

No. W2009-01255-SC-DDT-DD

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IN THE  
**Supreme Court of Tennessee**  
AT JACKSON

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STATE OF TENNESSEE,

*Appellee,*

*vs.*

CORINIO PRUITT,

*Appellant.*

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APPEAL FROM  
COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON  
NO. W2009-01255-CCA-R3-DD

CRIMINAL COURT FOR SHELBY COUNTY  
NO. 06-00460

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**BRIEF OF *AMICI CURIAE***  
**TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE**  
**LAWYERS, AND THE CONSTITUTION PROJECT**

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## **INTEREST OF THE *AMICI CURIAE***

*Amicus* Tennessee Association of Criminal Defense Lawyers is a non-profit corporation with several hundred members, comprised predominantly of attorneys actively engaged in the representation of criminal defendants. TACDL's principles are devoted to the promotion of justice, liberty, and the common good. TACDL provides education, training, and support to lawyers who represent citizens accused of crimes, and advocates fair and effective criminal justice in the courts, the legislature, and wherever justice demands.

*Amicus* The Constitution Project is a constitutional watchdog that creates coalitions of respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. Although The Constitution Project takes no position on capital punishment, it is deeply concerned with the preservation of our Eighth Amendment right to be free from the arbitrary, capricious, and discriminatory imposition of the death penalty.

In 2000 the Constitution Project convened a bipartisan, blue-ribbon Death Penalty Committee to evaluate procedural safeguards in capital sentencing. The Committee comprised members with extensive criminal justice experience, including former judges, prosecutors, defense lawyers, victim advocates, and others, and included both supporters and opponents of capital punishment. After evaluating various death penalty systems in this country, the Committee concluded that there are currently insuffi-

cient protections in place to ensure fundamental fairness, and recommended eighteen reforms to the death penalty.

In 2006 the Committee issued a further report, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED (“Mandatory Justice”) addressing the problems that continue to plague death penalty litigation. In it, the Committee emphasized the need for meaningful proportionality review mechanisms. Further, the committee made several recommendations for ensuring that capital punishment is reserved for the most heinous offenses and most culpable offenders. Among other safeguards, the Committee recommended jurisdictions exclude from eligibility for the death penalty all felony murders, reasoning that the death penalty must be reserved for the most culpable of offenders, such as cold-blooded executioners or multiple murderers, a goal undermined when the death sentence is imposed on a defendant who did not intend to kill.

*Amici*’s organizing principles of ensuring the protection of constitutional rights, along with their extensive knowledge of the appellate review procedures in place in this country, give *Amici* a strong interest in the resolution of the questions raised by the Court in its Order of December 6, 2012. The issues involved in this case are critically important and significantly affect fundamental rights of numerous persons charged with crimes, specifically those who face the ultimate penalty of execution. *Amici* thus submit this brief to assist the Court’s understanding of the constitutional principles under review.

## STATEMENT OF ISSUE

Pursuant to this Court's December 6, 2012, Order inviting the undersigned to file as *Amici Curiae*, this Brief addresses whether the absence of an intent to kill should render the death penalty disproportionate.

## STATEMENT OF THE CASE

In the mid-morning of August 2, 2005, Defendant Corinio Pruitt, unarmed, stole a car. As the owner, seventy-nine-year-old Lawrence Guidroz, exited a grocery store, Mr. Pruitt approached him, pushed him into the car, hit him, threw him onto the pavement, and drove away in the stolen vehicle. Mr. Pruitt neither carried nor used a weapon.

Mr. Guidroz had several medical conditions that contributed to his age-related frailty, including severe coronary atherosclerosis, osteoporosis, and coagulopathy. Mr. Guidroz was taken to the hospital and later died from the injuries he sustained during the robbery.

At trial, Mr. Pruitt was convicted of first-degree felony murder and second-degree murder, convictions the trial court later merged into a single offense. There was no finding that Mr. Pruitt intended to kill Mr. Guidroz.

During the penalty phase for Mr. Pruitt's felony murder conviction—a death-eligible offense in Tennessee—the jury found the presence of three aggravating factors: (1) Mr. Pruitt had been previously convicted of a felony which involved violence (in his case, aggravated burglaries and robberies), TENN. CODE ANN. § 39-13-204(i)(2);

(2) Mr. Pruitt “knowingly” committed a murder during the commission of a felony, *id.* § 39-13-204(i)(7); and (3) the victim was over the age of seventy, *id.* § 39-13-204(i)(14). After considering mitigating factors, including that Mr. Pruitt did not act with an intent to kill, the jury concluded that the aggravating factors outweighed any possible mitigating factors and imposed a sentence of death.

Mr. Pruitt timely appealed. The Tennessee Court of Criminal Appeals affirmed his sentence. Mr. Pruitt then appealed to this Court, which requested supplemental briefing on three issues: (1) whether the proportionality analysis adopted by the majority of the Court in *State v. Bland*, 958 S.W.2d 651, 664-68 (Tenn. 1997), should be modified; (2) whether the absence of an intent to kill should render the death penalty disproportionate; and (3) whether the pool of cases considered in proportionality analysis should be broadened. *See* December 6, 2012, Order.

*Amici* Tennessee Association of Criminal Defense Lawyers and The Constitution Project address solely the second question: whether the absence of an intent to kill should render the death penalty disproportionate.

### **SUMMARY OF ARGUMENT**

This case illustrates that it is grossly disproportionate to sentence to death a defendant who did not intend to kill.



The Eighth Amendment of the U.S. Constitution and Article I, § 16 of the Tennessee Constitution both prohibit the state-sanctioned infliction of “cruel and unusual punishment.” *See, e.g., Van Tran v. State*, 66 S.W.3d 790, 801 (Tenn. 2001). A sentence that is disproportionate to the crime committed—as measured against objective indicia of national standards and the subjective purposes served by a particular punishment—is “cruel and unusual,” and thus, unconstitutional. *See id.* at 800-01 (construing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Courts must exercise special care to ensure proportionality when the state seeks to impose the severest punishment of all—death. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“This [principle] is of particular concern . . . in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”).

Because “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment[,] [t]he standard itself remains the same, but its applicability must change as the basic mores of society change.” *Id.* at 419 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)). Thus, courts must (and do) continuously revisit whether the death penalty is a proportionate punishment against the backdrop of “evolving standards of decency that mark the progress of a maturing society.” *Id.* at 420 (quoting *Trop v.*

*Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *cf.* *Van Tran*, 66 S.W.3d at 808-09 (revisiting and reversing proportionality analysis conducted only thirteen years earlier); *Roper v. Simmons*, 543 U.S. 551, 555-56 (2005) (revisiting and reversing proportionality analysis conducted only sixteen years earlier).

Twenty-one years ago, in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), this Court upheld a death sentence for nonintentional homicide by a 3-2 vote. Relying on the then-recent opinion in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the majority held that the death sentence was not grossly disproportionate, despite the defendant's lack of an intent to kill. *See Middlebrooks*, 840 S.W.2d. at 339-40. Chief Justice Reid and Justice Daughtrey vigorously dissented, contending that imposing such a sentence in the absence of an intent to kill is grossly disproportionate. *Id.* at 350-55 (Reid, C.J., dissenting).

Two decades have elapsed since *Middlebrooks* and *Tison*, and society's standards—both in Tennessee and throughout the rest of the United States and the world—have evolved significantly. Both objective data and an evolved understanding of the death penalty's waning deterrent and retributive force confirm that punishing nonintentional homicides with death no longer reflects society's values. *Cf. Van Tran*, 66 S.Wd.3d at 802 (“It is immediately apparent . . . that the legislative landscape [during the preceding 12 years] has undergone a dramatic transformation.”).

Indeed, substantial shifts in death penalty jurisprudence during the last two decades show that a death sentence for a defendant lacking the intent to kill is so rare as to be objectively disproportionate. Only seven nonintentional murderers have been executed in the last decade, as compared to the 565 executions of intentional murderers during the same period. Those seven executions, moreover, have been limited to only four states of the 53 state and territorial U.S. jurisdictions. Furthermore, maturing societal mores hold that executing such a defendant—one who necessarily did not intend the results of his actions—is neither an effective deterrent nor an appropriate measure of retribution. For all of those reasons, it is unconstitutional to impose the death penalty on a defendant who lacked the intent to kill.

#### **ARGUMENT**

Sentencing to death a defendant who lacks the intent to kill is grossly disproportionate. To determine whether executing a certain class of defendants runs afoul of the proportionality principles in the Eighth Amendment of the U.S. Constitution or Article I, § 16 of the Tennessee Constitution, courts follow a two-step approach. *See Middlebrooks*, 840 S.W.2d at 338 (construing *Gregg*, 428 U.S. at 173); *Atkins v. Virginia*, 536 U.S. 304, 311-13 (2002).

In the first, “objective” step, courts ask whether a death sentence is rare or disproportionate when compared against contemporary federal, state, and international

practices. See *Middlebrooks*, 840 S.W.2d at 338 (construing *Gregg*, 428 U.S. at 173); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); see also *Roper*, 543 U.S. at 569-71, 575-78; *Atkins*, 536 U.S. at 316 & n.21.

In the second, “subjective” step, courts determine whether the death penalty “fulfill[s] the two distinct social purposes . . . [of] retribution and deterrence of capital crimes.” *Kennedy*, 554 U.S. at 441; see *Van Tran*, 66 S.W.3d at 808-09. If it does not, the death penalty becomes “nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker*, 433 U.S. at 592).

Because a death sentence for a defendant without intent to kill fails both the (I) objective and (II) subjective prongs of a proportionality review, it is unconstitutional under both the Federal and Tennessee constitutions.<sup>1</sup>

**I. Imposing a Death Sentence on a Defendant Who Never Formed the Intent to Kill Violates the Proportionality Principle of the Federal and Tennessee Constitutions Because of Its Exceeding Rarity.**

Imposing a death sentence on a defendant who lacked the intent to kill is objectively disproportionate

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<sup>1</sup> As this Court has reiterated, “it is axiomatic that this Court may extend greater protection under the Tennessee Constitution than is provided by the United States Supreme Court’s interpretations of the federal constitution.” *Van Tran*, 66 S.W.3d at 801.

and incongruent with contemporary values, as expressed by death penalty practices throughout the United States, and particularly in Tennessee. *See Van Tran*, 66 S.W.3d at 801-06 (conducting proportionality analysis by first examining nationwide practices before turning to Tennessee death penalty practices). This consensus, moreover, is consistent with widespread global condemnation of such a sentence. *See Roper*, 543 U.S. at 569-71, 575-78 (looking to international standards for proportionality guidance); *Atkins*, 536 U.S. at 316 & n.21 (same).

Courts look to many indicators of societal values to determine whether a consensus against the imposition of the death penalty for a particular practice exists, three of which are relevant here. *First*, courts tally the number of states for or against the practice. *See, e.g., Van Tran*, 66 S.W.3d at 801 (finding societal consensus against executing the mentally handicapped based on the opposition of eighteen states and the federal government (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))); *see also Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (plurality opinion) (finding societal consensus against the execution of persons under the age of sixteen based on the legislative opposition of eighteen states). *Second*, courts examine the frequency with which states impose the death penalty for a particular class of crimes, *see Coker*, 433 U.S. at 596 (“[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.”) (quoting *Gregg*, 428 U.S. at 181)).

*Third*, courts evaluate the frequency with which states actually execute certain types of defendants, *see Kennedy*, 554 U.S. at 432-34 (finding societal consensus against executing child-rapists who did not commit homicide based on the rarity of actual executions); *Roper*, 543 U.S. at 564-65 (finding societal consensus against executing juveniles based on fact that, of the 20 states permitting such executions, only three had actually done so in a decade); *Atkins*, 536 U.S. at 316 (finding societal consensus against executing mentally handicapped defendants, based on fact that, of 20 states permitting such executions, only five had actually done so in thirteen years); *Coker*, 433 U.S. at 596-97 (finding societal consensus against executing rapists based on fact that there had been only 72 executions for rape during previous 22 years).

On this latter point, *Enmund v. Florida* is illustrative. There, the Court evaluated whether death was a disproportionate punishment for defendants who neither killed nor intended to kill by examining how often states actually carried out the death sentences they imposed. *See* 458 U.S. at 794. In light of *Coker*, the Court found it overwhelmingly disproportionate that, notwithstanding the number of jurisdictions authorizing such a penalty, only six of the 362 executions performed during the last several years involved such a defendant. *Id.* at 794. As Justice Brennan later clarified, “it is critical to examine not simply those jurisdictions that authorize the death penalty in a given circumstance, but those that actually

*impose* it. Evidence that a penalty is imposed only infrequently suggests not only that jurisdictions are reluctant to apply it but also that, when it is applied, its imposition is arbitrary and therefore unconstitutional.” *Tison v. Arizona*, 481 U.S. 137, 176 (1987) (Brennan, J., dissenting).

Here, a review of death penalty practice in (A) the United States, (B) Tennessee, and (C) the international community reveals that it is uniformly disproportionate to impose a sentence of death against a defendant who lacked the intent to kill.

**A. The death penalty is so rarely imposed for nonintentional homicides that, under evolving federal and state standards, it has become a grossly disproportionate punishment.**

Nationwide, there is a stark consensus against imposing a death sentence on a defendant who lacked intent to kill.

As explained in detail below, an overwhelming 49 of the 53 jurisdictions in the United States<sup>2</sup> refuse to extend the death penalty’s scope to include nonintentional homicides. Indeed, out of 572 total executions during the last decade, only seven were for a nonintentional murder. This constitutes a national consensus far stronger than those that formed the basis for the decisions in *Van Tran*, *Ken-*

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<sup>2</sup> 50 states plus the District of Columbia, the U.S. government, and the U.S. military.

*nedy, Roper, Atkins, Enmund, and Coker*, and necessitates that this Court conclude that the absence of the intent to kill renders the death penalty grossly disproportionate.

1. *There is an overwhelming national consensus against imposing the death sentence for nonintentional homicides.*

By the numbers, there is a demonstrable nationwide consensus against executing nonintentional murderers.

During the last decade, five jurisdictions have abolished the death penalty entirely<sup>3</sup> bringing to eighteen the total number of jurisdictions that forbid the death penalty for any crime.<sup>4</sup>

Of the remaining 35 jurisdictions, eight retain the death penalty as an available punishment, but have not

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<sup>3</sup> The five jurisdictions that have abolished the death penalty in the last decade (and the year of abolition) are: Connecticut (2012), Illinois (2011), New Jersey (2007), New Mexico (2009), and New York (2007).

<sup>4</sup> The eighteen jurisdictions that forbid the death penalty altogether are: Alaska, Connecticut, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. A nineteenth, Maryland, will likely abolish the death penalty in the coming month. See Michael Dresser, *Death Penalty Repeal Clears a Key Test Vote in Senate: Final Vote Could Come Next Week*, BALTIMORE SUN, March 1, 2013, [www.baltimoresun.com/news/maryland/politics/blog/bal-maryland-senate-begins-debate-to-end-death-penalty-20130301,0,6017453.story](http://www.baltimoresun.com/news/maryland/politics/blog/bal-maryland-senate-begins-debate-to-end-death-penalty-20130301,0,6017453.story) (noting that a majority of the senate has pledged to pass the bill, and that no hurdles to abolition remain, as Governor Martin O'Malley has promised to sign the repeal after it passes the senate).



executed any defendant for over a decade,<sup>5</sup> leaving only 27 jurisdictions that still carry out death sentences. *See* App'x A. Of the 35 jurisdictions that retain the death penalty, five—Alabama, Kansas,<sup>6</sup> Missouri, Ohio, and Virginia—explicitly forbid imposing the death penalty absent the intent to kill.<sup>7</sup> Three more—Louisiana, North Carolina and Texas—permit executing a defendant who lacked the intent to kill in only rare or extremely aggravated circumstances,<sup>8</sup> and research has uncovered no in-

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<sup>5</sup> The eight jurisdictions that have not executed anyone for at least a decade are: Colorado (last execution: 1997), Kansas (last execution: 1965), Nebraska (last execution: 1997), New Hampshire (last execution: 1939), Oregon (last execution: 1997), Pennsylvania (last execution: 1999), Wyoming (last execution: 1992), and the U.S. Military (last execution: 1961). Collectively, these jurisdictions have 274 persons on death row.

<sup>6</sup> Kansas both forbids the imposition of the death penalty without an intent to kill and has not executed anyone since 1965.

<sup>7</sup> *See* ALA. CODE §§ 13A-5-40(a)-(b), 13A-6-2(a)(1) (stating that, for purposes of the capital offense statute, murder is defined as requiring an intent to kill); KAN. STAT. ANN. § 21-5401 (stating that capital murder requires “[i]ntentional and premeditated killing” in conjunction with other aggravating factors); *State v. O'Brien*, 857 S.W.2d 212, 217-218 (Mo. 1993) (noting that intent to kill is a prerequisite to be found guilty of first- or second-degree murder); OHIO REV. CODE ANN. § 2903.01(D) (requiring intent to kill as a prerequisite for capital murder); VA. CODE ANN. § 18.2-32 (stating that capital murder requires a “willful, deliberate and premeditated” killing).

<sup>8</sup> *See* LA. REV. STAT. ANN. § 14:30(A) (requiring specific intent to kill as a prerequisite for first degree murder other than for murders in prevention of or reprisal for testifying in court); N.C.G.S. § 14-17 (making death-eligible only intentional murders or felony murders

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stance during the last decade in which a defendant in these states has actually been sentenced or executed without an intent to kill. None of these three states would permit the execution of Mr. Pruitt here, as felony murder is not a death-eligible crime absent an intent to kill.

Thus, based on legislative action and death penalty practice, Mr. Pruitt's execution could not (or would not) take place in at least 33 jurisdictions, either because the death penalty is not permitted whatsoever (eighteen states),<sup>9</sup> because his lack of intent would render him legally ineligible for a death sentence (eight jurisdictions), or because the death penalty has been so rarely carried out for so long a time that its continued practical and constitutional viability is dubious (an additional seven jurisdictions).<sup>10</sup> *See, e.g., William Yardley, Oregon Governor*

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perpetrated with a deadly weapon); TEX. PEN. CODE ANN. § 19.03(a) (defining capital murder as one “intentionally” committed during a felony, but imposing no *mens rea* threshold for the murders involving the death of a peace officer or child under the age of six, the collection of a debt, multiple homicides, or the escape from or incarceration in a penal institution).

<sup>9</sup> Connecticut, which abolished its death penalty in 2012, executed a single person during this last decade. Before abolishing its death penalty, though, Connecticut's operative death penalty statute required intent, *see* CONN. GEN. STAT. ANN. § 53a-9(a) (2011), and the sole defendant executed possessed it. *See State v. Ross*, 624 A.2d 886 (Conn. 1993) (involving serial killer guilty of eight murders).

<sup>10</sup> Technically, as noted above, *eight*, not seven, jurisdictions have ceased to execute defendants, but Kansas falls into both the cat-

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*Says He Will Block Executions*, N.Y. TIMES, Nov. 22, 2011, at A14; cf. *Enmund*, 458 U.S. at 796 (“[I]t would be relevant if [states] rarely [carried out] the death penalty for [a particular crime], for it would tend to indicate that prosecutors, who represent society’s interest in punishing crime, consider the death penalty excessive . . .”); *Furman*, 408 U.S. at 309 (1972) (Stewart, J., concurring) (noting that prolonged delays in carrying out death sentences is “cruel and unusual in the same way that being struck by lightning is cruel and unusual”). These 33 jurisdictions, taken together, account for 1,252 of the 3,146 persons currently on death row, and two-thirds of all executions over the last decade (380 of 572, or 66 percent). See App’x A.<sup>11</sup>

That is not the end of the story. The remaining 20 jurisdictions—those that permit executing a defendant who, like Mr. Pruitt, lacked the intent to kill—currently hold slightly less than 1,900 defendants on death row<sup>12</sup> and have carried out 192 executions in the last decade. See App’x A. Evaluating the *mens rea* of each of these death-

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egory of states that prohibit executions absent an intent to kill and states that have an effective moratorium on the death penalty.

<sup>11</sup> See also *Death Row Inmates by States*, DEATH PENALTY INFORMATION CENTER, [www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year](http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year).

<sup>12</sup> See *id.*

row defendants is an all-but-impossible task, especially given these states' lack of an intent prerequisite for the death penalty. But an examination of the 192 executions those states have carried out during the last decade—effectively a 10-percent sample of the 1,900 on death row—provides a manageable set from which the Court can extrapolate data about those on death row and, more importantly, itself indicates society's maturing values. *See Roper*, 543 U.S. at 564-65; *Enmund*, 458 U.S. at 794.

Of the 192 defendants executed in jurisdictions that might permit executing a defendant without intent to kill, *only seven executions*, limited to *four states*—Arizona, Georgia, Oklahoma, and Tennessee—have actually involved a defendant whose intent to kill was at all in doubt.<sup>13</sup> *See* App'x A. The remaining 185 executions all involved defendants whose intent to kill was abundantly clear from either an explicit *mens rea* finding or the meth-

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<sup>13</sup> *See State v. West*, 862 P.2d 192 (Ariz. 1993) (involving death from punching victim during burglary); *State v. Beaty*, 762 P.2d 519 (Ariz. 1988) (involving death of child from aspirating on vomit during rape); *Blankenship v. State*, 365 S.E.2d 265 (Ga. 1988) (involving death of an elderly woman from heart attack during rape); *Gilson v. State*, 8 P.3d 883 (Okla. Crim. App. 2000) (involving death of eight-year-old from child abuse); *Fields v. State*, 923 P.2d 624 (Okla. Crim. App. 1996) (involving death from accidental discharge of victim's own firearm while wrestling for its control during robbery); *Workman v. State*, 824 P.2d 378 (Okla. Crim. App. 1991) (involving death of two-year-old from child abuse); *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984) (involving death of police officer from unintentional discharge of defendant's firearm).

od or number of the murders.<sup>14</sup> *Cf. Bland*, 958 S.W.2d at 660 (noting that a defendant’s procurement and use of a deadly weapon permits an inference of premeditation); *Middlebrooks*, 840 S.W.2d at 353 (Reid, C.J., dissenting) (noting that, even where no explicit *mens rea* finding was made, in most cases “proof of the method of killing or other evidence [c]ould [be used to] support a finding of intent to kill”); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED (“Mandatory Justice”) 10, 16 (2005) (recommending limiting the death penalty to only certain types of murders, among them multiple murders). These seven executions are only a tiny fraction of the 572 executions that have taken place in the United States during this time. *See* App’x A. And, the four jurisdictions that have actually executed a defendant who lacked intent to kill are dwarfed by the 49 who have not done so.

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<sup>14</sup> The jurisdictions and numbers of executions are as follows: Arkansas (3 executions, all with intent); California (4 executions, all with intent); Delaware (3 defendants, all with intent); Florida (23 defendants, all with intent); Idaho (2 defendants, both with intent); Indiana (11 defendants, all with intent); Kentucky (1 defendant, with intent); Maryland (2 defendants, both with intent); Mississippi (17 defendants, all with intent); Montana (1 defendant, with intent); Nevada (3 defendants, all with intent); South Carolina (18 defendants, all with intent); South Dakota (3 defendants, all with intent); Utah (1 defendant, with intent); Washington (1 defendant, with intent); and the federal government (1 defendant, with intent). *See* App’x A.

Whether evaluated on a (1) state-by-state basis or (2) as a percentage of the total executions in America, Supreme Court precedent compels the conclusion that there is an overwhelming consensus against executing a defendant who lacked intent to kill. *First*, 26 jurisdictions, accounting for the majority of all executions in America during the past decade, forbid it; a further seven have exhibited an unwillingness to execute *any* defendants; and, of the 20 jurisdictions in which such an execution might be possible,<sup>15</sup> sixteen have not executed a defendant who

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<sup>15</sup> In many of these 20 states, as elsewhere, moreover, the death penalty's continued existence is in serious doubt. *See, e.g.*, Editorial, *Death in Little Rock*, THE ECONOMIST, Feb. 9, 2013, [www.economist.com/news/united-states/21571428-politicians-national-ambitions-are-suddenly-willing-challenge-death](http://www.economist.com/news/united-states/21571428-politicians-national-ambitions-are-suddenly-willing-challenge-death) (“[T]he present governor of Arkansas, Mike Beebe, said on January 16th that he would sign a bill repealing the death penalty if legislators sent him one. . . . Martin O’Malley, Maryland’s Democratic governor, . . . has launched a push to abolish his state’s death penalty this year. . . . Governor John Hickenlooper of Colorado[] is reconsidering his support for capital punishment, as state legislators launch a bid for abolition. In libertarian-minded New Hampshire, . . . the Democratic governor, Maggie Hassan, is expected to sign any repeal bill that reaches her, after two predecessors vetoed such bills. Oregon’s John Kitzhaber . . . has suspended them and asked legislators to review a state death penalty he calls “neither fair nor just”. Ohio’s Republican governor, John Kasich, has risked the wrath of voters by commuting four death sentences . . . . [And] Sam Brownback of Kansas, a Republican and devout Catholic, won office despite declaring that execution should be reserved for figures such as Osama bin Laden who might inspire fresh killings from a prison cell.”); Editorial, *Maryland and the Death Penalty*, N.Y. TIMES, Jan. 18, 2013, at A16 (“As a practical matter, Maryland can-  
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lacked an intent to kill. Only four states have actually executed a defendant without intent to kill, and even then, have done so only seven times in the last decade.

The 20 states that permit such an execution are much fewer in number than the 32 states that previously permitted the execution of persons under the age of sixteen, *see Thompson*, 487 U.S. at 829, or of the mentally handicapped, *see Van Tran*, 66 S.W.3d at 801-02. In both instances, the opposition of merely eighteen states and the federal government was sufficient evidence of a national consensus to establish disproportionality.

The argument strengthens when narrowed to the states actually carrying out such executions. For example, in *Atkins*, the Court based its holding in part on the fact that, only five of the 20 states permitting the execution of the mentally handicapped had actually performed such an execution during the previous thirteen years. *See* 536 U.S. at 316. In *Roper*, the Court based its holding in part on the fact that, of the 20 states permitting the execution of juveniles, only six had done so during the previous sixteen years, and only three had done so during the previous decade. *See* 543 U.S. at 565-66. Here, as in *Atkins* and *Roper*, executing a defendant without intent to

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not execute anyone now. . . . [and] has not executed anyone since 2005.”).

kill is permitted in just 20 jurisdictions, and only four states have carried out that sentence in the past decade.

*Second*, and starker still, the total number of defendants actually executed without intent to kill—seven, out of 572 total executions (1.2 percent)—places this practice far beyond the bounds of numerical disproportionality. Regardless of how many states permit this practice, the number of actual executions is far smaller than that in *Coker*, in which the Court held that 72 executions for rape in a 22-year period demonstrated disproportionality. *See Enmund*, 458 U.S. at 795 (explaining the facts of *Coker*).

As a percentage of the total number of executions during this period (1.2 percent of 572), moreover, this ratio is even smaller than the six-out-of-362 (1.6 percent) ratio found unconstitutionally disproportionate in *Enmund*. *See id.* at 794-95. Even measured against only the executions taking place in the 20 jurisdictions that might execute such a defendant (3.6 percent of 192 total), much less the four jurisdictions that actually did (8.5 percent of 82 total), these ratios still represent a percentage of total executions far smaller than *Coker*'s ratio of 72 executions for rape out of roughly 500 total executions (14.4 percent). *See Coker*, 433 U.S. at 596; *Furman*, 408 U.S. at 291-92 & n.40 (Brennan, J., concurring). Courts have used execution ratios to approximate the percentage of similar defendants awaiting execution on death row. *See*,



*e.g.*, *Enmund*, 458 U.S. at 794-95. There is no reason to assume these ratios are any less reliable.

Accordingly, and especially because disproportionality “concerns are all the more pronounced where, as here, the death penalty for this crime has been most infrequent,” *Kennedy*, 554 U.S. at 440, executing a defendant who lacked the intent to kill is an occurrence so rare, random, uncommon, and ultimately, “freakis[h],” *Furman*, 408 U.S. at 310 (Stewart, J., concurring), that it can no longer be considered a constitutionally proportionate punishment.

2. *Tison and Middlebrooks no longer reflect society’s values with respect to proportionate punishment for nonintentional homicide.*

*Tison* and *Middlebrooks*, reflecting the state of law more than two decades ago, permitted executing defendants whose culpability rose merely to the level of reckless indifference. But, as was the case in *Van Tran*, in which this Court revisited and superseded a U.S. Supreme Court holding barely one decade old, things have changed. *See* 66 S.W.3d at 804. Indeed, “there exists today evidence of a substantial societal change in attitude [since *Tison* and *Middlebrooks*,] and . . . that evidence warrants a different conclusion.” *Id.*; *cf. Roper*, 543 U.S. at 555 (“This case requires us to address, for the second time in a decade and a half, whether it is permissible . . . to execute a juvenile . . .”).

Preliminarily, *Tison* has been the subject of criticism and controversy from the beginning.<sup>16</sup> As Justice Brennan explained at length in dissent, the *Tison* majority failed to grapple with the dearth of executions actually carried out against defendants who neither killed nor intended to kill—a factor that had been dispositive in *Enmund*. See *Tison*, 481 U.S. 137 at 176-79 (Brennan, J., dissenting). Indeed, in a belated vindication of this warning’s wisdom, the Tison brothers’ sentences were ultimately reduced on remand to life imprisonment. See *Arizona Inmate Is Executed for 4 Killings*, N.Y. TIMES, Jan. 24, 1997, at A22.

Moreover, *Tison*—and, by extension, *Middlebrooks*—was ostensibly premised on the notion that “some nonintentional murderers may be among the most dangerous and inhumane of all” and thus required the continued availability of the death penalty for those crimes. *Middlebrooks*, 840 S.W.2d at 339 (quoting *Tison*, 481 U.S. at 157). For this proposition, though, the Court pointed to solely (a) torturers and (b) gunmen who purposefully shoot their victims “utterly indifferent to . . . the unintended consequence of killing the victim.” *Id.* (quoting *Tison*, 481 U.S. at 157). Even assuming these hypotheticals are worse than other murders, neither example can

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<sup>16</sup> See, e.g., Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1153 (1990) (discussing immediate aftermath and problems created by *Tison*).

fairly be considered nonintentional—certainly, a jury could infer intent to kill in both cases. *See Bland*, 958 S.W.2d at 660 (noting that a defendant’s use of a deadly weapon permits an inference of premeditation and intent); *Middlebrooks*, 840 S.W.2d at 353 (Reid, C.J., dissenting) (noting that “proof of the method of killing or other evidence [c]ould [be used to] support a finding of intent to kill”); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 10, 16-17 (2005) (recommending limiting the death penalty to only certain types of murders, among them murders involving the infliction of torture). Justice O’Connor’s opinion, therefore, says nothing about the propriety of executing a defendant for a truly nonintentional murder like the one at issue here—one which lacked the protracted depravity of torture or the premeditation of acquiring, loading, and aiming a firearm, and involved nothing more than the incidental death of an elderly man during a seconds-long, unarmed scuffle.

To be sure, on the rare occasions since *Tison* when a nonintentional murderer has been sentenced to death, some courts have repeated the proposition that it would not be disproportionate to execute him. *See e.g., State v. Godsey*, 60 S.W.3d 759, 773-74 (Tenn. 2001) (noting, in passing, that *Tison* would condone executing a defendant lacking intent, but nevertheless holding the imposition of the death penalty in that case to be disproportionate); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993) (relying on

*Middlebrooks* to uphold death sentence despite lack of intent)<sup>17</sup>; *Middlebrooks*, 840 S.W.2d at 339 (holding, in construing *Tison*, that the “absence of intent does not render the death penalty disproportionate”); cf. *Workman v. Mullin*, 342 F.3d 1100, 1103-04 (10th Cir. 2003) (relying on *Tison* to conclude that, regardless of culpability, a death penalty is proportionate so long as the defendant actually committed a murder).

But none of these or other courts have revisited the calculus from *Enmund* and *Tison* to determine the statistical (dis)proportionality of executing a defendant without an intent to kill. Whatever the Court’s proportionality analysis showed when *Tison* was decided, in 1987, the statistics, numbers, and data above make pellucid that now, in 2013, there is a profound national consensus against executing a defendant who did not intend to kill. This practice has become objectively disproportionate, and thus, unconstitutional.

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<sup>17</sup> In *Smith*, Chief Justice Reid and Justice Daughtrey repeated their plea from *Middlebrooks* that the Court recognize the gross disproportionality of executing a defendant who lacked the intent to kill but to no avail. See 857 S.W.2d at 25-26. Incidentally, and similarly to the post-decision events in *Tison*, *Smith*’s death sentence was later vacated on collateral review for ineffective assistance of counsel, and he is no longer on death row. See *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011).

**B. Tennessee standards have also evolved such that the death penalty is rarely imposed for nonintentional homicides.**

Since *Middlebrooks*, Tennessee has rarely imposed the death penalty for nonintentional homicides. *First*, the percentage of defendants on Tennessee’s death row and defendants actually executed who lacked an intent to kill is disproportionately and unconstitutionally miniscule. *Second*, a review of these defendants’ cases underscores the disproportionality of their sentences.

1. *There are so few death sentences and executions in Tennessee for non-intentional homicides as to render the practice unconstitutional.*

Tennessee’s current death row population represents the State’s evolving death penalty standards. Approximately 82 people, including Mr. Pruitt, are currently on death row. *See* App’x B. At least 63 had an undeniable intent to kill (77 percent)—either because they were convicted of premeditated murder, *see* TENN. CODE ANN. § 39-13-202(a)(1), or because the court made a specific finding of intent. *See* App’x B. A further fifteen cases (18 percent), in which an explicit *mens rea* determination was not made, undeniably manifested an intent to kill based on inferences permitted under Tennessee law—for example, by use of a deadly weapon upon an unarmed victim or

threats to kill.<sup>18</sup> *Id.*; see, e.g., *Middlebrooks*, 840 S.W.2d at 353 (Reid, C.J., dissenting) (noting that, even where no explicit *mens rea* finding was made, in most cases “proof of the method of killing or other evidence [c]ould [be used to] support a finding of intent to kill”); *State v. Keough*, 18 S.W.3d 175, 181 (Tenn. 2000) (listing factors that can be used to infer premeditation, including the use of a deadly weapon upon an unarmed victim and threats or declarations of intent to kill made by the defendant).

Thus, after excluding those who had an intent to kill, there are only four defendants on the State’s death row—less than five percent of the 82 total defendants—whose intent to kill is even arguable.<sup>19</sup>

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<sup>18</sup> See Jerica Phillips, *Guilty Verdict Reached in Starr Harris Murder Trial*, WMC-TV, Mar. 30, 2012, [www.wmctv.com/story/17296068/jury-deliberating-in-starr-harris-murder-trial](http://www.wmctv.com/story/17296068/jury-deliberating-in-starr-harris-murder-trial); *Judge Mulls Trial Motion in John Freeland Jr. Case*, JACKSON SUN, July 26, 2011, at A3; *State v. Thomas*, 158 S.W.3d 361 (Tenn. 2005); *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003); *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003); *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002); *State v. Bane*, 57 S.W.3d 411 (Tenn. 2001); *State v. Stout*, 46 S.W.3d 689 (Tenn. 2001); *Strouth v. State*, 999 S.W.2d 759 (Tenn. 1999); *State v. Cauthern*, 967 S.W.2d 726 (Tenn. 1998); *State v. Hines*, 919 S.W.2d 573, (Tenn.1995); *State v. Porterfield*, 746 S.W.2d 441 (Tenn. 1988); *State v. McKay*, 680 S.W.2d 447 (Tenn. 1984).

<sup>19</sup> See *State v. Pruitt*, No. W2009-01255-CCA-R3-DD, 2011 WL 2417856 (Tenn. Crim. App. June 13, 2011); *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000); *Middlebrooks*, 840 S.W.2d at 340; *State v. Irick*, 762 S.W.2d 121, 128-29 (Tenn. 1988). Each is discussed in detail, *infra*.

Of the six people executed in Tennessee since the death penalty was reinstated, in 1978,<sup>20</sup> five had an intent to kill.<sup>21</sup> In fact, since 1960, Tennessee has executed only one man who lacked the intent to kill.<sup>22</sup> *See State v. Workman*, 667 S.W.2d 44 (Tenn. 1984).

Under the teachings of *Kennedy*, *Enmund*, and *Coker*, these numbers are disproportionately low, for at least two reasons. *First*, the number of nonintentional murders on death row is, by itself, persuasive evidence of disproportionality. In *Kennedy*, the U.S. Supreme Court forbade using the death penalty for child rapes not resulting in death based in part on the fact that only two per-

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<sup>20</sup> *See* Tennessee Department of Correction, [www.tn.gov/correction/media/tnexecutions.html](http://www.tn.gov/correction/media/tnexecutions.html) (last visited Feb. 19, 2013).

<sup>21</sup> *See State v. Holton*, 126 S.W.3d 845 (Tenn. 2004) (2007 execution for killing all four of his children with an assault rifle); *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989) (2006 execution for savage rape of victim, who died of internal bleeding sustained from the rape and the accompanying beatings); *State v. Henley*, 774 S.W.2d 908 (Tenn. 1989) (2009 execution for shooting and killing an elderly couple and then setting fire to their house); *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983) (2000 execution for raping, intentionally choking, and stabbing an eight-year-old with a pocket knife, causing her death); *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982) (2009 execution for shooting a child and two other people during an armed robbery).

<sup>22</sup> Amnesty International, “Death Penalty/Legal Concern: Philip Workman (m), white, aged 53”, April 27, 2007, *available at* [www.amnesty.org/en/library/asset/AMR51/080/2007/en/1987673c-969b-4447-b4f3-9a54b8bf3a34/amr510802007en.pdf](http://www.amnesty.org/en/library/asset/AMR51/080/2007/en/1987673c-969b-4447-b4f3-9a54b8bf3a34/amr510802007en.pdf) (explaining the proof that Workman was likely innocent).

sons were currently on Louisiana's death row for that crime (out of 88 total defendants). *See* 554 U.S. at 432-34; DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2008: YEAR-END REPORT [www.deathpenaltyinfo.org/2008YearEnd.pdf](http://www.deathpenaltyinfo.org/2008YearEnd.pdf) (listing 88 defendants on Louisiana's death row at the beginning of 2008). Similarly, the *Enmund* Court considered it to be persuasive evidence of disproportionality that, out of 46 felony-murder defendants, Florida's death row contained only one who lacked intent to kill. *See* 458 U.S. at 795. And, presciently, former-Chief Justice Reid and Justice Daughtrey, in dissent in *Middlebrooks*, found it persuasive that all but two of the 28 Tennessee defendants on death row for felony murder possessed an intent to kill. *See* 840 S.W.2d at 353-54 (Reid, C.J., dissenting); *see also Coker*, 433 U.S. at 596-97 (noting that the presence of only five rapists on death row demonstrated disproportionality).

*Second*, a review of actual executions underscores Tennessee's reluctance to impose the death sentence absent an intent to kill. That Tennessee executed solely one such defendant in over 50 years demonstrates the manifest rarity of such a punishment. *See Kennedy*, 554 U.S. at 434 (finding it persuasive evidence of disproportionality that only one person had been executed for rape since 1964).

At bottom, the four defendants on Tennessee's death row who lacked intent to kill (along with the sole such defendant actually executed) represent a disproportionately



small percentage of the 82 other murderers awaiting execution. Accordingly, death sentences for nonintentional homicides no longer pass constitutional muster.

2. *Reviewing Tennessee defendants sentenced to death for nonintentional homicides demonstrates the gross disproportionality of making such defendants death-eligible.*

The extreme infrequency of sentences and executions of defendants lacking intent to kill, alone, establishes their constitutional impropriety. But a survey of the cases leading to these executions further underscores the gross disproportionality that is fostered when states allow the death penalty for nonintentional homicides.

Of the nonintentional murderers currently on death row, the first, Billy Ray Irick, was convicted of felony murder and sentenced to death for the rape and subsequent death of a seven-year-old. *See Irick*, 762 S.W.2d at 128-29. The state never proved intent to kill, nor was one evident from the facts, given Mr. Irick's severe mental illness, intoxication, and means of death (accidental suffocation). But, in affirming his death sentence, this Court explained that a felony-murder death sentence does not require intent and the underlying rape supplied the requisite *mens rea* in any event. *Id.*<sup>23</sup>

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<sup>23</sup> Recent testimony from a doctor demonstrates that, due to Mr. Irick's substantial mental impairment, he would have been unable to form an intent to kill at the time of the offense. *See Irick v. State*, No.

(continued . . .)

Donald Middlebrooks, the subject of the eponymous 1992 case, *see Middlebrooks*, 840 S.W.2d 317, was found guilty of first-degree felony murder and aggravated kidnapping (but not guilty of premeditated first degree murder) for his admittedly minor accomplice role in the beating death of a young man. On appeal, with its vociferous dissents and resentencing, this Court affirmed his sentence on the basis that a defendant need only have had a reckless indifference to human life to pass muster under proportionality review.

Next, Tyrone Chalmers confessed to shooting a victim six times during a robbery, but contended that the gun fired accidentally when the victim grabbed it aggressively and pulled it toward his body. *See Chalmers*, 28 S.W.3d 913. Although intent might be inferred from these circumstances, the jury credited Mr. Chalmers's confession that his gun "went off" accidentally, *id. at* 916, and found a *mens rea* of recklessness, which was nonetheless sufficient to support his death sentence for felony-murder.

The fourth defendant on death row for committing a nonintentional homicide is the Defendant here, Mr. Corinio Pruitt. Although accounts differ, the prosecution proved at trial that Mr. Pruitt pushed Mr. Guidroz into the car, hit him, threw him onto the pavement, and drove

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(continued . . .)

E-2010-02385-CCA-R3-PD, No. E-2010-02385-CCA-R3-PD, 2011 WL 1991671 (Tenn. Crim. App. May 23, 2011) (May 23, 2011).

away. *See Pruitt*, 2011 WL 2417856, at \*3-4. Unlike most of the defendants currently on death row in Tennessee, nothing in the facts found by the jury indicated that Mr. Pruitt intended to do more than rob the victim. Mr. Pruitt did not use a firearm or any form of deadly weapon, nor did he even carry a weapon. Additionally, the victim was 79 years old and suffered from several medical conditions, including severe coronary atherosclerosis, osteoporosis, and coagulopathy, that contributed to his age-related frailty. *See id.* at \*5.

Finally, the single Tennessee execution of a defendant without intent bears mention. Philip Workman was sentenced to death for felony murder. *See Workman*, 667 S.W.2d 44. After robbing a restaurant at gunpoint, police surrounded Workman. Gunfire erupted, one of the officers was shot and killed, and Workman escaped. The State argued, and the jury found, that Workman had accidentally fired the fatal shot when he was hit in the head with a flashlight after he had surrendered. But other evidence showed that the other officers may have killed the victim when they fired their weapons. *See Workman v. State*, 868 S.W.2d 705, 709 (Tenn. 1993). Years later, the State's key eyewitness recanted his testimony, *State v. Workman*, 111 S.W.3d 10, 14-15 (Tenn. 2002), and a forensic pathologist testified that the bullet that killed the victim was not necessarily from Workman's firearm, *id.* at 15-16. Despite this new evidence, the court affirmed the judgment of the trial court, and Workman was executed in 2007.

The circumstances of these five cases highlight the proportionality problems made possible by not requiring intent to kill as a prerequisite for imposing the death penalty.<sup>24</sup> Indeed, orders of magnitude separate defendants like Mr. Pruitt—who, unarmed, intended nothing more than to steal a car—from other murderers who have been sentenced to death in Tennessee, like Daryl Holton, who executed his four children with an assault rifle after preparing pipe bombs for use against his estranged wife, *see State v. Holton*, 126 S.W.3d 845 (Tenn. 2004); or Cecil Johnson, who, while robbing a convenience store, shot the owner, intentionally killed the owner’s twelve-year-old son, shot and killed two more bystanders waiting outside in a taxicab, then later killed a fellow inmate, *see State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982). Imposing an intent-to-kill threshold would prevent the facial and gross disproportionality caused by imposing an equal punishment on Mr. Pruitt as on messieurs Holton and Johnson.

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In sum, Tennessee’s own death penalty practices—and, in particular, the rarity with which nonintentional murderers receive the death penalty—demonstrates a

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<sup>24</sup> It should be noted that other defendants who have been sentenced to death for nonintentional murders have later had their death sentences overturned, and are no longer on death row. *See, e.g., Smith v. State*, 357 S.W.3d 322 (Tenn. 2011); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993).

statewide consensus that tracks the national consensus against punishing nonintentional murderers with death. Therefore, death sentences for nonintentional homicides are no longer constitutional under the federal or State Constitutions.

**C. The international community roundly condemns the death penalty where the defendant lacks an intent to kill.**

Finally, the international community roundly condemns the death penalty where the defendant lacks an intent to kill. *First*, most of the international community is opposed to the death penalty altogether. By the end of 2010, the “global trend towards abolition of the death penalty could not have been clearer,” with fewer and fewer countries maintaining the death penalty and those that do performing fewer executions. AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2010, at 6 (2011) (“AMNESTY”). The Death Penalty Information Center reports that 141 countries have abolished the death penalty in law or practice while just 57 retain it. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFORMATION CENTER, [www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries#de%20facto](http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries#de%20facto) (last visited Mar. 1, 2013) (“DPIC Countries List”).

*Second*, of the fifty-seven countries that retain the death penalty, most have laws completely incongruous with the laws of Tennessee. While countries like China, Iran, Nigeria, North Korea, Somalia, and Sudan do not

require an intent to kill before executing a defendant, their laws also permit the death penalty for things that are not crimes in Tennessee, such as adultery, homosexuality, and political disagreement. *See* AMNESTY at 3 (“In numerous countries death sentences are handed down for offences that are not violent and do not meet the threshold of ‘most serious crimes’—such as economic crimes, sorcery, apostasy and drug-related offences or sexual relations between consenting adults.”); *see also* DPIC Countries List (listing China, Iran, Nigeria, North Korea, Somalia, and Sudan among the countries that retain the death penalty). Tennessee has little in common with countries that execute adulteresses via stoning, and this Court should not be influenced by their laws. *See* Mike Wooldridge, “Iran’s Grim History of Death By Stoning,” B.B.C. NEWS, July 9, 2010, [www.bbc.co.uk/news/10579121](http://www.bbc.co.uk/news/10579121) (explaining that Iran and Somalia have recently executed adulteresses by stoning and noting that Iran did so fifteen times in 1995 alone).

*Third*, of the countries that share the same common-law background as Tennessee, where the death penalty is retained at all, most nations do not impose it when there is no intent to kill. Peer common-law countries such as Australia, Canada, the United Kingdom, New Zealand, and South Africa do not permit the death penalty at all. *See* DPIC Countries List. Of those common-law countries that retain it, most require intent or have not sentenced anyone to death in recent times. *See, e.g.*, BAHAMAS PEN.

CODE, 84 STATUTE LAW OF BAHAMAS § 290 (“Whoever *intentionally* causes the death of another person by any unlawful harm is guilty of murder.” (emphasis added)); AMNESTY at 5 (showing that common law jurisdictions such as Antigua and Barbuda, Belize, Dominica, Saint Kitts and Nevis, and Saint Vincent and the Grenadines neither executed nor sentenced to death anyone in 2010).

The only common-law jurisdictions *Amici* have identified that allow the death penalty without intent are those that base their felony murder rule on the India Penal Code of 1860, and even those countries employ a very high standard. *See* INDIA PEN. CODE § 300(d) (defining murder to include if “the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death”); BANGLADESH PEN. CODE § 300(d) (same); SINGAPORE PEN. CODE §300(d) (same); PAKISTAN PEN. CODE § 300 (defining murder as “doing an act . . . with the knowledge that his act is so imminently dangerous that it must in all probability cause death”). With the weight of international opinion decidedly against the death penalty when there is no intent to kill, Tennessee should not maintain an outlier status solely because of four common-law countries that follow an ante-bellum penal code designed to maintain order in the British Far East. *See Indian Courts, About the Indian Penal Code*, [www.ipc.in/index.html](http://www.ipc.in/index.html) (last viewed Feb. 21, 2013) (noting that India is a diverse country “such that there are dis-

putes and clashes of interest between different states, ethnic to particular cultural consortiums” and that the India Penal Code “is known to have originated from a British legislation account in its colonial conquests, dating back to the year 1860”).

**II. Imposing a Death Sentence on a Defendant Who Never Formed the Intent to Kill Violates the Proportionality Principle of the Federal and Tennessee Constitutions Because Executing a Less-Than-Fully-Culpable Defendant Serves Limited Penological Purposes**

Independent from its objective disproportionality, punishing nonintentional homicides with death is also subjectively disproportionate, as that punishment fails to serve the penological purposes of the death penalty.

“[C]apital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.” *Kennedy*, 554 U.S. at 441. Here, imposing death penalty for one who lacked intent to cause death fails both social purposes, and thus, is excessive and unconstitutional.

**A. Capital punishment fails to deter nonintentional murder.**

It is unconstitutional to impose a sentence of death where it “does not fulfill” the “distinct social purpose[] served by the death penalty” of “deter[ing] capital crimes.” *Kennedy*, 554 U.S. at 441; *see also Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 173, 183, 187. For this



reason alone, executing Mr. Pruitt is constitutionally impermissible. *First*, as jurists and commentators have explained, the threat of execution cannot deter homicide where the perpetrator lacks the intent to commit homicide. *See, e.g., Atkins*, 536 U.S. at 319-320. *Second*, unarmed robbery leads to homicide so infrequently that the threat of a death sentence cannot deter the commission of the underlying crime. *See, e.g., Enmund*, 458 U.S. at 798-800. At the same time, excluding *nonintentional* homicide from the operation of the death penalty would not diminish the potential deterrence force of a death sentence in the context of *intentional* homicides. *See, e.g., Atkins*, 536 U.S. at 320.

Deterrence theory holds that the threat of punishment may discourage criminal activity by impacting the cost-benefit analysis in which a would-be criminal engages prior to performing a prohibited activity. *See, e.g., Roper*, 543 U.S. at 561-62; *Thompson*, 487 U.S. at 837. In other words, “to justify [a] penalty on grounds of deterrence” one must “[a]ssum[e] the offender behaves in a rational way” and avoids illegal conduct under circumstances where the risk of punishment overwhelms the potential for reward. *Kennedy*, 554 U.S. at 445.

Setting aside the general question of whether the death penalty is an efficacious deterrent under any circumstances, *see, e.g., Furman*, 408 U.S. at 301-02 (Brennan, J., concurring); Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates? The Views*

of *Leading Criminologists*, 99 NW. J. CRIM. L. & CRIMINOLOGY 489, 504 (2009), it is elementary that the threat of execution cannot deter *nonintentional* homicide. That is, when one lacks, as Mr. Pruitt lacked, the intent to take another life, there simply is no opportunity to undertake a cost-benefit analysis prior to acting.

This truism has been emphasized time and again by the United States Supreme Court. *See, e.g., Atkins*, 536 U.S. at 319-20 (“[C]apital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation” (quotations omitted)); *Enmund*, 458 U.S. at 798-99 (“We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken”); *Gregg*, 428 U.S. at 185-86 (“We may nevertheless assume safely” that “the threat of death has little or no deterrent effect” for murders committed without premeditation).

Unsurprisingly, myriad state supreme courts and legal commentators are in accord. *See, e.g., State v. Allen*, 687 S.E.2d 21, 24 (S.C. 2009) (“With respect to deterrence, *i.e.*, the interest in preventing capital crimes by prospective offenders, it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.” (quotations omitted)); *Vernon Kills On Top v. State*, 928 P.2d 182, 206 (Mont. 1996) (examining *Middlebrooks* and “conclud[ing] that imposition of the death penalty without a requirement

that there have been some intent to kill on the part of the defendant would serve no purpose of deterrence” because “[i]f a person has no intent to kill from the beginning, then the fact that he might suffer the imposition of a death penalty cannot enter the cold calculus that precedes the decision to act” (quotations omitted); Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1410 (2011) (“It is not possible to deter a person from an action he or she does not intend to commit.”); Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 780 & n.103 (1999) (explaining that “[u]nintended consequences and accidents are simply not deterrable” and noting that “[m]odern commentators uniformly denounce the [felony murder] rule and its illusory deterrence value”); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine At Constitutional Crossroads*, 70 CORNELL L. REV. 446, 451 (1985) (“Quite simply, how does one deter an unintended act?”).

A second reason that a death sentence serves no deterrent function under the relevant circumstances is that felonies—especially unarmed robberies—result in death so infrequently as to render the threat of execution for a potential homicide too remote to discourage the underlying felony. *See, e.g., Enmund*, 458 U.S. at 799 (“[C]ompetent observers have concluded that there is no basis in experience for the notion that death so frequently

occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered a justifiable deterrent to the felony itself.”); *Tison*, 481 U.S. at 148-49 (“[K]illing only rarely occur[s] during the course of robberies.”).

At the time of the Court’s observation in *Enmund*, 0.43 percent of robberies resulted in homicide (*i.e.*, only *four* times in 1000). *Enmund*, 458 U.S. 799-800. Thus, a rational potential robber would balance the potential for lucre against the exceedingly slim possibility of death occurring during that robbery and, accordingly, be undeterred by the threat of execution. *Id.* With the passage of time, the remote possibility expounded upon by the *Enmund* Court has become practically illusory. In 2010, the most recent year for which such data are available, 0.21 percent of robberies resulted in homicide (*i.e.*, only *two* times in 1000). *See, e.g., Dickens v. Ryan*, 688 F.3d 1054, 1083 (9th Cir. 2012) (Reinhardt, J., dissenting) (citing UNIFORM CRIME REPORT, 2010, CRIME IN THE UNITED STATES, tbl. 1, [www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s-2010/tables/10tbl01.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s-2010/tables/10tbl01.xls)).

Similarly, because a threatened punishment can only deter if it is commonly administered, the exceedingly rare execution of one who has committed nonintentional homicide, *see supra* Section I, has a very limited deterrent value. *See, e.g., Enmund*, 458 U.S. at 800 (noting that fact that the “death penalty is rarely imposed” under circumstances of the case “further attenuates its possible utility

as an effective deterrence”); *Tison*, 481 U.S. at 149 (same); *Spaziano v. Florida*, 468 U.S. 447, 480 (1984) (Stevens, J. dissenting) (same); *Lockett v. Ohio*, 438 U.S. 621, 625 (1978) (White, J. concurring) (same); Trigilio & Casadio, at 1410 (“[N]o penological purpose can be served under such conditions because ‘common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct.’” (quoting *Furman*, 408 U.S. at 312 (White, J., concurring))); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 981-83 (2008) (“Empirical investigations indicate that increases in the certainty of punishment are more effective deterrents than increases in the severity of punishment” as a result of “widespread psychological disposition to discount low probability dangers.”). Of course, *unarmed* robberies, like Mr. Pruitt’s, logically result in homicide and subsequent death sentences even less frequently, further belying any notion that the attenuated threat of death might deter a felony.

Accordingly, because it lacks a penological justification in deterrence, executing defendants who lack intent to kill consists of “nothing more than the purposeless and needless imposition of pain and suffering,” and thus, violates the Eighth Amendment and Article I, § 16 of the Tennessee Constitution. *Thompson*, 487 U.S. at 838 (quotations omitted); *see also Kennedy*, 554 U.S. at 441. Moreover, excluding *nonintentional* homicide from the ambit of the death penalty would not diminish any potential deter-

rence value in other situations. *See, e.g., Atkins*, 534 U.S. at 320 (holding that exempting mentally handicapped from death sentences will not “lessen the deterrent effect of the death penalty” because those not mentally handicapped “are unprotected by the exemption and will continue to face the threat of execution”); *Thompson*, 487 U.S. at 837-38 (“[E]xcluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment [as to older offenders].”). Thus, reversing Mr. Pruitt’s death sentence would still be consistent with a punishment framework that seeks to employ the death penalty to deter, for example, *intentional* homicides committed during the course of a robbery or other crime. *See, e.g., Atkins*, 534 U.S. at 320; *Thompson*, 487 U.S. at 837-38.

**B. Using the death penalty to punish both intentional and nonintentional homicides alike does not reflect society’s retributive interests.**

Finally, executing defendants for nonintentional homicides fails the second “distinct social purpose[] served by the death penalty” of exacting measured retribution against the defendant for the crime committed. 554 U.S. at 441. Whether a sentence of death “reflects society’s and the victim’s interests in seeing that the offender is repaid for the hurt he caused,” *id.* at 442, “very much depends on the degree of [the defendant’s] culpability—what [his] intentions, expectations, and actions were.” *Enmund*, 458

U.S. at 800; *see also Van Tran*, 66 S.W.3d at 805-06 (construing U.S. Supreme Court retributivist precepts).

Indeed, “American criminal law has long considered a defendant’s intention—and therefore his moral guilt—to be critical to ‘the degree of his criminal culpability,’ and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.” *Enmund*, 458 U.S. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)); *see Atkins*, 536 U.S. at 319 (“[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender.”).

The rationale for this principle is two-fold. A punishment must both adequately exact retribution against the defendant in the instant case for the crime committed, *see Enmund*, 458 U.S. at 801 (“[R]etributi[on] [means] ensuring that the criminal gets his just deserts.”), but, in so doing, the punishment must not cheapen the retributive power of the death sentence, which must be “reserved for the worst of crimes.” *Kennedy*, 554 U.S. at 411; *see also Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (“[T]he death penalty must be reserved for ‘the worst of the worst.’”). To preserve its potency, “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” *Roper*, 543 U.S. at 568 (quotation omitted). Otherwise, “[r]etribution is not proportional if the

law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . ." *Id.* at 571.

Because of the importance of tailoring a punishment to the culpability underlying the crime, a punishment that fails to distinguish between intentional and nonintentional acts is not appropriately retributive. See *Enmund*, 458 U.S. 800-01; see also *Roper*, 543 U.S. at 568-70 (noting that "irresponsible conduct is not as morally reprehensible" (quotations omitted)). As the *Enmund* Court explained, for instance, statutes criminalizing nonintentional acts, such as addiction and accidental falsification of records, have been struck down under the Eighth Amendment on retributivist grounds. See *Robinson v. California*, 370 U.S. 660, 667 (1962); *Weems v. United States*, 217 U.S. 349, 363 (1910).

The Court has followed this approach in the death penalty context, too. In *Godfrey v. Georgia*, the Court reversed a death sentence stemming from an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." 446 U.S. 420, 433 (1980). In *Roper*, the Court foreclosed death as a punishment for juveniles because of their "underdeveloped sense of responsibility" and "impetuous and ill-considered actions and decisions." 543 U.S. at 569. And in *Atkins*, the Court forbade the imposition of the death penalty against the mentally handicapped because, "[i]f the culpability of the average murderer is insufficient to justify the most extreme



sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” 536 U.S. at 319.

Here, it cannot proportionately satisfy retributive aims to execute nonintentional murderers, as such defendants are not on equal footing with those who commit intentional murder. *See, e.g.*, *Mandatory Justice* at 18-23 (illustrating the absurd results that follow from not requiring an intent to kill before sentencing a defendant to death, and noting that even “[t]he panicked killing is simply not as culpable as the cold-blooded, premeditated kind.”). To be sure, defendants such as Mr. Pruitt have acted “irresponsibl[y],” *Roper*, 543 U.S. at 570, and “impetuous[ly],” *id.* at 569. But such behavior does not reflect “a consciousness materially more depraved than that of any person guilty of murder,” *Godfrey*, 446 U.S. at 433, especially as compared to an *intentional* murderer. Indeed, though culpable for a tragic act, such defendants have not acted in the *most* culpable manner.

Accordingly, it makes little sense to punish *nonintentional* and intentional murders alike with the same, severest form of punishment. *Cf. Furman*, 408 U.S. at 287 (Brennan, J., concurring) (“Death is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.”). As the *Atkins* Court explained, “[i]f the culpability of the average murderer is insufficient to justify the most

extreme sanction available to the State, the lesser culpability of the [nonintentional] offender surely does not merit that form of retribution.” 536 U.S. at 319; *see also Kennedy*, 554 U.S. at 439 (noting that only 2.2 percent of convicted first-degree murderers are sentenced to death).

In sum, because imposing the death sentence for nonintentional murder does not proportionately satisfy society’s interests in either deterrence or retribution, such a sentence can no longer be considered constitutional.

## CONCLUSION

For the foregoing reasons, this Court should acknowledge that executing a defendant who lacked intent to kill is unconstitutionally disproportionate, as it is both contrary to society's values and unable to fulfill the deterrent or retributive purposes of the death penalty. The death sentence against Mr. Pruitt should be vacated.

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March 4, 2013

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## ADDENDUM OF CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST., amend. VIII.

\* \* \* \* \*

Article One, Section 16 of the Tennessee Constitution provides:

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

TENN. CONST., art. I, § 16.

## APPENDIX A<sup>1</sup>

### List of Executions by State, 2002-2012<sup>2</sup>

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Christopher Johnson	AL*	10/20/2011
Derrick Mason	AL*	9/22/2011
Eddie Powell	AL*	6/16/2011
Jason Williams	AL*	5/19/2011
William Boyd	AL*	3/31/2011
Leroy White	AL*	1/13/2011
Phillip Hallford	AL*	11/4/2010
Holly Wood	AL*	9/9/2010
Michael Land	AL*	8/12/2010
John Parker	AL*	6/10/2010
Thomas Whisenant	AL*	5/27/2010
Max Payne	AL*	10/8/2009
Jack Trawick	AL*	6/11/2009

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<sup>1</sup> Source: *Searchable Execution Database*, DEATH PENALTY INFORMATION CENTER, [www.deathpenaltyinfo.org/views-executions](http://www.deathpenaltyinfo.org/views-executions). These data were gathered by generating a table including all executions carried out in the United States between 2002 and 2012.

<sup>2</sup> \* denotes jurisdictions that require intent to kill as a prerequisite for the death penalty;

† denotes jurisdictions that require intent to kill for most impositions of the death penalty, including for felony murder;

‡ denotes jurisdictions that, though permitting executions absent an intent to kill, have not executed such a defendant between 2002 and 2012;

° denotes jurisdictions that have abolished the death penalty;

# denotes a defendant who lacked an intent to kill (e.g., “# Thomas West”). Otherwise, for all jurisdictions that might permit such executions, *Amici* have reviewed the facts of each executed defendant’s case to verify explicit or inferred intent to kill.

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Willie McNair	AL*	5/14/2009
Jimmy Dill	AL*	4/16/2009
Danny Bradley	AL*	2/12/2009
James Callahan	AL*	1/15/2009
Luther Williams	AL*	8/23/2007
Darrell Grayson	AL*	7/26/2007
Aaron Jones	AL*	5/3/2007
Larry Hutcherson	AL*	10/26/2006
John Peoples	AL*	9/22/2005
George Sibley	AL*	8/4/2005
Jerry Henderson	AL*	6/2/2005
Mario Centobie	AL*	4/28/2005
David Hocker	AL*	9/30/2004
James Hubbard	AL*	8/5/2004
Tommy Fortenberry	AL*	8/7/2003
Gary Brown	AL*	4/24/2003
Michael Thompson	AL*	3/13/2003
Anthony Johnson	AL*	12/12/2002
Lynda Block	AL*	5/10/2002
Eric Nance	AR‡	11/28/2005
Charles Singleton	AR‡	1/6/2004
Riley Noel	AR‡	7/9/2003
Richard Stokley	AZ	12/5/2012
Daniel Cook	AZ	8/7/2012
Samuel Lopez	AZ	6/26/2012
Thomas Kemp	AZ	4/24/2012
Robert Towery	AZ	3/8/2012
Robert Moormann	AZ	2/29/2012
# Thomas West	AZ	7/19/2011
Richard Bible	AZ	6/30/2011
# Donald Beaty	AZ	5/25/2011
Eric King	AZ	3/29/2011
Jeffrey Landrigan	AZ	10/26/2010
Robert Comer	AZ	5/22/2007
Clarence Allen	CA‡	1/17/2006
Stanley Williams	CA‡	12/13/2005
Donald Beardslee	CA‡	1/19/2005

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Stephen Anderson	CA‡	1/29/2002
Michael Ross	CT <sup>0</sup>	5/13/2005
Shannon Johnson	DE‡	4/19/2012
Robert Jackson	DE‡	7/29/2011
Brian Steckel	DE‡	11/4/2005
Louis Jones	FE‡	3/18/2003
Manuel Pardo	FL‡	12/11/2012
David Gore	FL‡	4/11/2012
Robert Waterhouse	FL‡	2/15/2012
Oba Chandler	FL‡	11/15/2011
Manuel Valle	FL‡	9/28/2011
Martin Grossman	FL‡	2/16/2010
John Marek	FL‡	8/19/2009
Wayne Tompkins	FL‡	2/11/2009
Richard Henyard	FL‡	9/23/2008
Mark Schwab	FL‡	7/1/2008
Angel Diaz	FL‡	12/13/2006
Danny Rolling	FL‡	10/25/2006
Arthur Rutherford	FL‡	10/18/2006
Clarence Hill	FL‡	9/20/2006
Glen Ocha	FL‡	4/5/2005
John Blackwelder	FL‡	5/26/2004
Johnny Robinson	FL‡	2/5/2004
Paul Hill	FL‡	9/3/2003
Newton Slawson	FL‡	5/16/2003
Amos King	FL‡	2/26/2003
Linroy Bottoson	FL‡	12/9/2002
Aileen Wournos	FL‡	10/9/2002
Rigoberto Sanchez-Velasco	FL‡	10/2/2002
Troy Davis	GA	9/21/2011
Andrew DeYoung	GA	7/21/2011
# Roy Blankenship	GA	6/23/2011
Emmanuel Hammond	GA	1/25/2011
Brandon Rhode	GA	9/27/2010
Melbert Ford	GA	6/9/2010
Mark McClain	GA	10/21/2009

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
William Mize	GA	4/29/2009
Robert Newland	GA	3/10/2009
Jack Alderman	GA	9/16/2008
Curtis Osborne	GA	6/4/2008
William Lynd	GA	5/6/2008
John Hightower	GA	6/25/2007
Robert Conklin	GA	7/12/2005
Stephen Mobley	GA	3/1/2005
Timothy Carr	GA	1/25/2005
Eddie Crawford	GA	7/19/2004
Robert Hicks	GA	7/1/2004
James Brown	GA	11/4/2003
Carl Isaacs	GA	5/6/2003
Larry Moon	GA	3/25/2003
William Putman	GA	11/13/2002
Wallace Fugate	GA	8/16/2002
Tracy Housel	GA	3/12/2002
Ronald Spivey	GA	1/24/2002
Richard Leavitt	ID‡	6/11/2012
Paul Rhoades	ID‡	11/18/2011
Matthew Wrinkles	IN‡	12/11/2009
Michael Lambert	IN‡	6/14/2007
David Woods	IN‡	5/4/2007
Marvin Bieghler	IN‡	1/27/2006
Alan Matheney	IN‡	9/28/2005
Kevin Conner	IN‡	7/27/2005
Gregory Johnson	IN‡	5/25/2005
Bill Benefiel	IN‡	4/21/2005
Donald Wallace	IN‡	3/10/2005
Joseph Trueblood	IN‡	6/13/2003
Kevin Hough	IN‡	5/2/2003
Marco Chapman	KY‡	11/21/2008
Gerald Bordelon	LA‡	1/7/2010
Lesile Martin	LA‡	5/10/2002
Wesley Baker	MD‡	12/6/2005
Steven Oken	MD‡	6/17/2004
Martin Link	MO*	2/9/2011



<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Dennis Skillicorn	MO*	5/20/2009
Marlin Gray	MO*	10/26/2005
Timothy Johnston	MO*	8/31/2005
Vernon Brown	MO*	5/18/2005
Donald Jones	MO*	4/27/2005
Stanley Hall	MO*	3/16/2005
John Smith	MO*	10/29/2003
Kenneth Kenley	MO*	2/5/2003
William Jones	MO*	11/20/2002
Daniel Basile	MO*	8/14/2002
Paul Kreutzer	MO*	4/10/2002
Jeffrey Tokar	MO*	3/6/2002
Michael Owsley	MO*	2/6/2002
James Johnson	MO*	1/9/2002
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Gary Simmons	MS‡	6/19/2012
Jan Brawner	MS‡	6/11/2012
Henry Jackson	MS‡	6/4/2012
William Mitchell	MS‡	3/22/2012
Larry Puckett	MS‡	3/20/2012
Edwin Turner	MS‡	2/8/2012
Rodney Gray	MS‡	5/17/2011
Benny Stevens	MS‡	5/10/2011
Joseph Burns	MS‡	7/21/2010
Gerald Holland	MS‡	5/20/2010
Paul Woodward	MS‡	5/19/2010
Dale Bishop	MS‡	7/23/2008
Earl Berry	MS‡	5/21/2008
Bobby Wilcher	MS‡	10/18/2006
John Nixon	MS‡	12/14/2005
Jessie Williams	MS‡	12/11/2002
Tracy Hansen	MS‡	7/17/2002
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David Dawson	MT‡	8/11/2006
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Samuel Flippen	NC†	8/18/2006
Willie Brown	NC†	4/20/2006
Patrick Moody	NC†	3/17/2006
Perrie Simpson	NC†	1/20/2006
Kenneth Boyd	NC†	12/2/2005

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Elias Syriani	NC†	11/18/2005
Steven McHone	NC†	11/11/2005
Earl Richmond	NC†	5/6/2005
William Powell	NC†	3/11/2005
Frank Chandler	NC†	11/12/2004
Charles Roache	NC†	10/22/2004
Sammy Perkins	NC†	10/8/2004
Raymond Rowsey	NC†	1/9/2004
Robbie Lyons	NC†	12/5/2003
John Daniels	NC†	11/14/2003
Joseph Keel	NC†	11/7/2003
Edward Hartman	NC†	10/3/2003
Joseph Bates	NC†	9/26/2003
Henry Hunt	NC†	9/12/2003
William Jones	NC†	8/22/2003
Desmond Carter	NC†	12/10/2002
Ernest Basden	NC†	12/6/2002
Daryl Mack	NV‡	4/26/2006
Terry Dennis	NV‡	8/12/2004
Lawrence Colwell	NV‡	3/26/2004
Brett Hartman	OH*	11/13/2012
Donald Palmer	OH*	9/19/2012
Mark Wiles	OH*	4/17/2012
Reginald Brooks	OH*	11/15/2011
Daniel Bedford	OH*	5/17/2011
Clarence Carter	OH*	4/12/2011
Johnnie Baston	OH*	3/10/2011
Frank Spisak	OH*	2/17/2011
Michael Benge	OH*	10/6/2010
Roderick Davie	OH*	8/10/2010
William Garner	OH*	7/13/2010
Michael Beuke	OH*	5/13/2010
Darryl Durr	OH*	4/20/2010
Lawrence Reynolds	OH*	3/16/2010
Mark Brown	OH*	2/4/2010
Vernon Smith	OH*	1/7/2010
Kenneth Biros	OH*	12/8/2009

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Jason Getsy	OH*	8/18/2009
Marvallous Keene	OH*	7/21/2009
John Fautenberry	OH*	7/14/2009
Daniel Wilson	OH*	6/3/2009
Gregory Bryant-Bey	OH*	11/19/2008
Richard Cooley	OH*	10/14/2008
Christopher Newton	OH*	5/24/2007
James Filiaggi	OH*	4/24/2007
Jeffrey Lundgren	OH*	10/24/2006
Darrell Ferguson	OH*	8/8/2006
Rocky Barton	OH*	7/12/2006
Joseph Clark	OH*	5/2/2006
Glenn Benner	OH*	2/7/2006
John Hicks	OH*	11/29/2005
William Williams	OH*	10/25/2005
Herman Ashworth	OH*	9/27/2005
William Smith	OH*	3/8/2005
Adremy Dennis	OH*	10/13/2004
Scott Mink	OH*	7/20/2004
Stephen Vrabel	OH*	7/14/2004
William Zuern	OH*	6/8/2004
William Wickline	OH*	3/30/2004
John Roe	OH*	2/3/2004
Lewis Williams	OH*	1/14/2004
Ernest Martin	OH*	6/18/2003
David Brewer	OH*	4/29/2003
Richard Fox	OH*	2/12/2003
Robert Buell	OH*	9/25/2002
Alton Coleman	OH*	4/26/2002
John Byrd	OH*	2/19/2002
George Ochoa	OK	12/4/2012
Garry Allen	OK	11/6/2012
Michael Hooper	OK	8/13/2012
Michael Selsor	OK	4/30/2012
Timothy Stemple	OK	3/15/2012
Gary Welch	OK	1/5/2012
Jeffrey Matthews	OK	1/11/2011

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Billy Alverson	OK	1/6/2011
John Duty	OK	12/16/2010
Donald Wackerly	OK	10/14/2010
Julius Young	OK	1/14/2010
Michael DeLozier	OK	7/9/2009
# Donald Gilson	OK	5/14/2009
Darwin Brown	OK	1/22/2009
Jessie Cummings	OK	9/25/2008
Terry Short	OK	6/17/2008
Frank Welch	OK	8/21/2007
Jimmy Bland	OK	6/26/2007
Corey Hamilton	OK	1/9/2007
James Malicoat	OK	8/31/2006
Eric Patton	OK	8/29/2006
John Boltz	OK	6/1/2006
Richard Thornburg	OK	4/18/2006
Kenneth Turrentine	OK	8/11/2005
Michael Pennington	OK	7/19/2005
George Miller	OK	5/12/2005
Jimmy Slaughter	OK	3/15/2005
# Windel Workman	OK	8/26/2004
Robert Bryan	OK	6/8/2004
Hung Thanh Le	OK	3/23/2004
David Brown	OK	3/9/2004
Norman Cleary	OK	2/17/2004
Tyrone Darks	OK	1/13/2004
Harold McElmurry	OK	7/29/2003
Jackie Willingham	OK	7/24/2003
Bryan Toles	OK	7/22/2003
Robert Duckett	OK	7/8/2003
Lewis Gilbert	OK	7/1/2003
Kenneth Charm	OK	6/5/2003
Robert Knighton	OK	5/28/2003
Larry Jackson	OK	4/17/2003
Don Hawkins	OK	4/8/2003
Scott Hain	OK	4/3/2003
John Hooker	OK	3/25/2003

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Walanzo Robinson	OK	3/18/2003
# Bobby Fields	OK	2/13/2003
Daniel Revilla	OK	1/16/2003
Ernest Carter	OK	12/17/2002
Jay Neill	OK	12/12/2002
Jerry McCracken	OK	12/10/2002
Earl Frederick	OK	7/30/2002
Randall Cannon	OK	7/23/2002
David Woodruff	OK	1/31/2002
John Romano	OK	1/29/2002
Jeffrey Motts	SC‡	5/6/2011
Thomas Ivey	SC‡	5/8/2009
Luke Williams	SC‡	2/20/2009
Joseph Gardner	SC‡	12/5/2008
James Reed	SC‡	6/20/2008
David Hill	SC‡	6/6/2008
Calvin Shuler	SC‡	6/22/2007
William Downs	SC‡	7/14/2006
Shawn Humphries	SC‡	12/2/2005
Arthur Wise	SC‡	11/4/2005
Richard Longworth	SC‡	4/15/2005
James Tucker	SC‡	5/28/2004
Jason Byram	SC‡	4/23/2004
Jerry McWee	SC‡	4/16/2004
David Hill	SC‡	3/19/2004
Michael Passaro	SC‡	9/13/2002
Anthony Green	SC‡	8/23/2002
Richard Johnson	SC‡	5/3/2002
Donald Moeller	SD‡	10/30/2012
Eric Robert	SD‡	10/14/2012
Elijah Page	SD‡	7/11/2007
Cecil Johnson	TN	12/2/2009
Steve Henley	TN	2/4/2009
Daryl Holton	TN	9/12/2007
# Philip Workman	TN	5/9/2007
Sedley Alley	TN	6/28/2006
Preston Hughes	TX†	11/15/2012

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Ramon Hernandez	TX†	11/14/2012
Mario Swain	TX†	11/8/2012
Donnie Roberts	TX†	10/31/2012
Bobby Hines	TX†	10/23/2012
Jonathan Green	TX†	10/9/2012
Cleve Foster	TX†	9/24/2012
Robert Harris	TX†	9/19/2012
Marvin Wilson	TX†	8/6/2012
Yokamon Hearn	TX†	7/17/2012
Beunka Adams	TX†	4/25/2012
Jesse Hernandez	TX†	3/27/2012
Keith Thurmond	TX†	3/7/2012
George Rivas	TX†	2/29/2012
Rodrigo Hernandez	TX†	1/26/2012
Guadalupe Esparza	TX†	11/16/2011
Frank Garcia	TX†	10/26/2011
Lawrence Brewer	TX†	9/21/2011
Steven Woods	TX†	9/13/2011
Martin Robles	TX†	8/10/2011
Mark Stroman	TX†	7/20/2011
Humberto Leal	TX†	7/7/2011
Milton Mathis	TX†	6/21/2011
Lee Taylor	TX†	6/16/2011
Gayland Bradford	TX†	6/1/2011
Cary Kerr	TX†	5/3/2011
Timothy Adams	TX†	2/22/2011
Michael Hall	TX†	2/15/2011
Larry Wooten	TX†	10/21/2010
Peter Cantu	TX†	8/17/2010
Derrick Jackson	TX†	7/20/2010
Michael Perry	TX†	7/1/2010
David Powell	TX†	6/15/2010
George Jones	TX†	6/2/2010
John Alba	TX†	5/25/2010
Rogelio Cannady	TX†	5/19/2010
Billy Galloway	TX†	5/13/2010
Kevin Varga	TX†	5/12/2010

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Samuel Bustamante	TX†	4/27/2010
William Berkley	TX†	4/22/2010
Franklin Alix	TX†	3/30/2010
Joshua Maxwell	TX†	3/11/2010
Michael Sigala	TX†	3/2/2010
Gary Johnson	TX†	1/12/2010
Kenneth Mosley	TX†	1/7/2010
Bobby Woods	TX†	12/3/2009
Robert Thompson	TX†	11/19/2009
Danielle Simpson	TX†	11/18/2009
Yosvanis Valle	TX†	11/10/2009
Khristian Oliver	TX†	11/5/2009
Reginald Blanton	TX†	10/27/2009
Christopher Coleman	TX†	9/22/2009
Stephen Moody	TX†	9/16/2009
Terry Hankins	TX†	6/2/2009
Michael Riley	TX†	5/19/2009
Derrick Johnson	TX†	4/30/2009
Michael Rosales	TX†	4/15/2009
Luis Salazar	TX†	3/11/2009
James Martinez	TX†	3/10/2009
Kenneth Morris	TX†	3/4/2009
Willie Pondexter	TX†	3/3/2009
Johnny Johnson	TX†	2/12/2009
Dale Scheanette	TX†	2/10/2009
David Martinez	TX†	2/4/2009
Ricardo Ortiz	TX†	1/29/2009
Virgil Martinez	TX†	1/28/2009
Reginald Perkins	TX†	1/22/2009
Frank Moore	TX†	1/21/2009
Curtis Moore	TX†	1/14/2009
Robert Hudson	TX†	11/20/2008
Denard Manns	TX†	11/13/2008
George Whitaker	TX†	11/12/2008
Elkie Taylor	TX†	11/6/2008
Gregory Wright	TX†	10/30/2008
Eric Nenno	TX†	10/28/2008

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Joseph Ries	TX†	10/21/2008
Kevin Watts	TX†	10/16/2008
Alvin Kelly	TX†	10/14/2008
William Murray	TX†	9/17/2008
Michael Rodriguez	TX†	8/14/2008
Leon Dorsey	TX†	8/12/2008
Heliberto Chi	TX†	8/7/2008
Jose Medellin	TX†	8/5/2008
Larry Davis	TX†	7/31/2008
Derrick Sonnier	TX†	7/23/2008
Carlton Turner	TX†	7/10/2008
Karl Chamberlain	TX†	6/11/2008
Michael Richard	TX†	9/25/2007
Clifford Kimmel	TX†	9/20/2007
Tony Roach	TX†	9/5/2007
John Amador	TX†	8/30/2007
DaRoyce Mosley	TX†	8/28/2007
Johnny Conner	TX†	8/22/2007
Kenneth Parr	TX†	8/15/2007
Lonnie Johnson	TX†	7/24/2007
Patrick Knight	TX†	6/25/2007
Gilberto Reyes	TX†	6/21/2007
Lionell Rodriguez	TX†	6/20/2007
Michael Griffith	TX†	6/7/2007
Charles Smith	TX†	5/16/2007
Ryan Dickson	TX†	4/26/2007
James Clark	TX†	4/11/2007
Roy Pippin	TX†	3/29/2007
Vincent Gutierrez	TX†	3/28/2007
Charles Nealy	TX†	3/20/2007
Joseph Nichols	TX†	3/7/2007
Robert Perez	TX†	3/6/2007
Donald Miller	TX†	2/27/2007
Newton Anderson	TX†	2/22/2007
James Jackson	TX†	2/7/2007
Christopher Swift	TX†	1/30/2007
Jonathan Moore	TX†	1/17/2007



<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Carlos Granados	TX†	1/10/2007
Willie Shannon	TX†	11/8/2006
Donell Jackson	TX†	11/1/2006
Gregory Summers	TX†	10/25/2006
Farley Matchett	TX†	9/12/2006
Derrick Frazier	TX†	8/31/2006
Justin Fuller	TX†	8/24/2006
Richard Hinojosa	TX†	8/17/2006
William Wyatt	TX†	8/3/2006
Robert Anderson	TX†	7/20/2006
Mauriceo Brown	TX†	7/19/2006
Derrick O'Brien	TX†	7/11/2006
Angel Resendiz	TX†	6/27/2006
Lamont Reese	TX†	6/20/2006
Timothy Titsworth	TX†	6/6/2006
Jesus Aguilar	TX†	5/24/2006
Jermaine Herron	TX†	5/17/2006
Jackie Wilson	TX†	5/4/2006
Kevin Kinney	TX†	3/29/2006
Robert Salazar	TX†	3/22/2006
Tommie Hughes	TX†	3/15/2006
Clyde Smith	TX†	2/15/2006
Robert Neville	TX†	2/8/2006
Jaime Elizalde	TX†	1/31/2006
Marion Dudley	TX†	1/25/2006
Shannon Thomas	TX†	11/16/2005
Robert Rowell	TX†	11/15/2005
Charles Thacker	TX†	11/9/2005
Melvin White	TX†	11/3/2005
Luis Ramirez	TX†	10/20/2005
Ronald Howard	TX†	10/6/2005
Frances Newton	TX†	9/14/2005
Robert Shields	TX†	8/22/2005
Gary Sterling	TX†	8/10/2005
David Martinez	TX†	7/28/2005
Alexander Martinez	TX†	6/7/2005
Richard Cartwright	TX†	5/19/2005

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Bryan Wolfe	TX†	5/18/2005
Lonnie Pursley	TX†	5/3/2005
Douglas Roberts	TX†	4/20/2005
George Hopper	TX†	3/8/2005
Dennis Bagwell	TX†	2/17/2005
Troy Kunkle	TX†	1/25/2005
James Porter	TX†	1/4/2005
Anthony Fuentes	TX†	11/17/2004
Frederick McWilliams	TX†	11/10/2004
Demarco McCullum	TX†	11/9/2004
Robert Morrow	TX†	11/4/2004
Lorenzo Morris	TX†	11/2/2004
Dominique Green	TX†	10/26/2004
Ricky Morrow	TX†	10/20/2004
Donald Aldrich	TX†	10/12/2004
Peter Miniel	TX†	10/6/2004
Edward Green	TX†	10/5/2004
Andrew Flores	TX†	9/21/2004
James Allridge	TX†	8/26/2004
Jasen Busby	TX†	8/25/2004
David Harris	TX†	6/30/2004
Kelsey Patterson	TX†	5/18/2004
Marcus Cotton	TX†	3/3/2004
Cameron Willingham	TX†	2/17/2004
Bobby Hopkins	TX†	2/12/2004
Edward Lagrone	TX†	2/11/2004
Billy Vickers	TX†	1/28/2004
Kevin Zimmerman	TX†	1/21/2004
Kenneth Bruce	TX†	1/14/2004
Ynobe Matthews	TX†	1/6/2004
Ivan Murphy	TX†	12/4/2003
Richard Duncan	TX†	12/3/2003
Robert Henry	TX†	11/20/2003
Larry Hayes	TX†	9/10/2003
Allen Janecka	TX†	7/24/2003
Cedric Ransom	TX†	7/23/2003
Christopher Black	TX†	7/9/2003

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Hilton Crawford	TX†	7/2/2003
Kia Johnson	TX†	6/11/2003
Bruce Jacobs	TX†	5/15/2003
Roger Vaughn	TX†	5/6/2003
Juan Chavez	TX†	4/22/2003
James Colburn	TX†	3/26/2003
Keith Clay	TX†	3/20/2003
Bobby Cook	TX†	3/11/2003
Richard Williams	TX†	2/25/2003
Henry Dunn	TX†	2/6/2003
John Elliott	TX†	2/4/2003
Granville Riddle	TX†	1/30/2003
Richard Dinkins	TX†	1/29/2003
Alva Curry	TX†	1/28/2003
Robert Lookingbill	TX†	1/22/2003
John Baltazar	TX†	1/15/2003
Samuel Gallamore	TX†	1/14/2003
James Collier	TX†	12/11/2002
Leonard Rojas	TX†	12/4/2002
William Chappell	TX†	11/20/2002
Craig Ogan	TX†	11/19/2002
James Powell	TX†	10/1/2002
Calvin King	TX†	9/25/2002
Rex Mays	TX†	9/24/2002
Ronald Shamburger	TX†	9/18/2002
Jessie Patrick	TX†	9/17/2002
Tony Walker	TX†	9/10/2002
Toronto Patterson	TX†	8/28/2002
Gary Etheridge	TX†	8/20/2002
Javier Medina	TX†	8/14/2002
T.J. Jones	TX†	8/8/2002
Richard Kutzner	TX†	8/7/2002
Jeffrey Williams	TX†	6/26/2002
Robert Coulson	TX†	6/25/2002
Daniel Reneau	TX†	6/13/2002
Stanley Baker	TX†	5/30/2002
Napoleon Beazley	TX†	5/28/2002

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Johnny Martinez	TX†	5/22/2002
Ronford Styron	TX†	5/16/2002
Reginald Reeves	TX†	5/9/2002
Rodolfo Hernandez	TX†	4/30/2002
Gerald Casey	TX†	4/18/2002
William Burns	TX†	4/11/2002
Jose santellan	TX†	4/10/2002
Gerald Tigner	TX†	3/7/2002
Monty Delk	TX†	2/28/2002
Randall Hafdahl	TX†	1/31/2002
Windell Broussard	TX†	1/30/2002
Jermarr Arnold	TX†	1/16/2002
Michael Moore	TX†	1/9/2002
Ronnie Gardner	UT‡	6/17/2010
Robert Gleason	VA*	1/16/2013
Jerry Jackson	VA*	8/18/2011
Teresa Lewis	VA*	9/23/2010
Darick Walker	VA*	5/20/2010
Paul Powell	VA*	3/18/2010
Larry Elliott	VA*	11/17/2009
John Muhammad	VA*	11/10/2009
Edward Bell	VA*	2/19/2009
Christopher Emmett	VA*	7/24/2008
Kent Jackson	VA*	7/10/2008
Robert Yarbrough	VA*	6/25/2008
Kevin Green	VA*	5/27/2008
John Schmitt	VA*	11/9/2006
Michael Lenz	VA*	7/27/2006
Brandon Hedrick	VA*	7/20/2006
Dexter Vinson	VA*	4/27/2006
James Reid	VA*	9/9/2004
James Hudson	VA*	8/18/2004
Mark Bailey	VA*	7/22/2004
Dennis Orbe	VA*	3/31/2004
Brian Cherrix	VA*	3/18/2004
Bobby Swisher	VA*	7/22/2003
Earl Bramblett	VA*	4/9/2003

<u>Name of Defendant</u>	<u>State</u>	<u>Date of Execution</u>
Mir Aimal Kasi	VA*	11/14/2002
Walter Mickens	VA*	6/12/2002
Daniel Zirkle	VA*	4/2/2002
James Patterson	VA*	3/14/2002
Cal Brown	WA‡	9/10/2010

## APPENDIX B

Defendants on Tennessee's Death Row<sup>1</sup>  
(as of March 4, 2013)

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John Michael Bane‡  
Rickey Bell‡  
G'dongalay Parlo Berry\*  
Byron Black\*  
Andre Bland\*  
Kevin Burns\*  
Tony Carruthers\*  
Preston Carter (Akil Jahi) †‡  
Walter Caruthers\*  
Ronnie Cauthern†  
# Tyrone Chalmers  
Gary Cone\*  
Lemaricus Davidson\*  
Jerry Ray Davidson\*  
Christopher A. Davis\*  
James Anderson Dellinger\*

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<sup>1</sup> \* denotes an explicit *mens rea* finding of intent to kill;

† denotes an inference of intent to kill from commission of multiple homicide;

‡ denotes an inference of intent to kill from use of deadly weapon;

# denotes a defendant who lacked the intent to kill.

Jessie Dotson\*  
David Duncan\*  
Robert Faulkner\*  
John Freeland, Jr. †  
Jon Hall\*  
Leroy Hall\*  
William (Billy) Hall\*  
James Hawkins\*  
Kennath Henderson\*  
John Patrick Henretta\*  
Harold R. Hester\*  
Anthony Darrell Hines†  
Henry Eugene Hodges\*  
Michael Wayne Howell\*  
Stephen Lynn Hugueley\*  
Olen Hutchinson\*  
# Billy Ray Irick  
David Ivy\*  
Nikolus Johnson\*  
Donnie E. Johnson\*  
Henry Lee Jones\*  
James Jones (a.k.a. Abu-Ali Abdur'Rahman)\*  
David Lynn Jordan\*  
David Keen\*  
Roy Keough\*  
Terry Lynn King\*  
Marlon Kiser\*  
Larry McKay††  
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David McNish\*  
# Donald Middlebrooks  
David Miller\*  
Farris Morris\*  
Clarence Nesbit\*  
Harold Nichols‡  
Richard Odom‡  
Pervis Payne\*  
Christa Gail Pike\*  
Sidney Porterfield‡  
Gerald Lee Powers‡  
# Corinio Pruitt  
Derrick Quintero\*  
Paul Dennis Reid\*  
Charles Rice\*  
Michael Dale Rimmer\*  
Gregory Robinson\*  
William Glenn Rogers\*  
Michael Eugene Sample†‡  
Joel Schmeiderer\*  
Vincent Sims\*  
Oscar F. Smith\*  
Jonathan Stephenson\*  
William R. Stevens\*  
James P. Stout†  
Donald Wayne Strouth (a.k.a Deelicho Best) ‡  
Dennis Wade Suttles\*  
Nicholas Sutton\*



Gary Sutton\*  
Steven Ray Thacker\*  
Andrew Thomas‡  
Gregory Thompson\*  
Heck Van Tran\*  
Stephen West\*  
Howard Hawk Willis\*  
Charles Wright\*  
Leonard Young\*  
Edmund Zagorski\*