⁴³ Finally, both the Court of Criminal Appeals and the Tennessee Supreme Court,

³⁹ Tenn. Code Ann. § 39-13-205(a) (2004).

⁴⁰ Tenn. Code Ann. § 39-13-205(b) (2004). *But see Ring v. Arizona*, 536 U.S. 584 (2002), which requires that aggravating circumstances be found by a jury rather than a judge, as they are comparable to elements of a crime. A defendant may still waive the jury, but the waiver must be consistent with the requirements for the waiver of any constitutional right. *See Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁴¹ Tenn. Code Ann. § 39-13-206(a)(1) (2004).

⁴² Tenn. Code Ann. § 39-13-206(a)(2)(b) (2004).

⁴³ *Davis and Hoss*, *supra* note 24 at 800. *State v. Godsey*, 60 S.W. 3d 759 (Tenn. 2001) is the only case in which the Tennessee Supreme Court has found that the death penalty was disproportionate to sentences imposed in similar cases. There, the Court found that Godsey’s first-degree murder by aggravated child abuse conviction was

on their own authority, can either affirm the death sentence or modify the punishment by reducing it to life or life without parole.⁴⁴

There are currently one hundred and six (106) persons on death row in Tennessee.

IV. Analysis of Effective Assistance of Counsel in Tennessee

A. Evaluation of Standards and Resources

The Committee introduces this section by quoting (with its endorsement) from MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY, published by “The Constitution Project,” 2001. Among its recommendations are the following:

Creation of Independent Appointing Authorities.

“Each state should create or maintain a central, independent appointing authority whose role is to ‘recruit, select, train, monitor, support, and assist’ attorneys who represent capital clients. . . . This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and certiorari.” (p.2)

Provision Of Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services.

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital

disproportionate to sentences imposed in similar Cases involving child victims. Justice Birch concurred in part and dissented in part, argued that the majority defined pool of cases for this analysis was “too small” and that the pool should be expanded to include “all cases in which the defendant has been convicted of first-degree murder regardless of the penalty [and] all cases in which the defendant was initially indicted for a capital offense.”

proceeding, including state and federal post-conviction and certiorari. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the ‘extraordinary responsibilities inherent in death penalty litigation.’ Such compensation should be set according to actual time and service performed, and should be sufficient to insure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.” (pp. 3 & 4)

The Committee has determined that the only way rationally to discuss the resources available in Tennessee is to compare the resources provided in this state against a national standard. In 1989, the American Bar Association published its first set of standards applied exclusively to death penalty cases. The evolving national standards for defense services were revised and again published in the American Bar Association Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases (hereafter referred to as ABA Guidelines) February, 2003 [published at 31 Hofstra L. Rev. 913 (2003).] Both the United States Supreme Court, in *Wiggins v. Smith*,⁴⁵ and the Sixth Circuit Court of Appeals, in *Hamblin v. Mitchell*⁴⁶

⁴⁴ Tenn. Code Ann. § 39-13-206(d)(1) and (2) (2004).

⁴⁵ 123 S. Ct. 2527 (2003).

⁴⁶ 354 F. 3d 482 (6th Cir. 2003). This opinion was authored by Judge Gilbert Merritt.

have recognized and held that the ABA Guidelines govern the obligations and duties of defense attorneys in capital cases.

For over twenty years it has been settled that the proper representation of indigent defendants charged with, or convicted of, capital offenses requires a core team including two attorneys, an investigator, and a mitigation specialist. In addition to this core team, the courts are to provide funds for experts and other support services necessary to investigate, prepare and present an effective defense for the accused. Basic questions related to these tasks include how and by whom attorneys are appointed, the qualifications of counsel, compensation for counsel, the appointment and compensation of team members, and other related matters touching on the cost of providing such services in light of the standards governing the duty to provide an adequate, if not zealous, defense. Many of these issues are addressed in provisions of the recently adopted Tennessee Supreme Court Rule 13 and the ABA Guidelines. As later discussed, these provisions frequently conflict in profound ways.

Unfortunately, the support services available to the Committee and the time of the group members were limited. Additionally, we did not have access to vital information such as, for example, information relating to the costs of prosecuting a death penalty case, market rates for competent, qualified support service members, and the like. The study group did receive information from Connie Clark, Director of the Administrative Office of the Courts, as to financial data regarding defense costs. She was unable, however, to vouch for the accuracy of cost accounting for the costs of prosecution. Thus, she provided the Committee with spreadsheets summarizing expenses charged to the Tennessee Indigent Defense Fund and with a list of the most expensive capital cases to date from the Funds' perspective. That information appears as Appendix B. It should also be noted that later in this report, the July 2004

Comptroller's Report entitled "Tennessee's Death Penalty: Costs and Consequences" will be discussed and analyzed.

B. Cases Addressing Ineffective Assistance of Counsel

In 1977, the Tennessee Supreme Court issued its opinion in *Baxter v. Rose*⁴⁷ which adopted a standard of "reasonable competence" for assessing claims of ineffective assistance of counsel brought under the Tennessee Constitution. This standard was based, in part, on the standard previously adopted by the Sixth Circuit in *Beasley v. United States*⁴⁸ to assess claims under the Sixth Amendment to the United States Constitution. Rather than adopt specific standards to define "reasonable competence," the *Baxter* Court instructed lower courts to rely on various existing standards such as the ABA Standards for the Defense Function.

Subsequent to *Baxter*, the United States Supreme Court was faced with its own opportunity to give content to effective assistance of counsel in *Strickland v. Washington*,⁴⁹ a capital case. Importantly, the *Strickland* Court held that a criminal defendant was entitled to effective assistance of counsel during both the guilt and penalty phases of a capital trial. It also determined that criminal defendants could claim ineffective assistance even in cases in which counsel had been retained rather than appointed. In *Strickland*, the Court created a two-pronged test for determining the existence of ineffective assistance. The petitioner must first show that counsel's performance fell below standards of reasonable competence ("the proper measure of attorney performance remains the reasonableness under prevailing professional norms"). In making this determination, the court must give great deference to the conduct of counsel under the circumstances. ("Because of the difficulties inherent in making the evaluation, a court must

⁴⁷ 523 S.W.2d 930 (Tenn. 1975)

⁴⁸ 491 F.2d 687 (6th Cir. 1974)

⁴⁹ 466 U.S. 668 (1984)

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") Second, the defendant must establish that this inadequacy prejudiced his or her case. To demonstrate prejudice, the criminal defendant is required to show that, but for counsel's deficient performance, there was a reasonable likelihood that the result would have been different. This second prong shifted the burden in one type of constitutional claim. Normally, once a criminal defendant has established a constitutional violation, the burden falls on the state to show that the error was harmless beyond a reasonable doubt. Following *Strickland*, in claims of ineffective assistance of counsel, that burden now falls on the defendant to show that counsel's performance prejudiced the outcome of the proceedings.⁵⁰

Since the decision in *Strickland*, the Tennessee Supreme Court has been requiring that a criminal defendant who claims ineffective assistance of counsel under the Tennessee Constitution also show prejudice.⁵¹

In the years since *Strickland*, the United States Court of Appeals for the Sixth Circuit has found ineffective assistance of counsel in only a handful of Tennessee cases among the hundreds in which it has been raised. In *Martin v. Rose*⁵² the Court found ineffective assistance in a case in which the defense lawyer refused to participate in the defendant's trial for child sex abuse. Both the Tennessee courts and the U.S. District Court had found this to be "sound trial strategy," as the attorney had decided that participation in the trial would either waive pre-trial motions or

⁵⁰ In a companion case to *Strickland*, the Court held that in certain very limited situations, such as the existence of an actual conflict of interest that adversely affects the representation, prejudice need not be shown. *United States v. Cronin*, 466 U.S. 648 (1984).

⁵¹ See, e.g., *Goat v. State*, 938 S.W.2d 363 (Tenn. 1996).

⁵² 744 F.2d 1245 (6th Cir. 1984).

render their denial harmless. Although counsel had actively participated in pretrial investigation and motion practice, he stood mute during the trial. The Sixth Circuit found that while counsel's actions and omissions constituted "trial strategy," they were not sound. Because of counsel's failure to participate, the defendant was denied both the opportunity to testify and to cross-examine the witnesses against him. Because of the weakness of the state's case, and the lack of challenge, the Court found prejudice.

Twelve years later, in *Gravley v. Mills*,⁵³ the Court found ineffectiveness in counsel's failure to object, or to preserve for appeal, several instances of prosecutorial misconduct. Since the state's case was not overwhelming, and thus the defendant's credibility was crucial, counsel's failure to object to the prosecution's introduction of defendant's silence after being given his *Miranda* warnings was prejudicial.

The following year, in *Austin v. Bell*,⁵⁴ the Court addressed claims of ineffective assistance of counsel during both the guilt and sentencing phases of a capital trial. While the district court had found ineffectiveness at both stages, the Sixth Circuit found ineffectiveness only at the penalty phase. Although counsel's failure to call or even interview certain witnesses for the guilt phase could be attributed to trial strategy, his failure to investigate and to present any mitigating evidence during the sentencing phase "so undermined the adversarial process that Austin's death sentence was not reliable." "In this case, Livingston [the attorney] did not present any mitigating evidence because he did not think that it would do any good. However, given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy."

⁵³ 87 F.3d 779 (6th Cir. 1996).

The same year, the Sixth Circuit again found ineffectiveness of counsel in *Groseclose v. Bell*.⁵⁵ Counsel’s failure to prepare any case for mitigation could not be excused as “strategy.” Without investigation, the decision to forego presentation of proof at sentencing could not be considered “judgment.”

And, in a strongly worded rebuke of the state court system which had failed to find ineffective assistance of counsel, the Sixth Circuit found ineffective assistance of counsel at both the guilt and sentencing stages of a capital case in *Rickman v. Bell*.⁵⁶ The attorney repeatedly expressed contempt for his client and the effect was to “provide [the defendant] not with a defense counsel, but with a second prosecutor.” The attorney presented no defense at trial; at both trial and sentencing he described the defendant as “frightening.” “[W]hat the Tennessee judiciary permitted to occur was nothing less than the evisceration of the [sixth amendment guarantee] and as much a travesty for our judicial system as it is for [the defendant] individually.”

In 2000, the Court relied in part on the American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases in finding counsel’s performance deficient where counsel made no investigation into the defendant’s family, social or psychological background.⁵⁷

In 2001, the Court reversed another death sentence based on ineffective assistance of counsel. As was the case in *Austin*, the Court left intact the finding of guilt.⁵⁸ Once again, the trial lawyer claimed that his failure to call witnesses at the penalty phase – or to even argue for

⁵⁴ 126 F.3d 843(6th Cir. 1997).

⁵⁵ 130 F.3d 1161 (6th Cir. 1997).

⁵⁶ 131 F.3d 1150 (6th Cir. 1997).

⁵⁷ *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000).

⁵⁸ *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001).

life at the penalty phase – were based on trial strategy. The Tennessee Courts had accepted as strategic his decision to waive argument so as to prevent the prosecutor from presenting his final “devastating” closing argument. The Sixth Circuit disagreed. “A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer’s ‘strategy.’ But the noun ‘strategy’ is not an accused lawyer’s talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means ‘a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result’ ... must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a ‘specific goal.’ Here, where the goal was to sentence the defendant to life, a refusal to even ask the jury to do so could not be called strategic.” In 2002, the United States Supreme Court reversed, finding that counsel’s performance did not fall below the constitutional minima.⁵⁹

In probably the most-publicized allegation of ineffective assistance of counsel, the United States District Court for the Middle District of Tennessee disagreed with the state courts and found that counsel had provided ineffective assistance of counsel at sentencing.⁶⁰ Noting that the lawyers failed to investigate the defendant’s mental health history and failed to request educational, prison or military records, the district court found that the lawyer’s performance was “clearly inadequate.” Prejudice at the sentencing hearing was established by a “complete lack of mitigation evidence. ... [which] undermines confidence in the outcome of the sentencing.”

⁵⁹ *Bell v. Cone*, 535 U.S. 685 (2002).

Thereafter, the Sixth Circuit reversed on the ground that the defendant was not prejudiced – the supplemental evidence, while mitigating, “had aspects that would be compelling evidence of aggravating circumstances.”⁶¹

Two other death sentences were reversed by federal district courts in the state, principally on grounds that counsel failed to investigate or prepare for the sentencing hearing.⁶²

The Tennessee courts themselves have vacated several death sentences where counsel failed to present any evidence in sentencing. Principally this has occurred where counsel has failed totally to investigate the defendant’s background. In *Cooper v. State*⁶³ the Court of Criminal Appeals relied on the American Bar Association Standards for the Defense Function in finding that counsel’s failure to investigate, to obtain school, hospital and jail records, or to obtain information from former employers, from family, friends or from the community constituted ineffective assistance of counsel. The Court found prejudice in that the state relied exclusively on one aggravating circumstance and counsel failed to present readily available information about defendant’s emotional and mental disturbance. The Court of Criminal Appeals again relied on the ABA Standards in *Adkins v. State*,⁶⁴ finding that failure to present mitigating evidence constituted ineffective assistance of counsel where there was ample proof available pertaining to the defendant’s childhood and psychological history.

⁶⁰ *Abdur’Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). The state courts had held that the defendant had failed to show prejudice arising from the ineffectiveness of counsel both at trial and sentencing. The federal district court agreed that there was no ineffective assistance of counsel during the guilt phase of the trial.

⁶¹ *Abdur’Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

⁶² *Harries v. Bell*, 3:84-0597 (M.D. Tenn. 2002)(unpublished) and *Caruthers v. Bell*, 3:91-CV-031 (E.D. Tenn. 2001)(unpublished).

⁶³ 847 S.W.2d 521 (Tenn. Crim. App. 1992).

⁶⁴ 911 S.W.2d 334 (Tenn. Crim. App. 1994).

Likewise in *Campbell v. State*⁶⁵ the Court noted that while there was evidence available to counsel regarding the social history of the defendant, counsel failed to present any information at sentencing.

The key feature in many of these cases is the total lack of investigation by counsel, especially into aspects of the defendant's history and character which are relevant in sentencing. As the Court of Criminal Appeals noted in *Bell v. State*⁶⁶ counsel "did not put the necessary time and effort into investigation and preparing for the penalty phase. They should have investigated his background, checked his school records, his juvenile court record, his medical history, tried to find witnesses to demonstrate all aspects of his character. In short, trial counsel seemed to have prepared for sentencing as an afterthought."⁶⁷ In a case in which counsel presented some mitigating evidence, the Court of Criminal Appeals still found ineffective assistance of counsel because the presentation of expert testimony was so deficient that it justified the trial court's refusal to instruct on two mitigating circumstances.⁶⁸ The Tennessee Supreme Court reversed a death *sentence* based on counsel's failure to produce expert testimony on post-traumatic stress syndrome. The defendant was prejudiced by this neglect as the state presented evidence of only one aggravating circumstance. Had counsel presented mitigating proof, the jury might have found that the aggravating circumstance was outweighed by the mitigation.⁶⁹

⁶⁵ 1993 WL 122057 (Tenn. Crim. App. 1993).

⁶⁶ 1995 WL 113420 (Tenn. Crim. App. 1995).

⁶⁷ See also, *Henley v. State*, 1996 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1996) ("the dearth of favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available, establishes a reasonable probability that, but for trial counsel's deficient performance... the result of the proceeding would have been different."); *Smith v. State*, 1999 WL899362 (Tenn. Crim. App. 1998) (failure to investigate mental history); *Caughron v. State*, 1999 WL49906 (Tenn. Crim. App. 1999) (failure to present mitigating evidence); *Taylor v. State*, 1999 WL512149 (Tenn. Crim. App. 1999) (reversing both the death sentence and the conviction based on counsel's failure to explore a defense of mental incompetency); *Wilcoxson v. State*, 22 S.W.3d 289 (Tenn. Crim. App. 1999) (state conceded counsel was ineffective at sentencing hearing.)

⁶⁸ *Brimmer v. State*, 29 S.W.3d 497 (Tenn. Crim. App. 1998).

⁶⁹ *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996).

In four non-death penalty cases, the Tennessee Supreme Court has reversed a conviction based on ineffective assistance of counsel. In *Wallace v. State*⁷⁰ counsel had failed to file a timely motion for new trial and thus preserve defendant's appeal. The Court further held that the defendant was not required to show prejudice as failure to preserve and pursue post-trial remedies is presumptively prejudicial. In *Dean v. State*⁷¹ counsel was ineffective for failing to know the appropriate range of punishment, and his consequent failure both to object to an erroneous jury instruction regarding punishment and to raise the erroneous instruction in the motion for new trial. In *State v. Honeycutt*⁷² a case of aggravated child abuse, counsel failed to cross-examine the mother of the child about her access to the child or her incriminating statements. Because the state's case was entirely circumstantial, counsel's failure was prejudicial. As part of a claim that the state failed to elect offenses in a prosecution for sexual assault of a minor, the defendant also claimed that counsel was ineffective for failing to require the election. While the Court held that this failure did amount to ineffectiveness, it also found that defendant failed to establish prejudice as to three incidents and thus affirmed those convictions.⁷³

There have been thirty-six instances in which the Tennessee Court of Criminal Appeals has reversed non-death penalty convictions based on ineffective assistance of counsel. Four of these cases involved ineffective assistance of counsel on appeal.⁷⁴ Interestingly, fifteen of these

⁷⁰ 121 S.W.3d 652 (Tenn. 2003).

⁷¹ 59 S.W.3d 663 (Tenn. 2001).

⁷² 54 S.W.3d 762 (Tenn. 2001).

⁷³ *Tidwell v. State*, 922 S.W.2d 497 (Tenn. 1996).

⁷⁴ *Hendrix v. State*, 1998 Tenn. Crim. App. LEXIS 1050 (Tenn. Crim. App. 1998); *Pipkin v. State*, 1997 Tenn. Crim. App. LEXIS 1217 (Tenn. Crim. App. 1997); *State v. Black*, 1993 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. 1993); *Davidson v. State*, 1989 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. 1989).

cases have arisen in the context of guilty pleas.⁷⁵ While the facts of these cases are different, each defendant claimed that counsel either failed to investigate information that would have affected the decision whether to plead guilty. One conviction was vacated where counsel failed to convey a plea offer, even though the defendant had earlier stated that he did not intend to plead guilty.⁷⁶

In four of these cases, ineffectiveness was established by counsel's failure to either request a jury instruction or to object to an erroneous jury instruction.⁷⁷ Thus, in the vast majority of cases in which ineffectiveness has been found by the Court of Criminal Appeals, the decision was based on issues other than investigation or conduct of the trial. In only twelve cases in the last twenty-five years has the Court of Criminal Appeals found ineffective assistance of counsel based on lack of preparation, lack of investigation, or failure to object to evidence at trial.⁷⁸

⁷⁵ *Patton v. State*, 2003 WL22999443 (Tenn. Crim. App. 2003); *Carver v. State*, 2003 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. 2003); *State v. Conrad*, 2003 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. 2003); *Pearson v. State*, 2001 Tenn. Crim. App. LEXIS 333 (Tenn. Crim. App. 2001); *Taylor v. State*, 2001 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 2001); *Sanjines v. State*, 1999 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. 1999); *Means v. State*, 1998 Tenn. Crim. App. LEXIS 1050 (Tenn. Crim. App. 1998); *Netters v. State*, 957 S.W.2d 844 (Tenn. Crim. App. 1997); *Bentley v. State*, 938 S.W.2d 706 (Tenn. Crim. App. 2996); *Goosby v. State*, 917 S.W.2d 700 (Tenn. Crim. App. 1995); *Lueptow v. State*, 909 S.W.2d 830 (Tenn. Crim. App. 1995); *Thomas v. State*, 1994 Tenn. Crim. App. LEXIS 189 (Tenn. Crim. App. 1994); *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988); *Sherrill v. State*, 772 S.W.2d 60 (Tenn. Crim. App. 1988); *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986)(because of ineffectiveness of counsel in underestimating the risks of going to trial, plea offer was ordered to be reinstated).

⁷⁶ *State v. Garrison*, 1998 Tenn. Crim. App. LEXIS 249 (Tenn. Crim. App. 1998).

⁷⁷ *Clardy v. State*, 2002 Tenn. Crim. App. LEXIS 57 (Tenn. Crim. App. 2002); *Garner v. State*, 2001 Tenn. Crim. App. LEXIS 394 (Tenn. Crim. App. 2001); *Dean v. State*, 2000 Tenn. Crim. App. LEXIS 283 (Tenn. Crim. App. 2000)(*aff'd* 59 S.W.3d 663 (Tenn. 2001)); *Moffitt v. State*, 29 S.W.3d (Tenn. Crim. App. 1999).

⁷⁸ *Baker v. State*, 2003 WL 23021395 (Tenn. Crim. App. 2003); *Shelton v. State*, 2003 Tenn. Crim. App. LEXIS 667 (Tenn. Crim. App. 2003); *House v. State*, 1999 Tenn. Crim. App. LEXIS 2343 (Tenn. Crim. App. 1999); *Williams v. State*, 1998 Tenn. Crim. App. LEXIS 1099 (Tenn. Crim. App. 1998); *State v. Burns*, 1997 Tenn. Crim. App. LEXIS 1013 (Tenn. Crim. App. 1997); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *State v. Love*, 1996 Tenn. Crim. App. LEXIS 397 (Tenn. Crim. App. 1996); *State v. Ward*, 1996 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. 1996); *Prince v. State*, 1992 Tenn. Crim. App. LEXIS 493 (Tenn. Crim. App. 1992); *State v. Zimmermann*, 823 S.W.2d 220 (Tenn. Crim. App. 1991); *Campbell v. State*, 1987 Tenn. Crim. App. LEXIS 2214 (Tenn. Crim. App. 1987); *State v. Summerly*, 1985 Tenn. Crim. App. LEXIS 3080 (Tenn. Crim. App. 1985).

A reading of these cases makes clear that one cannot rely on constitutional claims of ineffective assistance of counsel as a measure for ensuring that defendants in death penalty cases receive even reasonably competent representation. This is true for several reasons: the case law is sparse and inconsistent and constitutional reliance on prejudice ensures that many cases of incompetent representation will go unremedied.⁷⁹

C. Ethical Standards

In 2002, the Tennessee Supreme Court adopted the Rules of Professional Conduct. As was the case with their predecessor, the Code of Professional Responsibility, the Rules are general statements applicable to all types of cases. These Rules became effective on March 1, 2003, and are modeled after the American Bar Association Model Rules of Professional Conduct.

There is no specific guidance in the Rules for attorneys representing defendants in capital cases, nor are there specific disciplinary sanctions applicable only to those cases. Attorneys in capital cases are guided by the same general provisions as are all other attorneys. Consequently, an attorney in a death penalty case can be disciplined for disciplinary violations such as negligence in handling a client's matter, failing to act competently on behalf of a client or for failing to respond appropriately to a conflict of interest.

In this regard, Tennessee is no different than any other state which imposes the death penalty. Ensuring competent representation in death penalty cases does not rest with disciplinary counsel.

⁷⁹ Moreover, effectiveness of counsel at trial and sentencing is made even more crucial because there is no right to effective assistance of counsel in post-conviction proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991).

V. Attempts at Reform: Historical Overview

For the last quarter of a century, the Tennessee Bar Association has assumed a leading role in assuring that the guarantee of the right to the assistance of counsel is a meaningful promise, not an empty one.

Recently, the TBA took a leading role in attempting to assure access to counsel and expert services for indigent defendants. Access to expert services is critical to effective representation in death penalty cases. Even the best lawyer is unable to provide effective representation in the absence of expert services to investigate and assess the evidence. In Tennessee, expert services are provided under the rubric of Supreme Court Rule 13, which is administered by the Administrative Office of the Courts. As structured prior to 2004, requests for expert services were made *ex-parte* to the trial judge hearing the case. If the request was denied, the defendant could appeal the denial to the Supreme Court.

In 2003, the Tennessee Supreme Court gave notice of intent to make changes to Rule 13. Indeed, in January 2004, the Tennessee Bar Association spearheaded a group which also included the Public Defenders' Conference, the Post-Conviction Defender and Tennessee Association of Criminal Defense Lawyers which provided comment to the Court. As stated in their Joint Comments: "Joint commentators' aim was to prepare and submit joint comments as to the ways in which the proposed rule could better address not only the just, speedy and economical disposition of criminal actions and post-conviction proceedings, but also the provision of counsel and services to indigent persons in other proceedings described in the proposed rule." (See Appendix C.)

In their submission, the joint commentators suggested the creation of an independent body whose sole mission would be to determine whether expert services should be provided in

individual cases. The Tennessee Indigent Representation Services (TIRS) would “completely remove any appearance of conflict between the courts’ role as administrator, on the one hand, and their role as the final adjudicator of closely related legal claims and issues, on the other. TIRS would also, among other things, (1) develop uniform, statewide standards for the appointment, performance, and compensation of counsel and service providers; (2) prescribe, administer, and monitor uniform, cost effective procedures and rates for state-wide support services; and (3) relieve the Court of the day-to-day oversight of these matters.”

That proposal was not a novel one; indeed, it mirrored suggestions made by the ABA Guidelines, recommendations of the Indigent Defense Commission, and others. Rather than adopting this proposal, the Supreme Court suggested that this issue was “best addressed through the legislative process.”

Another issue addressed by Rule 13 is the rate of compensation for attorneys appointed to represent indigent clients. In this regard, the Joint Commentators also requested the Court to raise the rate of compensation for attorneys. As they stated: “The joint commentators fervently believe the present rates of compensation and caps on compensation place an extreme financial burden on the lawyer who wishes to do a competent, thorough job in representing an indigent party. See TRCP 6.2. The smaller rate of compensation for out of court time diminishes the amount of time that counsel spend on investigation and preparation. The greater compensation rate for in-court time thus serves to emphasize and encourage ‘seat of the pants’ litigation.”

As noted at the beginning of this report, Judge Gill Merritt, in his September 26, 2002, speech, observed that “death penalty trials are designed to convict [indigent] defendants,” a conclusion that directly calls into question the reliability, fairness, and impartiality on which the criminal justice system is bottomed. In response to Judge Merritt’s observations and criticisms,

the Tennessee Bar Association's Board of Governors admonished this Committee not to investigate whether the death penalty in Tennessee produces reliable results. Respectfully, this limitation has proven problematic throughout this Committee's work.

In death penalty cases, where much more is at stake than a run of the mill criminal prosecution, the United States Supreme Court has underscored that the fundamental demand for reliability is heightened.⁸⁰ Given this demand for reliability, by removing this from consideration for the particular study, the Board of Governors has eliminated the legal touchstone by which all procedural/evidentiary rules, criminal trials, and, ultimately, the criminal justice delivery system, must be measured.

The prohibition of an assessment of reliability eliminates from consideration not only a vast body of historical information that demonstrates the ways in which the system for indigent capital representation has been flawed, but the ways in which the Tennessee Supreme Court has played a central role in the design and implementation of this system. To put this in proper context, it is necessary to briefly outline the historical problems attending the recognition of the right to counsel and the huge costs and massive systemic changes demanded by this recognition.

The due process, as opposed to Sixth Amendment, right to counsel was first recognized in 1932 in the capital case of *Powell v. Alabama*.⁸¹ Six years later, in *Johnson v. Zerbst*,⁸² the Supreme Court held that the Sixth Amendment guarantees the right to counsel in federal criminal prosecutions. In 1963, over 20 years after *Zerbst*, the Supreme Court held in *Gideon v. Wainwright*⁸³ that the Sixth Amendment right to counsel extends to state court criminal

⁸⁰ See *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988) ("Qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

⁸¹ 287 U.S. 45 (1932).

⁸² 304 U.S. 458 (1938).

⁸³ 372 U.S. 335 (1963).

defendants. This delay in the extension of the right to counsel for state court criminal defendants was undoubtedly due, at least in part, to the common sense recognition that such a holding would entail enormous costs and likely require the creation of complex, comprehensive delivery systems that did not exist.⁸⁴

In 1977, 15 years after *Gideon*, the Office of the Executive Secretary of the Tennessee Supreme Court undertook a study of the indigent defense system in Tennessee.⁸⁵ Although the 1977 Executive Secretary Study attributed many of deficiencies in Tennessee's indigent defense system to lack of funds,⁸⁶ the reporters concluded that, on the whole, the system "falls substantially short of the minimum standards required by law."⁸⁷ Notably, many of the deficiencies were attributable not simply to a lack of funds, but to the difference between the Tennessee Supreme Court's decisional standards governing the performance of counsel, on the one hand, and the Tennessee Supreme Court's rules and practices governing its own

⁸⁴ See A. Lewis, *Gideon's Trumpet* 2002-03 (Vintage 1989). The principal concern of Abe Fortas, whom the Court appointed to represent Gideon, was the fact that the federal courts had themselves not effectively implemented the right to counsel over 20 years after *Zerbst*.

⁸⁵ Fall 1977 Tennessee Court Study: Defense System Study (1977 Executive Secretary Study).

⁸⁶ See 1977 Executive Secretary Study at 20-21 (the amount appropriated for indigent defense "is never sufficient to cover even the limits set by statute in the cases processed. As a result, many requests for payment are arbitrarily reduced in order to stretch the remaining funds to provide payments for the fiscal year"); 21 ("inadequate funding of indigent defense services results in many cases that are not thoroughly investigated and prepared"); 25 (in an unknown number of criminal cases counsel fail to file for reimbursement "because so little of the attorney's time is required to represent the client or because the attorney just does not care to take the time and trouble to request reimbursement"); 33 (appropriations "appear to be grossly inadequate, particularly when compared with the services required to be performed. Substantial investigation and preparation is required in all criminal cases, and is expected by the Tennessee Supreme Court. Yet it is the general impression of the lawyers and trial judges, as reported to the NLADA team, that investigatory expenses, travel expenses, and criminalistic expert expenses will be rarely authorized, if at all"); 69-70 (despite ABA standards, "the funding pattern, the general practice and implementation of delivery of legal services discourages performance consistent with these standards"); and 73 ("lawyers were generally of the opinion that they would not be compensated, or at best only partially compensated for the use of investigatory services of criminalistics experts").

⁸⁷ See 1977 Executive Secretary Study at 74.

administration of the system for the appointment and payment for counsel and resources, on the other.⁸⁸

The picture presented of the state of criminal defense services for criminally charged persons is a curious conflict between expressed objectives as enunciated in legislation and the Tennessee Supreme Court case law . . . and the implementation and practice of those objectives.⁸⁹

In 1987, the TBA joined in a report by the Sixth Circuit Death Penalty Task Force⁹⁰ aimed at attempting to secure proper representation of death sentenced inmates in habeas corpus proceedings under 28 U.S.C. §2254. In that report, the committee stated that, “the problem [of competent representation] cannot be realistically addressed at the federal habeas corpus level, without attempting to address the identical crisis in representation at the state post conviction level.”⁹¹ Indeed, the report concluded that the resolution of the crisis in state post conviction representation would not only resolve many of the problems at the federal habeas level, but would “reduce drastically the need for cases in the federal system,” thereby reducing costs “both in money and in-court and lawyer time both in state courts and in federal courts.”⁹²

Five years after the TBA’s participation in the study attempting to resolve the crisis in capital representation in federal and state post conviction, it participated in a broader study of

⁸⁸ See 1977 Executive Secretary Study at 17 (Tenn.S.Ct.R. 44, as opposed to the standards set out in *Baxter*, “falls far short of the representation required”); 18 (TennS.Ct.R. 44 is “quite restrictive in its provision for payment of criminalistic experts in appointed counsel cases”); 19-20 (Tenn.S.Ct.R. 44 “appears to be inconsistent with Tennessee case law”); 69-70 (despite ABA standards, “the funding pattern, the general practice and implementation of delivery of legal services discourages performance consistent with these standards”).

⁸⁹ See 1977 Executive Study at 66.

⁹⁰ June 1987 Sixth Circuit Death Penalty Task Force: Report of the Tennessee Committee (1987 Sixth Circuit Task Force).

⁹¹ 1987 Sixth Circuit Task Force at 10-11.

⁹² 1987 Sixth Circuit Task Force at 11-12.

Tennessee's indigent defense fund as a member of the Criminal Justice Funding Crisis Group.⁹³ The study, conducted by the nationally-recognized Spangenberg Group, concluded that 15 years after the Executive Secretary's study, little had changed.⁹⁴ With respect to the representation of indigent persons charged with capital offenses, the report concluded that there were "major problems,"⁹⁵ finding that representation of capital defendants in Tennessee "falls short of virtually every standard explicated in the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases."⁹⁶

In sum, the historic evidence over the last 25 years indicates that Tennessee's system of indigent defense has not met minimum standards of representation, and that there has been a substantial gap between the judicial pronouncements of the Tennessee Supreme Court and the ABA Standards, on the one hand, and the rules and the administration of the indigent defense system by the Tennessee Supreme Court, on the other. Past outcomes have not been reliable, and the present system perpetuates a number of aspects of the past system. These lessons of the past, and the reliability of the present system in light of those past lessons, are key to any meaningful assessment of Tennessee's present system for indigent capital defense.

There is truly no meaningful standard for evaluating proposed changes or additions to the present system without considering reliability. For example, it is true that resources necessary to represent properly a capital defendant are very costly, a fact that has plagued adequate indigent representation in Tennessee for 25 years. One key aspect of capital defense is conducting an

⁹³ December 1992 Study of the Indigent Defense System in the State of Tennessee (1992 Spangenberg Report).

⁹⁴ 1992 Spangenberg Report at 11 ("underfunding of the indigent defense system in Tennessee is extreme"; 87 and 150 (resources available to the private bar for investigation, experts and other costs of litigation are "wholly inadequate"); 166 ("the plain fact [is] that the current indigent defense system in Tennessee is suffering from extreme underfunding; enormous case overload for public defenders; no overall system complete with appropriate standards from district-to-district; unacceptable levels of representation for indigent defendants").

⁹⁵ 1992 Spangenberg Report at 166.

adequate investigation and frequently such investigations take hundreds of hours. Furthermore, competent, trained investigators are costly. As a partial remedy to the State's limitations on investigative funds and investigative hourly rates, the Tennessee Supreme Court could consider mandating broader discovery in capital cases and providing it earlier. Doing so would make the investigation more focused, eliminating wasted hours and dead ends. In the end, the prudence of funding limitations notwithstanding, with improved discovery the defense would be able to subject the prosecution's case to more rigorous testing and the jury would be presented with more reliable information. Reliability issues are vital to the meaningful consideration of this, and similar, proposals.⁹⁷ Because the Committee's resources were limited, and because issues of reliability were not considered, this report is necessarily limited and incomplete.

VI. Resources and the Comptroller's Report

Early in the Committee's deliberations, it was brought to our attention that the State Comptroller's Office was involved in a fiscal study of the death penalty. Two research analysts working on that study, Ms. Emily Wilson and Mr. Brian Doss, expressed interest in attending some of our meetings in order to better understand death penalty issues. In a very informative and constructive meeting, Ms. Wilson and Mr. Doss reported that they had attempted to gather necessary background and financial information to make their study credible. They reported that they had itemized all costs, including fixed and variable costs, brought to their attention. It

⁹⁶ 1992 Spangenberg Report at 164.

⁹⁷ It should be noted that the Office of the District Attorney General for the 20th Judicial District (Davidson County) implemented written guidelines pertaining to death penalty cases October 18, 2001. Among other things, one guideline provides that "in all cases where notice for the death penalty has been given, the Office shall provide counsel for the defendant an opportunity for open-file discovery." On February 6, 2003, House Bill 409 was introduced in the Tennessee General Assembly, under which a similar liberal discovery system in death penalty cases would be mandated. Lastly, the Constitution Project [cited earlier] recommends that "the rule in capital cases should be full, open-filed discovery under which, at an early stage, all documents, information, and materials available to the prosecution are automatically and routinely made available to the defense." (at p. 48).

became obvious to the Committee, however, that important cost considerations were not being factored into the study. For example, the analysts had not looked at the cost of investigation of death penalty cases (reporting that they did not have the resources to do so). They also assumed that an investigator in a first degree murder case did not know at the time of investigation whether it was a capital or life without parole case. Additionally, they were not looking at all cases, but rather only those where they could obtain two data sources that corroborated each other. Their study starts at the time of the “death notice;” clearly, by starting at that point, all sorts of costs already incurred are being excluded. The Committee also learned that death eligible cases settled prior to trial were not included. The analysts ultimately agreed that the data they had collected was “imperfect.”

At one point during the Committee’s deliberations, it was reported that the Comptroller’s study had been “postponed indefinitely.” Obviously, that was in error. In July 2004, the Comptroller’s Office issued its report entitled “Tennessee’s Death Penalty: Costs and Consequences.” It is attached as Appendix D.

A thorough and carefully reasoned critique of the report requires time and expertise that members of this Committee do not possess. Nonetheless, several who have read the full report have serious doubts regarding a number of conclusions reached by the authors. One conclusion that immediately caught the attention of the Committee is that “the execution of an inmate saves the state approximately \$773,736 for the future imprisonment of the inmate when compared to an inmate sentenced to life without parole.” Those familiar with comparable studies in other states report that no state has ever reached that conclusion. In fact, they all reached just the opposite conclusion.

It is generally agreed that the most carefully prepared study of this sort was undertaken by experts in North Carolina. That report, entitled “The Costs of Processing Murder Cases in North Carolina,” published May 1993, concludes as follows:

“The extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a non-capital adjudication that results in conviction for first degree murder and a 20-year prison term is about \$329,000, substantially more than the savings in prison costs which we estimate to be \$166,000. We note that a complete account must also include the extra costs of cases that were adjudicated capitally but did not result in the execution of the defendant. All told, the extra costs per death penalty imposed is over a quarter million dollars and per execution exceeds \$2 million.”

Similarly, a 1991 study of the Texas criminal justice system estimated the cost of appealing capital murder at \$2,300,000. In contrast, the cost of housing a prisoner in a Texas maximum security prison single cell for forty (40) years is estimated at \$750,000.⁹⁸ In the late 90’s, Florida calculated that each execution costs some \$3.2 million. If incarceration is estimated to cost \$17,000 per year, a comparable statistic for life in prison of forty (40) years would be \$680,000.⁹⁹

While the Committee is not suggesting that data collected and/or conclusions reached in other studies should, or even could, be replicated in Tennessee, the Committee cannot understand why the Comptroller’s Office has not even attempted to reconcile or justify its conclusions in light of overwhelming data to the contrary. And with respect to the North Carolina study, it is

⁹⁸ Punishment and the Death Penalty, edited by Robert Baird and Stuart Rosenbaum (1995).

⁹⁹ The Geography of Execution: The Capital Punishment Quagmire in America, by Keith Harries and Derral Cheatwood (1997).

clear that those authors carefully and thoroughly gathered data, eschewing reliance upon “anecdotal” evidence. Again, the Tennessee study comes up short when measured by that benchmark.

Turning to the Comptroller’s report, itself, a number of cautionary statements scattered throughout the report raise serious questions as to whether the necessary data was in hand and was adequate for the purpose of providing a basis for general conclusions. For example, the report states:

1. “Data collection required attorneys and judges to recollect information regarding time and resources on some cases up to ten years old. This was often difficult and sometimes impossible because public attorneys and judges keep no time records. Therefore, some information included in the study, particularly attorney and judge time spent on cases, represents estimates at best.” (pp. 4 & 5)
2. “Anecdotal information suggests that attorneys for both sides file more motions in capital cases, which in part leads to more documents and case records” (p. 11)
3. “Anecdotal information indicates that all parties involved with first-degree murder cases have additional staff assistance, but more so in capital cases: investigators, administrative assistants, social workers, paralegals and victim witness coordinators” (p. 11)
4. “Because cost and time records were not maintained, the Office of Research was unable to determine the total, comprehensive cost of the death penalty in Tennessee.” (p. 12)
5. “Many defense attorneys interviewed indicated that they have to start preparing for the death penalty before the prosecution has filed a death notice to have

adequate time. This strategy may save future costs at the trial and appellate levels but it is impossible to account for the resources spent during preparation.” (p. 15)

6. “District Attorney’s General and Public Defenders can employ additional staff to assist in capital post-conviction cases. Researchers did not collect information to determine how often District Attorneys or Public Defenders employ such additional staff.” (pp. 26 & 27)
7. “Researchers could not identify costs associated with state inmates pursuing federal appeals. However, provisions in the federal appeals process set capital cases apart from non-capital cases.” (p. 28)
8. Immediately after the statement that the execution of an inmate saves the state more than \$773,000, the authors note: “Tennessee has executed one person since the reinstatement of the death penalty. The state imprisoned the inmate for approximately 19 years prior to his execution. Researchers used this figure in calculations because it was the only available data. It is not an average because it only represents one case.” (p. 36)
9. “Neither attorneys nor judges in Tennessee track the time they spend on individual cases. The law does not require either to keep records. Consequently, no reliable data exists concerning the cost of prosecution or defense of first-degree murder cases in Tennessee. Attorney and judge time is one of the greatest expenses of the total cost of the death penalty, but is not collected. Office of Research staff found anecdotal information regarding the differences between capital and non-capital cases. Although anecdotal information is useful,

measurable criteria to compare capital and non-capital cases would also reveal important information.” (p. 46)

10. “Judges, District Attorney Generals, and District Public Defenders all indicated that they frequently work on several cases simultaneously. This makes it difficult, if not impossible, to estimate time spent on individual cases. Several judges, attorneys and public defenders indicated that weighted caseload studies are the only way to understand time spent.” (p. 46)

The Comptroller’s analysts are to be commended for candidly admitting that they were “unable to determine the total, comprehensive costs of the death penalty in Tennessee.” Even so, one must ask what the analysts should have done after making this damning admission. It is the Committee’s judgment that the answer is simple and straightforward. They should have acknowledged that it was premature to make any judgments at that point due to the lack of adequate information. Stated differently, the responsible course of action was to report that further study and analysis was imprudent, if not impossible, until the necessary data was collected.

Overall, for the reasons set forth above, the Committee has grave concerns regarding the accuracy of conclusions reached and recommendations made by the Comptroller’s Office in its report. To summarize, first, the report contains no discussion or analysis of other studies in which authors in other jurisdictions concluded that the death penalty is far more costly than life without parole. Second, the report contains frequent references to the fact that more exact information and complete data is needed and that the authors are relying upon “anecdotal evidence.” Third, there are numerous references to additional cost “categories,” yet no serious attempt appears to have been made to factor them into total dollar comparisons.

VII. The Committee's Approach to Evaluating Resources for Defense Counsel in Death Penalty Cases

A. Appropriate Test

The primary question facing this Committee concerns the proper litmus tests to apply when evaluating the resources provided defense counsel in capital cases in Tennessee. Some have suggested that we determine whether a problem exists in this state by simply reviewing capital cases in which a state or federal court has reversed the conviction or sentence based upon a finding of ineffective assistance of counsel. Indeed, this report contains such evaluative information in Section IV B. While this case law is important, the Committee rejects using cases reversed for ineffective assistance of counsel as the sole basis for evaluating representation for the following reasons: (1) such a review would place the bar very low; (2) in numerous cases the reviewing courts either failed to consider whether the representation was substandard because it first found there was not prejudice or found deficient performance, yet failed to find prejudice;¹⁰⁰ (3) the sentences or convictions in many cases were reversed for other reasons and the quality of counsel was never explored; and (4) the vast majority of Tennessee death penalty cases are still under review. It should also be noted that the fact that some cases are actually reversed upon a finding of both deficient performance and prejudice does not mean that Tennessee defendants, facing the death penalty, are getting adequate representation; rather, it simply means the courts are not finding ineffective assistance of counsel. It is this Committee's judgment, therefore, that a more trustworthy approach to evaluating Tennessee's system of delivering services to indigent death sentence inmates requires a comparison of the Tennessee system to the requirements of the ABA Guidelines.

¹⁰⁰ *Strickland v. Washington*, 446 U.S. 668 (1984) (two-pronged tests for ineffective assistance of counsel requires a finding of deficient performance and prejudice to defendant).

The ABA Guidelines set forth the objective in Guideline 1.1 (A) as: “To set forth a national standard of practice for the defense of capital cases in order to insure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” The commentary to this guideline explains: “The quality of counsel’s ‘guiding hand’ in modern capital cases is crucial to insuring a reliable determination of guilt and the imposition of an appropriate sentence.”

As noted earlier in this report, both the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit have recognized that the ABA Guidelines are the authoritative national standard for death penalty cases. In order to evaluate the defense resources provided in Tennessee, the Committee has attempted to set out a side-by-side comparison of the requirements of Tennessee as provided by Statute and Supreme Court Rules with the requirements of the ABA Guidelines. The detailed comparison is set out in Appendix E. Comments are either interspersed within the columns or placed below the columns. The questions used as the structure of comparison are from a handout provided by the Committee which contains the questions used herein under a section title, “Guidelines for Review of Defender Services.”

B. Overall Assessment and Conclusion

Tennessee is woefully out of step with the national standards. Tennessee provides counsel too late, has created meaningless standards for the appointment of counsel and, contrary to ABA Guidelines, has resolved in favor of the State purse conflicts between the State Treasury and the fundamental constitutional rights of the accused facing a death penalty. Stated differently, a comparison of Tennessee’s machinery for providing defense services in death penalty cases and that endorsed by the American Bar Association demonstrates that they are

based upon two distinctly different models. The ABA Guidelines create the model for providing high quality representation for defendants. Regrettably, the Tennessee has resolved conflicts between the Treasury and the fundamental rights of the accused in favor of the State's Treasury.

The cornerstone for providing high quality representation is the creation of a jurisdiction-wide appointing authority that is independent from the judiciary and that sets up a procedure to review the performance of attorneys appointed in capital cases and to remove those who fail to demonstrate sufficient skill and zealous advocacy. In contrast, the Tennessee Statute and Rule places the appointing authority in locally elected judges and has no provisions for monitoring performance other than post-conviction claims for ineffective assistance of counsel. Such a system has been repeatedly suggested to the Tennessee Supreme Court and each time has been rejected.

The result of the Tennessee system is that it perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation. While the Tennessee system may sometimes provide high quality representation, it will all too often produce a level of representation that fails to insure reliable results in death cases. Therefore, often an individual defendant either is convicted and sentenced to death or is sentenced to death but is not deserving of this ultimate punishment.¹⁰¹

Because it is now clear that the ABA guidelines are the standards against which a defense attorney's performance are to be judged in death penalty cases, the focus must shift not to budgetary concerns but to creating a system for defense services that makes the imposition of death reliable and avoids the arbitrary imposition of the ultimate punishment. In short, the cost

¹⁰¹ This problem is exacerbated by state policy that allows defendants to refuse to present mitigating evidence and allows death sentenced inmates to refrain from pursuing post-conviction challenges, thereby insuring that no court will ever review the quality of the representation the inmate was afforded.

factor must be considered when the state elects to have a death penalty as a possible punishment and then when it determines the number of those whom it will make eligible for this unique punishment.¹⁰² The dialogue that must take place is not whether the State is required to implement the high quality defense standards of the ABA Guidelines, but rather, whether the State wants to fund the implementation of these high quality defense standards in order to maintain a penalty for which the only generally accepted purpose is retribution.

¹⁰² The legislature has significantly increased the potential pool of those who may face a trial in which the State seeks a death penalty by permitting a sentence of death not only for intentional murders but also felony murders and then basing eligibility for a death sentence on any one of fifteen separate aggravating factors. *See* Tennessee Code Annotated Sections 39-13-202(c) and 204(i).