

# Pretend Justice—Defense Representation in Tennessee Death Penalty Cases

WILLIAM P. REDICK, JR.,\* BRADLEY A. MACLEAN,\*\* AND  
M. SHANE TRUETT\*\*\*

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\* William P. Redick, Jr. was a Staff Attorney on the National Advisory Commission for Criminal Justice Standards and Goals in Washington D.C. after graduating from the University of Tennessee College of Law and being admitted to the practice of law in 1970. He was Director of the Treatment Alternative to Street Crime Project that was administered by the Davidson County District Attorney General's Office (1976-1978). He has practiced law in Nashville, Tennessee since 1978 emphasizing criminal defense, and since 1988, he has practiced almost exclusively death penalty defense representation. He was an assistant federal public defender for the Middle District of Tennessee (1985-1988) and Director of the Capital Case Resource Center of Tennessee (1988-1995). He also served as Chairman of the Death Penalty Committee of the Tennessee Association of Criminal Defense Lawyers (TACDL) (1984-1995). In 1995, Redick won TACDL's annual Lionel R. Barrett, Jr. award for outstanding work in the death penalty arena, and in 2003, he received the National Coalition to Abolish the Death Penalty Legal Service Award. He has been Director of The Tennessee Justice Project since its inception in 2004.

\*\* Mr. MacLean is the Assistant Director of The Tennessee Justice Project. He is also Of Counsel to the Nashville law firm of Stites & Harbison, PLLC, where his practice currently focuses on state post-conviction and federal habeas death penalty cases. Mr. MacLean is a member of the Sixth Circuit Court of Appeals Rules Advisory Committee and is an Adjunct Professor of Law at Vanderbilt Law School where he teaches a course on the death penalty. Mr. MacLean has been named to *The Best Lawyers in America* and has received other awards and honors, including the Nashville Bar Association's Liberty Bell Award in 1997 and the Tennessee Association of Criminal Defense Lawyers' Lionel Barrett Award in 1998. Mr. MacLean holds a B.A. in Philosophy from Stanford University, a M.A. in Education from Emory University, and a J.D. from Vanderbilt Law School where he received the Founder's Medal for graduating first in his class.

\*\*\* Shane Truett was a criminal defense attorney in Durham, NC after graduating from North Carolina Central University School of Law in 2006. While at law school, he was a constitutional law tutor, an intern for the District Attorney's office in North Carolina's Fifth Judicial District, worked with

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NCCU's Legal Aid Criminal Defense Program, and assisted with the ACLU's drive for a Death Penalty Moratorium in North Carolina. Shane received a BA in English in 1999 from the University of North Carolina at Wilmington, and has several publications to his merit ranging from non-fiction to poetry.

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I. THE RIGHT TO EFFECTIVE REPRESENTATION AND JUDICIAL REVIEW OF TENNESSEE DEATH PENALTY CASES

The principle of equal justice for all is a cornerstone of our American democracy, engrained in our national consciousness: the opening lines of our Declaration of Independence proclaim that “[w]e hold these truths to be self-evident, that all men are created equal,” and engraved in the edifice above the entrance to the United States Supreme Court are the words “Equal Justice Under Law.” An articulation of this inalienable right to equal justice, the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.” The Tennessee Constitution provides the same assurances.<sup>1</sup> Any person accused of a crime is thus ensured the right to legal representation in order to guarantee that justice is fairly and equally applied to all, and to provide protection from excessive government action.<sup>2</sup>

The right to counsel accrues to the benefit of the rich and poor alike. If a criminal defendant cannot afford counsel, counsel must be provided,<sup>3</sup> including in cases that the state seeks the death penalty.<sup>4</sup> If the defendant has sufficient resources to obtain a lawyer, he or she selects the lawyer to handle the case. If the defendant is indigent, however, the selection of counsel is made by the government, not the accused person.<sup>5</sup> Because virtually all capital defendants are indigent, generally, they receive counsel appointed by the state.

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1. TENN. CONST. art. I, § 9 (“[I]n all criminal prosecutions the accused hath the right to be heard by himself and his counsel.”).

2. Another primary cornerstone of our democracy recognized by our Founding Fathers in the Declaration of Independence is the protection of an accused criminal’s inalienable rights from excessive government action: “Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive in these ends, it is the Right of the People to alter or to abolish it . . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

4. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Powell v. Alabama*, 287 U.S. 45, 72 (1932).

5. See TENN. CODE ANN. § 40-14-207(b) (2006); TENN. SUP. CT. R. 13 § 1(c) (2006).

As a constitutional mandate, the right to counsel means the right to the “effective” assistance of counsel.<sup>6</sup> The United States Supreme Court established the legal standard for the determination of whether counsel is “effective” in the 1984 death penalty case of *Strickland v. Washington*.<sup>7</sup> Pursuant to the *Strickland* standard, a sizeable number of Tennessee death sentences have been set aside due to ineffective assistance of counsel in both state (eighteen cases)<sup>8</sup> and federal (six cases)<sup>9</sup> courts. The United States Supreme

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6. See *Strickland*, 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Tennessee Supreme Court has found that: “[A] denial of the Sixth Amendment right to the effective assistance of counsel is simultaneously a denial of the right to be heard by counsel, as provided under the Constitution of Tennessee.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

7. *Strickland*, 466 U.S. at 686.

8. See *Goad v. State*, 938 S.W.2d 363, 365 (Tenn. 1996) (sentence relief only); *Taylor v. State*, No. 01C01-9709-CC-00384, 1999 WL 512149, at \*22 (Tenn. Crim. App. July 21, 1999) (conviction relief); *McCormick v. State*, No. 03C01-9802-CR-00052, 1999 WL 394935, at \*20 (Tenn. Crim. App. June 17, 1999) (conviction relief); *Wilcoxson v. State*, 22 S.W.3d 289, 310 (Tenn. Crim. App. 1999) (sentence relief only); *Caughron v. State*, No. 03C01-9707-CC-00301, 1999 WL 49906, at \*17 (Tenn. Crim. App. Feb. 5, 1999) (sentence relief only); *Brimmer v. State*, 29 S.W.3d 497, 531 (Tenn. Crim. App. 1998) (sentence relief only); *Smith v. State*, No. 02C01-9801-CR-00018, 1998 WL 899362, \*25 (Tenn. Crim. App. Dec. 28, 1998) (conviction relief); *Bell v. State*, No. 03C01-9210-CR-00364, 1995 WL 113420, at \*22 (Tenn. Crim. App. Mar. 15, 1995) (sentence relief only); *Adkins v. State*, 911 S.W.2d 334, 356 (Tenn. Crim. App. 1994) (sentence relief only); *Campbell v. State*, No. 03C01-9012-CR-00283 1993 WL 122057, at \*6 (Tenn. Crim. App. Apr. 21, 1993) (sentence relief only); *Cooper v. State*, 847 S.W.2d 521, 532–33 (Tenn. Crim. App. 1992) (sentence relief only); *Johnson v. State*, No. 1037 1992 WL 210576, at \*5 (Tenn. Crim. App. Sept. 2, 1992) (sentence relief only); *Teague v. State*, 772 S.W.2d 915, 930 (Tenn. Crim. App. 1988) (sentence relief only); *State v. Bush*, No. 88-411, order at 8 (Cumberland County Cir. Ct. filed Mar. 7, 2002) (sentence relief only); *Hurley v. State*, No. 4802 (Cocke County Cir. Ct. order filed Dec. 12, 1998) (sentence relief only); *Coker v. State*, No. 4778 (Sequatchie County Cir. Ct. order filed Apr. 22, 1996) (sentence relief only); *Teel v. State*, No. 1460 (Marion County Cir. Ct. order filed Apr. 12, 1995) (sentence relief only); *State v. Ransom*, No. B57716 (Shelby County Cir. Ct. order filed Jan. 1, 1983) (sentence relief only).

9. See *Harries v. Bell*, 2005 FED App. 0316P, 417 F.3d 631, 639–40 (6th Cir.) (sentence relief only); *Carter v. Bell*, 2000 FED App. 0221P, 218 F.3d 581, 595 (6th Cir.) (sentence relief only); *Austin v. Bell*, 1997 FED App. 0296P, 126 F.3d 843, 849 (6th Cir.) (sentence relief only); *Rickman v. Bell*, 1997 FED

Court has continued to struggle with the application of the *Strickland* standard in death penalty cases; but, as more is learned about the demands of capital defense, the Court's application of the standard has evolved and substantially clarified the duties of capital defense counsel.<sup>10</sup>

In Tennessee, even in the very rare case that a death penalty defendant is able to retain counsel at trial, thus far, no death-sentenced inmate has retained counsel for the direct appeal from trial or for any level of the collateral review process in state or federal court.<sup>11</sup> Since all Tennessee death row inmates are indigent, none of them have a choice in who will represent them. Consequently, all of the death row inmates are dependent for the provi-

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App. 0352P, 131 F.3d 1150, 1160 (6th Cir.) (conviction relief); *Groseclose v. Bell*, 1997 FED App. 0351P, 130 F.3d 1161, 1171 (6th Cir.) (conviction relief); *Morris v. Bell*, No. 2:99-CD-00424 (E.D. Tenn. *order filed* May 16, 2002) (sentence relief only).

10. See, e.g., *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); see also *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

11. See *infra* app. C. In Tennessee, trials occur in the circuit or criminal court and appeals from trial are taken to the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court, and the United States Supreme Court. This is sometimes referred to as the “*first tier of litigation*.” At the conclusion of this first tier of litigation, the judgment becomes “final.” Any review after judgment that is final is often referred to as “collateral” review, because it is subsequent to and collateral to the litigation that led up to “final” judgment.

The initial stage of collateral review—the “*second tier of litigation*”—is the state post-conviction review process. For this stage, new counsel is provided to the defendant and issues are raised from outside the first tier record. Thus, federal and state constitutional claims of error that have not yet been raised may be raised, such as claims involving the ineffective assistance of trial and appellate counsel, or involving prosecutorial misconduct before, during, or after the trial. Appeals from the trial court in this second tier of review are also taken to the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court, and the United States Supreme Court.

The next stage of collateral review—the “*third tier of litigation*”—is federal habeas corpus review, which takes place in the federal courts. Federal (but not state) constitutional claims of error raised in both the first and second tiers of litigation can be raised in the third tier in federal court. Federal habeas corpus petitions are filed in federal district court and appeals are taken to the Sixth Circuit Court of Appeals and the United States Supreme Court.

sion of counsel on the same government that seeks to execute them.

In recent years, Tennessee appellate courts have increasingly declined to grant relief based on the ineffectiveness of defendant's counsel. As of the end of 2006, Tennessee state courts had set aside death sentences in a total of eighteen cases based on ineffective assistance of counsel since the reinstatement of the death penalty in 1972.<sup>12</sup> All but one of these rulings occurred in 1999 or earlier; the only one since 1999 was in 2002.<sup>13</sup> Unfortunately, as discussed herein, the dramatic decrease in appellate relief in Tennessee state courts for the ineffectiveness of defense counsel in death penalty cases cannot be attributed to a similarly dramatic improvement in the quality of defense services provided to indigent capital defendants at trial.

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12. In 1972, the United States Supreme Court abolished the death penalty in this country as it was administered at that time in the case of *Furman v. Georgia*, 408 U.S. 238 (1972), and all death sentences that were imposed pursuant to the procedures in effect prior to 1972 were set aside. Four years later, in 1976, the Supreme Court ushered in a new era of the administration of the death penalty in this country, validating the revised death penalty sentencing statutes from five states in the cases of: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

13. See *infra* app. B. A death row inmate's complaint about the performance of his trial and appellate counsel can be brought for the first time after the completion of the trial and appeal in the first tier of litigation, after he or she has received new counsel in tier two of litigation. Any relief awarded based on ineffective assistance of counsel will necessarily be awarded in the second or third tiers. From the beginning of the post-*Furman* era in Tennessee until the end of 2006, Tennessee courts had set aside, in the post-conviction review process, either the conviction or sentence in a total of twenty-seven death penalty cases. See *infra* app. A. In eighteen of those twenty-seven cases, relief was granted based on the ineffective assistance of counsel. See *infra* app. B. In only three of these eighteen cases, the conviction was set aside; in fifteen of the eighteen cases, only the death sentence was set aside.

The Tennessee Supreme Court, our highest state court, has granted sentencing relief based on ineffective assistance of counsel in only one case, the case of William Goad in 1992. See *Goad*, 938 S.W.2d at 363. Relief was granted only on the sentence in *Goad*; the Tennessee Supreme Court has never granted relief on a conviction in a death penalty case based on ineffective assistance of counsel. *Id.*

In fact, the grant of relief for any reason in Tennessee death penalty cases has virtually trickled to a stop in the past decade. While Tennessee appellate courts granted relief on an average of 7.2 death penalty cases per year from 1992 through 1996, since then the grant of relief has steadily declined until the recent two-year stretch from the beginning of 2005 through the end of 2006 during which no Tennessee appellate courts granted relief in a single death penalty case.<sup>14</sup>

Although the decline in the grant of relief by the state appellate courts in death penalty cases probably has more than one contributing factor, politics seems to be one of them. Because state court appellate judges are elected by a retention vote in Tennessee,<sup>15</sup> their tenure on the bench is ultimately decided by popular opinion, which in one dramatic instance has apparently had a direct influence on the outcome of death penalty appeals. The decline in relief began in the mid-1990s after Justice Penny White was voted off the Tennessee Supreme Court in 1996. Shortly before she was up for a retention election, Justice White had joined a majority opinion, authored by Justice A. A. Birch, in which the death sentence for Richard Odom was set aside.<sup>16</sup> The general perception is that Justice White's defeat was due to her vote in favor of relief in the *Odom* case, that a small but aggressive pro-death penalty lobby made the difference in the unprecedented defeat in a retention vote of a sitting Supreme Court Justice, and that her removal from office has had a chilling effect on the subsequent review of Tennes-

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14. In the five-year period from 1992 through 1996, Tennessee appellate courts granted relief in death penalty cases in an average of 7.2 cases per year; in the following three-year period from 1997 through 1999, relief was granted by Tennessee appellate courts in an average of 3.33 death penalty cases per year; in the following three-year period from 2000 through 2002, relief was granted in an average of 2.67 cases per year; and in the following four-year period from 2003 through 2006, relief was granted in an average of 0.75 cases per year. *See infra* app. A. In 2005 and 2006, the Tennessee appellate courts granted final relief in no death penalty cases. *See infra* app. A. After two and one half years, on February 26, 2007, the Tennessee Supreme Court granted sentencing relief to death row inmate Franklin Fitch when it denied the state's TENN. R. APP. P. 11 application for permission to appeal the Court of Criminal Appeals decision in *State v. Fitch*, CCA No. W2004-02833-CCA-R3-DD, 2006 WL 3147057 (Tenn. Crim. App. Nov. 2, 2006).

15. *See* TENN. CODE ANN. §§ 17-1-103 to -4-201(a)(1) (2006).

16. *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

see death penalty cases by state appellate judges who are themselves subject to removal from office by a retention vote.<sup>17</sup>

Like the decline in Tennessee state courts, the grant of relief has also declined in recent years in federal courts.<sup>18</sup> This decline in the grant of relief in federal courts is attributed primarily to a shift in the ideology and composition of the Sixth Circuit federal courts,<sup>19</sup> and the Congressional passage of a more restrictive habeas corpus procedure in 1996, which has limited the opportunities

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17. See, e.g., Daniel J. Foley, *Death by Election? A UT Professor Says Voters Have Changed the Way the Supreme Court Decides Death Penalty Cases*, TENN. B. J., Dec. 2001, at 12–23.

18. Relief was granted in federal court in four Tennessee death penalty cases in three years, 1995–1997, but it took another five years, 1998–2002, before relief was granted in four more cases. See *infra* app. A. In the last four years, 2003–2006, relief has been granted in federal court in two Tennessee death penalty cases. See *infra* app. A.

By the end of 2006, the federal courts had granted relief in a total of nine Tennessee death penalty cases, including the six cases in which relief was granted based on ineffective assistance of counsel and three others in which relief was granted based on other grounds. See *infra* app. A; app. E.

All nine of the death penalty cases in which the federal courts have granted relief had previously gone through two complete tiers of litigation, see *supra* note 9, in state court—on direct appeal from trial and during state post-conviction proceedings—without any relief being granted by the state courts. See *infra* app. E.

19. Regarding the review of death penalty cases by the Sixth Circuit Court of Appeals, a Cincinnati newspaper reported: “Judges appointed by Republican presidents voted to *deny* inmate appeals 85 per cent of the time. Judges appointed by Democrats voted to *grant* at least some portion of those appeals 75 per cent of the time.” Dan Horn, *The Politics of Life and Death: An Inmate’s Fate Often Depends on the Luck of the Draw*, CINCINNATI ENQUIRER, April 15, 2007, at 1A. Retired Sixth Circuit Court of Appeals Judge Nathaniel Jones was quoted in the article as saying: “It’s a roll of the dice. When I look at a lineup of a panel in this kind of case, you can almost go to the bank on what the result is going to be.” *Id.* University of Pittsburgh law professor, Arthur Hellman said: “Literally, if someone lives or dies depends on the panel they get.” *Id.*

Since the beginning of the federal judicial appointments by current President George H. W. Bush, the majority of the Sixth Circuit judges has shifted from judges appointed by Democratic presidents to a strong majority of judges appointed by Republican presidents. *Id.* In death penalty cases, President Bush’s appointees have voted “the most lopsided track record, voting 50-4 against granting inmate appeals.” *Id.*

for federal courts to conduct substantive reviews of claims brought by death row petitioners.<sup>20</sup>

Other than the three tiers of litigation in state and federal court, discussed herein, death row litigants have no other judicial forum in which to seek review of meritorious claims for relief from unfair death sentences.<sup>21</sup> The declining availability of relief in Tennessee death penalty cases takes on even greater significance in view of the fact that a significant majority of all death penalty cases in this country are infected with serious constitutional error which casts doubt on the fairness of the trials and the accuracy of their outcome.<sup>22</sup> This is demonstrated by the fact that over two thirds—fully 68% of all death sentences imposed in this country since the new era of death penalty cases which began in 1976—have been reversed upon post-trial review.<sup>23</sup> Tennessee death pen-

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20. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (“AEDPA”).

21. After the death row inmate has completed the three tiers of litigation in state and federal court and has no eleventh-hour avenues for judicial review, he is confronted with his last opportunity for review—executive clemency—which is within the sole province of the governor of the state. The prospects for executive clemency for death row inmates are not good. Ironically, after the increasingly politicized and problematic judicial review in the state and federal courts, the governors typically decline a grant of clemency, citing deference to the judicial review process as their reason.

The American Bar Association (“ABA”) evaluated the Tennessee clemency review process in death penalty cases in its study of the administration of the death penalty in Tennessee. AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF TENNESSEE’S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES (2007) [hereinafter “*The ABA Tennessee Study*”], available at <http://www.abanet.org/moratorium/assessmentproject/Tennessee/finalreport.pdf>. *The ABA Tennessee Study* made 11 recommendations, none of which the ABA could find Tennessee in compliance with, for the reform of the clemency review process. See discussion, *infra* Part III.A.2. regarding *The ABA Tennessee Study*.

22. See JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973–1995 (2000), available at <http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf>.

23. *Id.* at Executive Summary, at 1 (finding that in every case in which a death sentence has been imposed in this country since the death penalty was reinstated in 1976, death sentences have been set aside on direct appeal and

alty cases are rife with error as are death penalty cases in other jurisdictions in this country.

In Tennessee, regarding the frequency of relief from 1977 to the present,<sup>24</sup> a total of 184 inmates have been sentenced to death; 67 of them have been granted permanent relief from their death sentences by the courts because of unfair and unreliable trials and instead, a final disposition of a sentence of less than death has been imposed.<sup>25</sup> Of the remaining 117 death-sentenced inmates, 101 are still on death row, 13 have died from causes other than execution, and 3 have been executed.<sup>26</sup> So, out of the total 184 inmates who have been sentenced to death, the state has executed 3 inmates in 30 years. The 101 inmates remaining on death row continue to litigate, and any of them could conceivably gain relief from their death sentence.

Under a historical perspective, which subsequently will be discussed more fully, the failures of defense representation in Tennessee death penalty cases became increasingly apparent and rose to a crisis level in the mid-1980s. In response, the federal circuit court of appeals in 1986 created the Tennessee Committee of the Sixth Circuit Death Penalty Task Force (“Task Force”) to evaluate

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collateral review due to “serious, reversible error in nearly 7 of 10 (68%) of the thousands of capital sentences that were fully reviewed”).

24. These statistics are current as of May 9, 2007 according to The Tennessee Justice Project. See Bradley A. MacLean & Shane Truett, *Tennessee’s Capital Punishment System: A Case for Reform*, NASHVILLE B.J., June 2007, at 6–7.

25. See *infra* app. C.

26. See *infra* app. C. Before the promulgation of the first valid post-*Furman* death penalty sentencing statute in Tennessee in 1977, the last execution in Tennessee was William Tines in 1960. Tennessee Executions, Tennessee Department of Corrections, <http://www.state.tn.us/correction/newsreleases/tnexecutions.htm> (last visited Dec. 31, 2007). The three inmates executed since the 1977 statute was passed are: Robert Glen Coe in 2000, Sedley Alley in 2006, and Phillip Workman in 2007. *Id.*

So, Tennessee has actually executed three inmates in 30 years since the passage of the first constitutionally valid post-*Furman* death penalty sentencing statute, and in 47 years, since the last execution pursuant to the pre-*Furman* death penalty sentencing statute. Of course, the first of the three executions that have occurred since 1977 did not occur until 2000. And, given the decline of relief in the courts and the consistent record of denied clemency applications, it is fair to conclude that the rate of executions will accelerate under the current regime.

the quality and need for defense representation in Tennessee death penalty cases. This joint state and federal Task Force issued a report in 1987 that confirmed the failures in defense representation in Tennessee death penalty cases. The report also recommended the creation of the Capital Case Resource Center of Tennessee (“CCRC”) in an attempt to recruit qualified counsel to defend capital cases and to address other defense representation needs in Tennessee death penalty cases. The CCRC was created and began operation in September 1988, funded by state and federal grants.<sup>27</sup>

In the mid-1990s, however, a change in the attitude of judges and lawmakers was abruptly and dramatically manifest. In addition to the decline in the frequency of relief granted by Tennessee state courts in death penalty cases that began in 1996<sup>28</sup>—the year Justice White was voted off the Supreme Court—other substantial evidence developed demonstrating that the state policy makers were more concerned with speeding up executions and less concerned with effective defense representation and meaningful review of death penalty cases. First, in 1995, the CCRC was abolished. In lieu of the CCRC, the same state administration responsible for the abolition of the CCRC designed the statutory scheme for the Post-Conviction Defender’s Office (“PCDO”), ostensibly to perform some of the tasks that had been performed by the CCRC.<sup>29</sup> The statute creating the PCDO, however, severely restricted the operation of the PCDO; consequently, the PCDO has never had the autonomy, independence, options, or success that CCRC enjoyed. Second, in that same year, with input only from state prosecutors, the state post-conviction procedures act was amended by the state legislature.<sup>30</sup> In an attempt to foster finality, the prosecutors’ purposes for the amendments were to impose time limits, create procedural barriers, and impose new standards of review that would expedite the proceedings and make it more difficult for inmate petitioners to obtain merit rulings on their claims. Third, in 1996, the

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27. Author William P. Redick was the Executive Director of the Capital Case Resource Center from its creation in 1988 until its termination in 1995. Many of the facts recounted about the CCRC are based on his own personal knowledge.

28. *See infra* app. A.

29. *See* TENN. CODE ANN. § 40-30-201 to -210 (1995).

30. *See* TENN. CODE ANN. § 40-30-101 to -122 (1995).

federal habeas corpus review statute was amended by Congress,<sup>31</sup> essentially to accomplish limitations on federal habeas corpus petitions for reasons similar to those intended by the state General Assembly in its 1995 amendments to the state Post-Conviction Procedures Act.<sup>32</sup> Therefore, beginning in the mid-1990s, state and federal courts and legislative bodies severely limited both death row inmates' opportunities to litigate their claims as well as efforts to insure they received quality representation.

Death row inmates, therefore, faced unreceptive state and federal judiciaries and new state and federal legislation that was hostile to their attempts to litigate their claims. Consequently, they had little reason to hope for relief based on even the most meritorious of claims, particularly without the assistance of effective, even exceptional, legal counsel. As described in this article, the quality of capital defense services in Tennessee continues to fall below constitutional requirements; yet death penalty defendants have no reason to expect that their claims of ineffective assistance of counsel will fare any better in the courts than will any other meritorious claims they bring to challenge their conviction or sentence. In the words of one United States Supreme Court Justice, "[P]ractical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'"<sup>33</sup> Unfortunately, "a person who happens to be a lawyer" will not get the job done in the surpassingly difficult task of defending a death penalty case.<sup>34</sup>

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31. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

32. See TENN. CODE ANN. § 40-30-101 (2006).

33. *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

34. Two Tennessee death row inmates, Richard Taylor and Tony Carruthers, both of whom were and are seriously mentally ill, were placed on trial and received death sentences without any counsel at all. See *State v. Carruthers*, 35 S.W.3d 516, 528 (Tenn. 2000); *State v. Taylor*, No. S834228, R. 12 form at 7 (Williamson County Cir. Ct. filed Aug. 9, 2006).

Prior to his most recent trial in which Richard Taylor was unrepresented, he had been convicted and sentenced to death in a previous trial for the same offense in which he had been represented by counsel. *Taylor v. State*, No. 01C01-9709-CC-00384, 1999 WL 512149, at \*1 (Tenn. Crim. App. July 21, 1999). A state post-conviction trial court had set aside the conviction and sen-

## II. THE SURPASSING DIFFICULTY OF EFFECTIVE DEFENSE REPRESENTATION IN DEATH PENALTY CASES

### A. *The Unique Post-Furman Procedure in Tennessee Death Penalty Cases*

The death penalty was reinstated in Tennessee in 1977 with the goal of complying with the new standards set by the United States Supreme Court.<sup>35</sup> The Court's reinstatement of the death penalty in 1976 interpreted the Eighth Amendment of the Constitution to require a fair and reliable process for identifying those to be executed, a process that is not discriminatory, arbitrary, or capricious.<sup>36</sup> In service of that mandate, the Tennessee General Assembly promulgated new procedures intended to achieve a fair and reliable result by: increasing the transparency of the trial process, ensuring that a trial was based on fully and fairly developed evi-

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tence from his first trial, and found him to be currently incompetent to be tried and incompetent to be executed, which was affirmed on appeal. *Id.* at \*1, 34. Taylor was deemed for years to be incompetent to be retried, until a trial court deemed him restored to competency through years of being forcibly administered potent antipsychotic medication. *Id.* at \*18. The trial court allowed him to waive his right to counsel and proceed to retrial without counsel, whereupon Taylor was tried, convicted, and sentenced to death without counsel in a two-day trial in which Taylor mostly sat and watched in an apparent catatonic state. Rob Johnson, *In 3-hour span, Taylor convicted, condemned*, THE TENNESSEAN, Oct. 17, 2003, at 1B. Since trial, Taylor has been appointed counsel and the conviction and death sentence imposed against him, without the benefit of counsel, is pending on direct appeal. *See State v. Taylor*, CCA No. M2005-1941-CCA-R3-DD (filed Aug. 17, 2005).

Even though Tony Carruthers received a death sentence at trial unrepresented by counsel, his case was affirmed on direct appeal. *Carruthers*, 35 S.W.3d at 572. Carruthers is different from Taylor in the important aspect that he did not wish to waive his right to counsel, yet was forced to go to trial in a capital case without counsel, having been deemed by the court to have unintentionally waived his right to counsel. *Id.* at 543-45. At the end of 2006, Carruthers was represented by counsel, his death sentence was in tact, and his case was pending in state post-conviction proceedings.

35. *See* TENN. CODE ANN. § 39-2402 (1977) (current version codified as 39-13-204 (2007)); *supra* note 12.

36. *See* *Gregg v. Georgia*, 428 U.S. 153, 182 (1976); *Jurek v. Texas*, 428 U.S. 262, 271 (1976); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

dence presented to objective triers of fact who dispassionately followed the law, and providing a meaningful appellate review process.<sup>37</sup> These new procedures provided for a bifurcated death penalty trial that includes two jury trials by the same jury—one trial to determine whether the defendant is guilty of first degree murder, and if so, a second trial to determine the defendant’s sentence.<sup>38</sup> But if the defendant is found guilty of any offense other than capital-eligible first degree murder, then he or she will be sentenced by the court, not a jury.<sup>39</sup>

Evolving constitutional standards, as defined by the United States Supreme Court, make it clear that the death penalty can never be imposed automatically for any offense.<sup>40</sup> Even a conviction of first degree murder is not sufficient to warrant an automatic death sentence; in Tennessee, a death sentence can only be imposed if the individual district attorney general exercises his or her personal discretion to seek it.<sup>41</sup> If a defendant is convicted of a capital-eligible first degree murder, a death sentence will pass constitutional muster only if the prosecution proves specific statutory “aggravating circumstances” beyond a reasonable doubt, a standard that further narrows the population of those who receive a death sentence.<sup>42</sup> To be a death penalty case, the law dictates that the homicide committed must be one of the worst homicides, as defined by the “aggravating circumstances” standard, with due consideration for the individual “mitigating circumstances” of the offense and the offender.<sup>43</sup> Although specific “mitigating circumstances” are identified in the statute, defense counsel is not limited to these enumerated circumstances whereas the prosecutor is limited to the enumerated statutory “aggravating circumstances.”<sup>44</sup>

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37. See TENN. CODE ANN. § 39-13-204 (2006).

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

39. See *id.*

40. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

41. See TENN. CODE ANN. § 39-13-208 (2006).

42. TENN. CODE ANN. § 39-13-204(i) (2006) (the Tennessee statutory aggravating circumstances); see also *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

43. See TENN. CODE ANN. § 39-13-204(j) (2006) (the Tennessee statutory mitigating circumstances); see, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978).

44. See TENN. CODE ANN. § 39-13-204(i), (j) (2006).

*B. The Challenge of Effective Representation in Death Penalty Cases*

According to the American Bar Association (“ABA”), “Today it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding.”<sup>45</sup> In death penalty cases, the defendant’s life is at stake and the litigation is as difficult as any found in the law. Death penalty defense representation is politically unpopular, emotionally challenging, and legally demanding in ways that no other cases are.

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.<sup>46</sup>

To be an effective advocate for death row inmates requires quality experience with the body of Eighth Amendment jurisprudence relevant to death penalty cases that has evolved dramatically since 1972 when *Furman v. Georgia* was decided. Significant experience is required because this body of law is unique in the criminal law, affects virtually every aspect of a capital sentencing trial, and has been evolving in both state and federal courts throughout this country, particularly in the United States Supreme Court. In order to be effective in a Tennessee death penalty case, it is not enough for counsel to be familiar with the statutes, judicial decisions, and court rules of this state.<sup>47</sup> Consequently, even experienced attorneys generally qualified in criminal defense are not qualified to represent defendants in death penalty cases, unless

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45. AM. BAR ASS’N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, guideline 1.1, cmt., at 3–4 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>.

46. *Id.* at 4 (quoting Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357–58 (1995)).

47. *See id.* guideline 5.1(B)(2)(a), at 35.

they have devoted considerable study to this volatile and evolving body of law and have some degree of quality experience applying it. A few training seminars will not convey the body of knowledge that is required and, in fact, it is only the rare attorney who can expect to effectively grasp the scope and scale of this jurisprudence without being devoted to it full-time and for long stretches of time.

The scope and scale of the legal defense of capital cases require uniquely dedicated representation, as well as significant investigative assistance, forensic expert assistance, and other resources. Effective representation requires more than legal counsel; rather, it requires a defense “team,” the members of which have unique, specialized expertise.<sup>48</sup> Consequently, death penalty cases are costly to defend. Yet as mentioned above, virtually all those on death row are poor and unable to retain their own representation. Effective representation for indigent death penalty defendants, therefore, is the responsibility of both the Tennessee government that selects counsel and funds the defense, and the individual attorneys who provide the defense representation.

To provide effective representation in a death penalty case, therefore, defense counsel confront surpassingly unique, difficult, and work-intensive problems in preparation for trial as well as during the presentation at trial, including the jury selection stage, the guilt stage, and the sentencing stage.

The requisite “death qualification” of jurors, which occurs at the onset of trial and purports to eliminate those jurors who have reservations about imposing a death sentence,<sup>49</sup> is a process that essentially erodes the defendant’s opportunity for a fair trial by an

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48. See, e.g., *id.*, guideline 4.1, at 28. In a case as factually, legally, and emotionally challenging as is a death penalty case, it is impossible to imagine a capital defendant being able to “effectively” represent himself. Yet in Tennessee, Richard Taylor and Tony Carruthers, both of whom have been diagnosed with serious mental illness, were convicted and sentenced to death in trials in which they had no representation at all. See *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000); *State v. Taylor*, No. S834228, R. 12 form at 7 (Williamson County Cir. Ct. filed Aug. 9, 2006). Tennessee trial courts allowed them to proceed to trial *pro se*. *Carruthers*, 35 S.W.3d at 543; *Taylor*, No. S834228, R. 12 form at 7. Richard Taylor had been deemed by the Tennessee courts mentally incompetent to be tried *with counsel* for years prior to his re-trial; then in that re-trial, he was allowed to proceed *without counsel*. See *supra* note 34.

49. See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 422 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968).

unbiased trier of fact. Required in death penalty cases, unlike other criminal cases, this process results in a jury whose members are notoriously “prosecution-prone,” that is jurors who are receptive to prosecutors and their witnesses and biased against defendants, defense counsel, and their witnesses, not only on the issue of life or death, but also on the issue of guilt or innocence.<sup>50</sup> Furthermore, the instructions that the court gives to the jurors in the sentencing stage are anomalous in the law, difficult to comprehend, and often ignored by jurors who tend to be influenced by their biases more than by the evidence.<sup>51</sup> After a death-qualified jury has unanimously found the defendant guilty of first degree murder, post-trial interviews of jurors demonstrate that many of the jurors had already decided, in violation of their oath and legal obligations as jurors, to impose a sentence of death before the sentencing stage of the trial had even begun.<sup>52</sup> In most death penalty cases, therefore, it is typically in the defendant’s best interest to avoid a jury trial and settle the case by agreement, if possible. Many inmates are on death row because their attorneys did not effectively negotiate a settlement by agreement and avoid a trial altogether.

The first stage of a capital trial is the guilt stage, where defense counsel has the arduous responsibility of defending his or her client from the most serious charges. It is the responsibility of counsel to ensure that an innocent client is not convicted,<sup>53</sup> and that

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50. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 168–73 (1986) (explaining the litigation history and the various studies used).

51. See, e.g., Michael B. Blankenship, et al., *Jurors’ Comprehension of Sentencing Instructions: A Test of the Death Penalty Process in Tennessee*, 14 JUST. Q. 325, 325–27 (1997).

52. See, e.g., Ursula Bentele & William J. Bowers, *How Jurors Decide On Death: Guilt Is Overwhelming; Aggravation Requires Death and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1019 (2001); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1486–89 (1998).

53. According to the Death Penalty Information Center in Washington DC, 124 inmates in twenty-five states in this country were released from custody between 1973 and 2007 based on evidence of their innocence after being convicted and sentenced to death. Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scod=6> (last

a client who has actually committed a lesser crime is not convicted of a more serious offense. For example, a person charged with first degree murder may in fact be guilty of the less serious crime of second degree murder or manslaughter, neither of which carries a potential death sentence. If the defendant is convicted of first degree murder and the prosecution is seeking a death sentence, the bifurcated trial goes to the second stage, the sentencing stage.

In the sentencing stage of the trial, a capital defense attorney makes the case that a sentence of life imprisonment, not death, be imposed.<sup>54</sup> The presentation of the client's case at sentencing includes both a rebuttal of the prosecution's evidence of aggravating circumstances and an affirmative presentation of the defendant's mitigating evidence. A rebuttal of any of the statutory aggravating circumstances sought by the prosecution requires that the facts underlying the circumstances be investigated and challenged, and any exculpatory or mitigating response in defense to the circumstances be prepared and presented. Almost always, the preparation and presentation of the mitigation case requires more work, time, skill, and creativity than any other aspect of the case.<sup>55</sup> The scope of the case in mitigation is potentially very broad because it may include "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death."<sup>56</sup> Mitigation work requires the development of the client's life history, as well as the assistance of varied forensic experts in fields such as psychology, medicine, and the social services to interpret that history. Not surprisingly, attorneys are rarely knowledgeable in these areas of ex-

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visited Oct. 31, 2007).

54. See, e.g., AM. BAR ASS'N, *supra* note 45, at guideline 10.7, cmt., 81 ("Because the sentencer in a capital case must consider in mitigation, 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant' 'penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.'") (quoting *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988)); see also Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35.

55. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

56. *Id.*

pertise<sup>57</sup> since they are certainly not a part of their formal legal training. Consequently, defense attorneys play a key role by functioning as “managers” of a defense team by marshalling expertise from these various disciplines.

Defense counsel has many options to weigh and decisions to make in the mitigation, preparation and presentation. In order to meet the demands of this task, counsel must first investigate and understand the social and psychological history of the client’s life, involving people and events throughout the defendant’s life and even predating his or her birth.<sup>58</sup> In an effort to mitigate the offense, counsel must understand the client’s life so that he or she can articulate to a lay jury the genetic and environmental forces that caused, or at least contributed to, the crime.

Even capital defense attorneys often fail to understand that the primary goal in the presentation of mitigating evidence is not so much to elicit mercy from the jury for the defendant as it is to demonstrate the causal forces outside the defendant’s control that have resulted in the commission of the offense. Defense counsel must assume that lay jurors do not understand the source and causes of violent behavior in general, particularly in the instant case.<sup>59</sup> Defense counsel’s challenge in the sentencing stage of a capital trial is nothing less than to alter the jurors’ most primary

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57. See, e.g., Videotape: Biology and Human Behavior: The Neurological Origins of Individuality, (2d ed., The Teaching Company, Ltd. 2005) (a series of twenty-four lectures, copy on file with the Tennessee Justice Project).

58. Research indicates that antisocial behavior, including homicide, is predominantly caused by: a combination of biological, psychological, and social phenomenon (such as abuse, neglect, negative parenting practices, and peer influence); genetics and heredity; neurobiological factors; and socio-economic/environmental influences. See John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 94 (2003). Numerous scientific studies confirm that genetic, biological, cognitive, and social factors predispose an individual to violent, criminal acts. See Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 689 n.273 (2004).

59. AM. BAR ASS’N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, guideline 10.11, cmt., at 106–10 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>.

and often erroneous assumptions regarding the source and nature of criminal responsibility and culpability as they apply to the defendant in the case on trial. Because the presentation of the prosecution in the sentencing phase of the trial naively assumes the complete autonomy of the defendant and that he is acting independently of his own free volition, consequently, defense counsel must redirect the jury's attention. The burden of the defense is to identify and demonstrate a more complex and accurate picture of the genetic and environmental influences that robbed the defendant of his free volition and led inevitably to the commission of the crime independent of any free unprovoked choice by the defendant.<sup>60</sup>

In order to represent a client effectively, capital defense counsel must be mindful of the sentencing litigation strategy during all stages of the trial. The sentencing litigation strategy impacts, and in some respects, dictates the litigation strategy during jury selection and the guilt stage of the trial, as well as the post-verdict sentencing stage. Sentencing stage preparation and presentation before a death-qualified jury with the client's life at stake is, perhaps, the most difficult task that an attorney can undertake. It is at this stage of a death penalty trial, ironically after the defendant has already been found guilty, that the performance of defense counsel is often most important, particularly if the proof of guilt is overwhelming. This stage is fraught with peril, yet it is the stage at which defense counsel has the greatest opportunity—and obligation—to make a life or death difference for the client.

### III. TENNESSEE FAILS TO PROVIDE EFFECTIVE DEFENSE REPRESENTATION IN DEATH PENALTY CASES

Capital defendants who are indigent must depend on the state that seeks to execute them to provide them with counsel. For all practical purposes, it must be assumed that all capital litigants are indigent.<sup>61</sup> Yet in death penalty cases, which are difficult and

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60. See Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourses of Collective Responsibility*, 57 HASTINGS L.J. 693, 743–50 (2006).

61. See *infra* app. C. Since 1991, every defendant who was represented by counsel at trial and sentenced to death was represented by appointed, not

complicated cases with lives at stake, Tennessee has not consistently provided effective representation or adequate defense resources. Questions of attorney qualification abound and even if appointed counsel is qualified, they are often underpaid, overworked, and/or denied necessary supporting resources. The enormous problems with indigent defense services call into question the fairness and reliability, not to mention constitutionality, of Tennessee's capital punishment system.

A. *Tennessee Does Not Meet the Prevailing Standards for Effective Representation in Death Penalty Cases*

1. *The ABA Guidelines Set the Prevailing Standards for Effective Representation in Death Penalty Cases*

Unlike in 1976, when the death penalty was reinstated, the professional standards for providing effective representation in death penalty cases are now resolved. The ABA promulgated the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("ABA Guidelines") in 1989, and revised them in 2003.<sup>62</sup> These standards are comprehensive in their coverage and are specific, clear, and easily available to all lawmakers, lawyers, and judges. They provide a blueprint for policy makers in any jurisdiction to follow in setting up a system that would have the best possible chance of consistently ensuring effective representation in death penalty cases.

The "performance" portions of the *ABA Guidelines* are recognized by the United States Supreme Court<sup>63</sup> and the Sixth Circuit Court of Appeals<sup>64</sup> to "provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases."<sup>65</sup> They establish standards for the performance of individual attorneys in the representation of capital defendants before, during, and after trial; on appeal; during state

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retained, counsel. *Id.* Currently, every inmate on Tennessee's death row is indigent and none have retained counsel. *Id.*

62. See AM. BAR ASS'N, *supra* note 45.

63. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

64. See, e.g., *Haliym v. Mitchell*, 492 F.3d 680, 716–17 (6th Cir. 2007); *Hamblin v. Mitchell*, 2003 FED App. 0457P, 354 F.3d 482, 486 (6th Cir.).

65. *Hamblin*, 354 F.3d at 486 (describing that the United States Supreme Court case of *Wiggins*, "stands for [this] proposition").

and federal post-conviction litigation; and during clemency proceedings.<sup>66</sup>

The “appointment” portions of the *ABA Guidelines* standardize the institutional structure for the provision of defense services in death penalty cases. They provide a blueprint for policy makers in any jurisdiction to follow in the establishment of a systematic process with the best possible chance of consistently ensuring effective representation in death penalty cases.

## 2. Tennessee Does Not Meet the Prevailing Standards Set by the *ABA Guidelines*

In December 1992, *A Study of the Indigent Defense System in the State of Tennessee*, prepared by The Spangenberg Group,<sup>67</sup> reported that “. . . current practice and procedure in Tennessee regarding representation of indigent capital defendants falls short of virtually every standard explicated in the ABA’s *Guidelines* . . . .”<sup>68</sup> In December 2004, twelve years after the 1992 study by the Spangenberg Group and one year after the ABA adopted the revised *ABA Guidelines*, the Tennessee Bar Association (“TBA”) investigated the effectiveness of counsel in Tennessee death penalty cases. As a result, the TBA released a report that recognized “the *ABA Guidelines* are the standards,”<sup>69</sup> but determined that “Tennessee is woefully out of step with the national standards.”<sup>70</sup> The TBA study concluded:

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66. See AM. BAR ASS’N, *supra* note 45, guideline 10.3–10.13, at 61–120 (pre-trial and trial), 10.14–10.15.2 at 121–31 (appeal, post-conviction and clemency).

67. “The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. Created in July 1985 and located in West Newton, Massachusetts, The Spangenberg Group has conducted research and provided technical assistance to justice organizations in every state in the nation.” The Spangenberg Group, <http://www.spangenberggroup.com>.

68. SPANGENBERG GROUP, *A STUDY OF THE INDIGENT DEFENSE SYSTEM IN THE STATE OF TENNESSEE* at 164 (1992).

69. TENN. BAR ASS’N, *REPORT TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE STUDY COMMITTEE ON EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES* 47 (2004), *available at* [http://www.tba.org/sections/TB\\_Crime/capitalcases\\_study.html](http://www.tba.org/sections/TB_Crime/capitalcases_study.html).

70. *Id.* at 46.

Because it is now clear that the *ABA Guidelines* are the standards against which a defense attorney's performance are to be judged in death penalty cases, the focus must shift not to budgetary concerns but to creating a system for defense services that makes the imposition of death reliable and avoids the arbitrary imposition of the ultimate punishment.<sup>71</sup>

In 2004, the TBA and other state-wide bar associations urged the Tennessee Supreme Court to specifically adopt the *ABA Guidelines*, but the Court declined even to address that request.<sup>72</sup>

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71. *Id.* at 47.

72. *See In Re* Amendments to Supreme Court Rule 13, M-2003-02181-SC-RL2-RL (Tenn. *order filed* June 1, 2004). In response to the court's proposed revisions to TENN. SUP. CT. R. 13 in 2004, the TBA, the District Public Defenders' Conference ("DPDC"), the PCDO, and the Tennessee Association of Criminal Defense Lawyers ("TACDL"), petitioned the court in opposition to the proposed revisions, albeit unsuccessfully. *Id.* at 2. At the forefront of the application to the court from the bar associations was their plea that the State of Tennessee adopt the *ABA Guidelines*. *Id.* The court declined to address the request to adopt the *ABA Guidelines*. *Id.*

The attempt in 2004 was not the first time in recent history that the TBA and other state-wide bar associations joined together to petition the Tennessee Supreme Court directly for reform of the indigent defense system. In 1992, precipitated by the complete depletion of the indigent defense fund in mid-fiscal year, the state-wide bar associations (including the associations involved in the appeal in 2004, above, plus the CCRC and the Tennessee Trial Lawyers Association ("TTLA")), petitioned the court for relief. *See In re* The Indigent Def. Sys., 883 S.W.2d 133, 134 (Tenn. 1994). The goal of the petitioning bar associations was complete reform of the indigent defense system. In support of its position, the petitioners submitted a comprehensive document prepared by the Spangenberg Group. *See SPANGENBERG GROUP*, *supra* note 68. In response to the petitions and the study, the court created an Indigent Defense Commission ("IDC"), directing that "the Commission will be responsible for developing and recommending to the Court a comprehensive plan for the delivery of legal services to indigent defendants in the state court system." *In re Indigent Def. Sys.*, 883 S.W.2d at 134. After considerable study by a dedicated, experienced, and qualified membership, the IDC submitted a comprehensive plan, as the court had directed. Interview with Jim Wetherly, former Chairman of the Indigent Defense Commission, in Nashville, Tenn. (Oct. 9, 2007). The IDC was subsequently disbanded by the court and none of its recommendations received any official response from the court or were implemented by the court. *Id.*

Although the Tennessee Supreme Court has long looked to the ABA as a resource for guidance on this important issue of criminal defense standards,<sup>73</sup> it has thus far been unwilling to consider the adoption of the *ABA Guidelines* or to recognize them as the standard in this state. The *ABA Guidelines* also have been ignored by both the lower state courts and the state legislature. As demonstrated by the fifty-page “Side-by-Side Comparison of Tennessee Procedures and Requirements of ABA Guidelines,” included in the 2004 TBA Study Committee Report,<sup>74</sup> Tennessee still “falls short of virtually every standard explicated in the *ABA Guidelines*.”<sup>75</sup>

In March 2007, the ABA released *The Tennessee Death Penalty Assessment Report, An Analysis of Tennessee’s Death Penalty Laws, Procedures, and Practices* (“*The ABA Tennessee Study*”).<sup>76</sup> *The ABA Tennessee Study*<sup>77</sup> comprehensively evaluated a range of issues relevant to the administration of the death penalty, going far beyond the issues relevant only to indigent defense in death penalty cases.<sup>78</sup> *The ABA Tennessee Study* applied protocols or standards for “a fair and accurate capital case system that complies with constitutional standards,” and from these standards

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73. For more than thirty years, the Tennessee Supreme Court has recognized the authority of the ABA with regard to defense representation standards and has directed in all criminal cases that “[t]rial courts and defense counsel [are to] look to and be guided by” an earlier articulation of such standards, the *ABA Standards for Criminal Justice for the Defense Function*. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

74. See *infra* app. F.

75. See *infra* app. F.

76. *The ABA Tennessee Study*, *supra* note 21.

77. Tennessee is one of eight states in which the ABA is conducting evaluations of the administration of the death penalty. In six of the eight states, the studies have been completed. See Dwight L. Aarons, *Studying the Death Penalty in Tennessee*, TENN. B.J., June 2007, at 21. Prof. Aarons was Chair of the Tennessee ABA Study Team.

78. See *The ABA Tennessee Study*, *supra* note 21, at ix–xxxviii. Concerning the administration of the death penalty in Tennessee, the ABA evaluated numerous additional issues other than the state of indigent defense and made recommendations regarding: (1) the collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) the direct appeal process; (6) the state post-conviction process; (7) clemency; (8) capital jury instructions; (9) judicial independence; (10) racial and ethnic minorities; (11) mental retardation and mental illness. *Id.*

made ninety-three recommendations applied to Tennessee laws, procedures, and practices.<sup>79</sup> Of these ninety-three recommendations, Tennessee was deemed to be in compliance with only seven.<sup>80</sup> *The ABA Tennessee Study* concluded that Tennessee partially complied with thirty-one of the recommendations, failed to comply with twenty-six of the recommendations, and was “unable to access adequate information to assess Tennessee’s compliance” with twenty-nine of the recommendations.<sup>81</sup>

Concerning indigent defense services, *The ABA Tennessee Study* made five recommendations, all of which were an application of various standards set out in the *ABA Guidelines*, and concluded that Tennessee was in compliance with none of them.<sup>82</sup> *The ABA Tennessee Study* found the state to be in partial compliance with three of the recommendations, and not in compliance at all with two. Specifically, the five recommendations concerning indigent defense services made by *The ABA Tennessee Study* regarded: (1) the provision of an adequate defense team and supporting services; (2) the designation of an agency independent of the judiciary to appoint and monitor the performance and caseload of capital counsel; (3) the provision of meaningful qualification standards for capital counsel; (4) the provision of adequate funding and compensation for the defense of capital cases; and (5) the training of capital counsel.<sup>83</sup>

*B. The Existing Attorney Qualification Standards in Tennessee Death Penalty Cases are Ineffective and Counterproductive*

Existing standards promulgated by rule<sup>84</sup> that purport to identify attorneys qualified to accept appointments to represent death penalty defendants do not in fact assure that they are qualified for the task. In 2001, the Nashville *Tennessean* reported that:

[A]t least 39 Tennessee lawyers who have been disciplined by the state have represented defendants in capital cases, which federal courts repeatedly have

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79. Aarons, *supra* note 77.

80. See *The ABA Tennessee Study*, *supra* note 21, at i–xxxix.

81. *Id.*

82. *Id.* at xvi–xviii, 125–62.

83. See *id.*

84. See TENN. SUP. CT. R. 13 § 3.

said require the highest legal standards. Most of the lawyers' conduct did not result in a death sentence being overturned, even in cases where the misconduct was directly related.<sup>85</sup>

Twenty of the thirty-nine lawyers were "suspended" usually for misconduct "so serious a severe penalty seems necessary."<sup>86</sup> Nineteen of them were "publicly censured . . . for an ethics or criminal violation."<sup>87</sup> This group of thirty-nine includes "attorneys convicted of crimes such as theft, income tax evasion, bank fraud, concealing stolen cash and obstruction of justice. They also include lawyers who seriously neglected client's cases – missed key filing deadlines, failed to interview important witnesses, or lied to or stole from clients."<sup>88</sup> Also included in this group were "the cocaine-sniffing Oak Ridge lawyer who was getting drunk in a bar when a jury returned his client's death sentence," and the "Clarksville lawyer who missed the deadline to file a death penalty appeal and later failed to show up for the oral argument."<sup>89</sup> Even more disturbing, the *Tennessean* determined that at the time of its report:

Eleven of [the thirty-nine lawyers] appear on a current list of lawyers who meet Tennessee Supreme Court standards for future appointment in death penalty cases. This list of eligible defense attorneys, circulated to trial judges by the state Supreme Court as a guide, includes a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man linger in jail for four years on a rape charge.<sup>90</sup>

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85. John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, THE TENNESSEAN, July 25, 2001, at 1A.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

Tennessee Supreme Court Rule 13 § 3, which governs the administration of the appointment of indigent defense counsel in death penalty cases, either too broadly expands or too narrowly reduces, through its various limitations, the universe of lawyers that may serve as defense counsel.<sup>91</sup> First, the Rule 13 “qualification standards” are based primarily on a quantification of an attorney’s experience representing defendants, requiring experience in a certain number of Tennessee murder and capital cases.<sup>92</sup> As pointed out in the *ABA Guidelines*, however, “quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications for the task,”<sup>93</sup> and in some cases, the standards do more to discourage the appointment of qualified counsel than to encourage it. By relying only on the attorney’s experience in the defense of murder and capital cases as the measure of his or her qualifications, the existing Rule 13 standard unintentionally includes unqualified attorneys because they technically have sufficient “experience.” Many of these attorneys have made a habit of providing ineffective representation; but since they have been appointed in a sufficient number of cases, they are deemed “qualified” pursuant to the rule. Conversely, the Rule 13 standard also operates to exclude qualified attorneys. Experienced attorneys who are committed and skilled litigators with necessary support services at their disposal are deemed ineligible, simply because they have not previously been involved in the trial of a Tennessee murder case.

Unfortunately, other than the counterproductive “quantification” standards, Rule 13 has other limitations that discourage the appointment of counsel who may provide “high quality representa-

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91. See TENN. SUP. CT. R. 13 (2006), which administers the distribution of funds for the compensation of indigent defense counsel, and the authorization of funds for the investigative, expert forensic services, and other expenses that are necessary in the defense of capital cases.

92. TENN. SUP. CT. R. 13 § 3 (2006). In addition to the experience requirement, the qualification standards also require the attorney to complete six hours of death penalty defense training every two years, which is a good idea, but sitting through a seminar does not qualify an attorney to represent a capital defendant. TENN. SUP. CT. R. 13 § 3(c)(3) (2006). The training requirement, although necessary, provides no assurance regarding the qualifications of the attorney.

93. AM. BAR ASS’N, *supra* note 45, guideline 5.1, cmt. at 37.

tion” and even *encourage* the appointment of counsel who provide representation that is less than minimally qualified. The guiding principle in the appointment of counsel in death penalty cases is “to provide capital defendants with attorneys who will give them high quality representation.”<sup>94</sup> A second limitation is that Rule 13 creates a presumption that “lead counsel” appointed in death penalty cases will be the public defender “[w]henver possible,” regardless of whether the public defender is the best available or even qualified.<sup>95</sup> The apparent motivation behind this limitation is to save money because the appointment of the public defender requires no additional attorney fees whereas the appointment of private counsel does.

A third limitation of Rule 13 is that it specifically gives the appointing judge discretion to refuse to appoint out-of-state counsel *pro hac vice*.<sup>96</sup> The appointment of out-of-state counsel would inevitably involve the appointment of private counsel, since out-of-state public defenders are government employees who have no authority to cross state lines and out-of-state private attorneys have no similar limitations as long as they satisfy the in-state *pro hac vice* requirements. Other than the cost-savings benefit, the motivation behind this limitation is unclear. If Tennessee actually provided a proactive recruitment effort of qualified death penalty defense counsel capable of providing “high quality representation,” as it should and as recommended by the *ABA Guidelines*, it would inevitably be necessary to go out of state in some instances to find them.<sup>97</sup>

Furthermore, a fourth limitation is that the current version of Rule 13 prohibits the appointment of attorneys, including in collateral litigation, with limited experience in criminal practice. However, some of the best representation provided to death row inmates in this state since *Furman*, particularly in collateral litiga-

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94. AM. BAR ASS’N, *supra* note 45, guideline 5.1, cmt. at 36. *ABA Guideline 5.1* specifies in detail the characteristics necessary for counsel to be able to provide “high quality representation.” *Id.* Eight specific requirements for appointment are described in *ABA Guideline 5.1(B)(2)(a)–(h)*, none of which are included in Tennessee’s Rule 13 qualification requirements. *See id.*; TENN. SUP. CT. R. 13 (2006).

95. TENN. SUP. CT. R. 13 § 3 (b)(1) (2006).

96. *Id.*

97. *See* AM. BAR ASS’N, *supra* note 45, guideline 3.1(E)(1), at 23.

tion including state post-conviction proceedings, has been by attorneys with limited experience in criminal practice. Before Rule 13 was amended to prohibit the appointment of counsel with little or no criminal experience, thirty of the forty-six attorneys who obtained relief for twenty-seven capital petitioners in Tennessee post-conviction proceedings were recruited from outside the “usual suspects.”<sup>98</sup> Many of these attorneys had no significant criminal experience and would be deemed ineligible for appointment under current Rule 13. Based on a couple reasons, the fact is that their civil practice experience appeared to prepare them better for quality representation in collateral capital proceedings: in part because proceedings collateral to the trial and direct appeal from trial are quasi-civil in nature, but more significantly, because the standard of practice of selected Tennessee civil litigators as a general rule is superior to that of criminal lawyers often appointed in capital cases. Also, regarding the recruitment of counsel for death penalty litigation, in general, Tennessee currently has no defense entity available to recruit counsel for appointment in capital cases at any procedural level such as at trial, on appeal, or on collateral review in state or federal court.<sup>99</sup>

If Rule 13 “qualification standards” followed the requirements of the *ABA Guidelines*, the inclusion of unqualified attorneys and the exclusion of qualified attorneys could be avoided. To ensure that unqualified attorneys do not qualify by virtue of repeated poor performance, the *ABA Guidelines* provide that “[a]n attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.”<sup>100</sup> To avoid the exclusion of qualified attorneys in the appointment roster, the *Guidelines* note that

[t]here are also those attorneys who do not possess substantial prior experience yet who will provide

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98. See *infra* app. D.

99. The thirty attorneys mentioned in this paragraph were recruited by the CCRC. See *infra* Part III.D. Since the CCRC was terminated in 1995, Tennessee has had no component for recruiting attorneys who are qualified to accept appointments in death penalty cases.

100. AM. BAR ASS'N, *supra* note 45, guideline 5.1, cmt. at 37.

high quality legal representation in death penalty cases. . . . These attorneys should receive appointments if the [entity determining qualification] is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.<sup>101</sup>

As is discussed more fully in Part III.D., and as existing standards universally require, the best way to ensure defense counsel is qualified to provide “high quality representation” to indigent defendants is to regulate appointments of counsel through a defense-oriented authority—independent of the judiciary—that is not subject to the arbitrary limitations imposed by Rule 13.

*C. Tennessee Fails to Provide Adequate Compensation and Supporting Resources for Indigent Capital Defense Representation*

Effective assistance of counsel depends not only on the qualifications and time of counsel, but also on the resources available to the attorney handling the case. Even a lawyer who is genuinely qualified and eager to provide adequate counsel in a capital case must have sufficient financial and investigative resources before he or she can actually do so. Yet all too often, such resources are not available to indigent capital defendants and otherwise competent attorneys end up providing unconstitutionally inadequate levels of assistance as a result.

1. Tennessee Fails to Provide Adequate Compensation for Defense Counsel in Death Penalty Cases

The lawyers appointed by the state for indigent defense representation, whether public defenders or private counsel, are dramatically under-compensated.<sup>102</sup> The starting salary of an assistant “public defender is just over \$38,000,” which is not much

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101. *Id.*

102. *See* AM. BAR ASS’N, *supra* note 45, guideline 9.1, at 49. “Counsel should be compensated at rate that is commensurate with the provision of high quality legal representation. . . .” *Id.* at guideline 9.1(B), at 49.

more than half “the average starting salary of a new lawyer in private practice: \$60,000.”<sup>103</sup>

Tennessee pays private court-appointed attorneys to represent capital defendants between \$60 and \$100 per hour, depending on the procedural status of the case.<sup>104</sup> For many private attorneys, the lower range of these rates (which is the range most frequently paid) is barely enough to cover the overhead costs of maintaining a law office.<sup>105</sup> At the same time, the state pays private attorneys for services in non-criminal appointments in amounts up to “\$225 an hour” and “\$350 an hour.”<sup>106</sup> When only the state’s property is at stake, attorneys appointed or retained to represent the state’s interest are paid at a rate two, three, or even four times what attorneys are paid by the state to represent human beings whose lives are at stake. Ironically and tragically, Tennessee provides a higher standard of care in cases in which only property is at risk than it does in these extraordinarily demanding cases in which human lives are in jeopardy.

The Tennessee Supreme Court requires that “[w]henever possible, a public defender shall serve as and be designated ‘lead counsel’” in death penalty cases.<sup>107</sup> It is common knowledge among public defenders and private attorneys alike that the Administrative Office of the Courts (“AOC”), under the supervision of the Supreme Court, encourages the district public defender offices to “qualify” as many staff attorneys as possible for death pen-

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103. Editorial, *State Grossly Underpays its Criminal Attorneys*, THE TENNESSEAN, Feb. 12, 2006, at 26A.

104. TENN. SUP. CT. R. 13 § 3(k) (2006).

105. In 1992, The Spangenberg Group surveyed the membership of the TACDL and the TBA. In their responses to the survey, private practitioners responded that the hourly overhead costs of maintaining a practice at that time—fifteen years ago—was approximately \$47.00 per hour. See SPANGENBERG GROUP, *supra* note 68, at 108–09. The average hourly cost of overhead reported by TACDL members was \$47.26; and the average hourly cost of overhead reported by TBA members was \$46.81. *Id.* Since 1992, particularly with the accelerating capital costs of the new technology of law offices, the overhead costs of maintaining a law practice have increased faster than annual rates of inflation. Altman Weil Inc., *Survey of Law Firm Economics* (Aug. 1, 2003), available at [http://www.altmanweil.com/dir\\_docs/resource/b4a94748-9bf4-487a-9f42-686f0f7500da\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/b4a94748-9bf4-487a-9f42-686f0f7500da_document.pdf).

106. Editorial, *supra* note 103.

107. TENN. SUP. CT. R. 13 § 3(b)(1) (2006).

alty appointments, and encourages the trial judges to administer a default appointment system that automatically appoints the public defender when more qualified counsel with a more realistic workload might be available. The appointment of private counsel requires that the attorney be paid by the hour, an additional cost even at sub-standard rates; but favorably for the state, one more case on the state-salaried public defender's overloaded caseload does not cost the state more money. By appointing an attorney at the least possible cost, but without reliable assurance of their qualifications or capacity to provide the kind of resources that death penalty defense requires, "[t]he result of the Tennessee system is that it perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation."<sup>108</sup>

Despite its cost-savings appeal to the state, the decision to add more capital cases to public defender caseloads further jeopardizes the quality of the defense representation and the reliability of the outcome of capital trials. Tennessee's underfunded public defenders are required to maintain caseloads that are dramatically excessive.<sup>109</sup> According to an editorial published early in 2006 in *The Tennessean*, individual assistant public defenders "handle on average close to a thousand cases a year"—one of the highest caseloads in the country, and one that makes it almost impossible for the defender to effectively represent even a single client in a death penalty case.<sup>110</sup> A recent "weighted caseload study" com-

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108. TENN. BAR ASS'N, *supra* note 69.

109. See AM. BAR ASS'N, *supra* note 45, guideline 10.3, at 61 ("Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation. . . .").

On May 13, 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441 regarding the *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*. In this opinion, the ABA Standing Committee concluded, among other things: "If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation." ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 06-441 (2006).

110. Editorial, *supra* note 103. A close look at the caseloads of the assistant public defenders in the individual thirty-one district public defender offices indicates a very high degree of variability in caseloads from office to office. *Id.*

missioned by the Tennessee State Comptroller<sup>111</sup> concluded that, based on current criminal caseloads, the state public defender system needs 120 additional lawyers.<sup>112</sup>

The excess caseloads and the underfunding of the public defenders are problems that are only getting worse, not better. Over the past two fiscal years (2005-2006, 2006-2007) and the fiscal year coming up (2007-2008), the state legislature has funded the public defenders conference for twenty-one additional staff attorney positions;<sup>113</sup> but during that same time period, the legislature has funded the prosecutors for an additional fifty-nine staff attorney positions, which is almost three times the number funded for the public defenders.<sup>114</sup> These additional prosecutors will make more work for the public defenders while, in relative terms, the public defenders will be less adequately staffed to effectively defend.

In the recent past, the public defender offices in the Sixth Judicial District (Knox County) and the Eleventh Judicial District (Hamilton County), for example, have been experiencing a crisis in caseload management that has spilled over into litigation in court. The public defenders in those two districts have taken the position that their staff attorneys are being forced to represent their clients

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A blanket statement that each assistant public defender handles a thousand cases per year may be misleading due to this variance. *Id.* The unavailability of reliable data may also render an accurate statement about caseloads difficult. *Id.*

111. JOHN G., MORGAN, COMPTROLLER OF THE TREASURY OFFICE OF RESEARCH, FY2004–2005 TENNESSEE WEIGHTED CASELOAD STUDY UPDATE: DISTRICT PUBLIC DEFENDERS (2006), *available at* <http://www.comptroller1.state.tn.us/repository/RE/PD2006.pdf>.

112. *Id.* at ii.

113. DEP'T FIN. & ADMIN., STATE OF TENN., THE BUDGET: FISCAL YEAR 2007-2008 B-241 (2007) [hereinafter BUDGET FY 2007-2008], *available at* <http://www.state.tn.us/finance/bud/bud0708/0708Document.pdf>; DEP'T FIN. & ADMIN., STATE OF TENN., THE BUDGET: FISCAL YEAR 2006-2007 B-199 (2006) [hereinafter BUDGET FY 2006-2007], *available at* <http://www.state.tn.us/finance/bud/bud0607/0607Document.pdf>; DEP'T FIN. & ADMIN., STATE OF TENN., THE BUDGET: FISCAL YEAR 2005-2006 B-187 (2005) [hereinafter BUDGET FY 2005-2006], *available at* <http://www.state.tn.us/finance/bud/bud0506/0506Document.pdf>.

114. BUDGET FY 2007-2008, *supra* note 113, at B-239; BUDGET FY 2006-2007, *supra* note 113, at B-197; BUDGET FY 2005-2006, *supra* note 113, at B-185.

in violation of their ethical and professional obligations, and in the process, the client's constitutional rights are being violated.<sup>115</sup> Eventually, because this is essentially a funding problem, this matter will likely be resolved in the legislature rather than in the courts. It is interesting to note, however, that the AOC has taken the position that the public defenders must take any case to which they are appointed, regardless of the ethical or professional obligations of the staff attorneys or the constitutional rights of the criminal defendants, because appointing the public defender is the least expensive way to deal with the problem.<sup>116</sup>

For the AOC to ignore the duty of counsel to provide effective assistance—and the concomitant rights of defendants to be receive effective assistance—in obeisance to budgetary considerations is an unseemly position to be taken by an arm of the Tennessee Supreme Court charged with the administration of the Tennessee's justice system. But that is exactly what the AOC has done and the message is clear: as far as the courts are concerned, the state can prosecute criminal defendants even if the defense attorneys cannot meet their professional obligations and even if the defendants are not effectively represented.

## 2. Tennessee Fails to Provide the Extra-Legal and Supporting Resources Necessary for Effective Defense Representation in Death Penalty Cases

Effective assistance of counsel depends not only on the qualifications and commitment of counsel, but also on the extra-legal resources available to the defendant's counsel. A death penalty case defense team requires various specialists, such as well-

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115. See Motion to Indefinitely Suspend Indigent Representations by the Public Defender's Office in the Three Divisions of the Knox Co. Criminal Courts, *In re* The Matter of Continued Representation by the District Public Defender's Office in the Three Divisions of Knox Co. Criminal Court, No. 46209 (Knox Co. Crim. Ct. filed Jan. 8, 1992); See Memorandum of Law in Support of Motion to Intervene and for a Continuance, *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Crim. Ct. filed May 5, 2006).

116. See Memorandum of Law in Support of Motion to Intervene and for a Continuance, *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Crim. Ct. filed May 5, 2006).

qualified investigators, forensic experts—particularly psychological, medical, and other social service experts—and other supporting services. If the defendant is indigent and can demonstrate the need, the state is constitutionally bound to provide the defendant with these resources and services.<sup>117</sup> According to the state and federal constitutions, the availability of funds is not a relevant consideration; if the funds are necessary to protect the defendant's constitutional rights, including the right to present a defense to criminal charges, then they are constitutionally required.

Yet Rule 13, particularly as amended in 2004, contains many arbitrary limitations unrelated to the measure of the defendant's need. These restrictions include: limitations on the hourly rate that can be paid investigators and forensic experts,<sup>118</sup> rates that are in some instances patently inadequate; presumptive requirements that the investigators or forensic experts for a case be located "within 150 mile radius of the court where the case is pending,"<sup>119</sup> if the appropriate forensic experts are frequently not available in the area; and presumptive limitations on the total fee that can be paid to investigators and forensic experts in state-post conviction litigation,<sup>120</sup> even if the amount is inadequate for the time and services needed. These extensive and often debilitating limitations on the resources at defense counsel's disposal are constitutionally<sup>121</sup> and statutorily<sup>122</sup> problematic because they are based on reasons other than a determination of the defendant's need.<sup>123</sup>

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117. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."); see also TENN. CODE ANN. § 40-14-207(b) (2006); TENN. SUP. CT. R. 13 § 5(a)(1) (2006) ("The court . . . may . . . in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.").

118. TENN. SUP. CT. R. 13 § 5(d)(1)–(3) (2006).

119. TENN. SUP. CT. R. 13 § 5(b) (2006).

120. TENN. SUP. CT. R. 13 § 5(d)(4)–(5) (2006).

121. See *Ake*, 470 U.S. at 75; *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

122. See TENN. CODE ANN. § 40-14-207(b) (West 2007); *Owens v State*, 908 S.W.2d 923, 924 (Tenn. 1995).

123. Even within individual public defenders' offices, the lack of resources for attorneys results in a shortage of investigators. The Tennessee

For example, Rule 13 restricts the trial court's authority, under Tennessee Code Annotated section 40-14-207(b), to approve a request for funds "necessary to ensure that the constitutional rights of the defendant are properly protected."<sup>124</sup> Because the trial court has knowledge of the particular case, it is thus the best situated entity (outside of the defense team itself) to know what extra-legal services are necessary in order to protect the defendant's constitutional rights. Tennessee Code Annotated section 40-14-207(b) does not anticipate any review of the trial court's decision to authorize funds; nevertheless, the revised Rule 13 provides that the trial courts' decisions are "submitted to the director [of the AOC] for prior approval."<sup>125</sup> Without any statutory authorization, Rule 13 gives the AOC, a non-judicial authority, the discretion to "den[y] prior approval of the request," requiring that "the claim shall also be transmitted to the chief justice for disposition and prior approval."<sup>126</sup> However, the AOC and Chief Justice of the Tennessee Supreme Court are necessarily less acquainted with the constitutional criteria—the specific needs of the defendant—than is the trial court. Nevertheless, the AOC, though staffed by non-judicial officials, regularly recommends that the funds authorized by the trial court be reduced or altogether refused, and the Chief Justice routinely accepts the AOC's recommendations.

Furthermore, Rule 13 also appears to conflict with the due process clause of the state<sup>127</sup> constitution and the Due Process Clause of the federal<sup>128</sup> constitution. For instance, the indigent defendant receives no notice or opportunity to be heard *before* the

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Comptroller's "weighted caseload study" revealed that "some districts used investigator positions as assistant public defenders because of high caseloads." JOHN G., MORGAN, *supra* note 111, at 18–19. Consequently, many public defender offices are not only short on attorneys, they are short on investigators. In 2005, eleven of the thirty-one districts had attorneys in investigator positions other than those occupied by attorneys acting as defenders. *Id.* The original weighted caseload study recognized that "not hiring investigators' compromises the function of representation." *Id.* at 19. Professional staff investigators with the training and capacity to investigate and prepare for a death penalty mitigation presentation are virtually nonexistent in district public defender offices.

124. TENN. SUP. CT. R. 13 § 5(a)(1) (2006).

125. TENN. SUP. CT. R. 13 § 5(e)(4) (2006).

126. TENN. SUP. CT. R. 13 § 5(e)(5) (2006).

127. *See* TENN. CONST. art. I, §§ 8, 17.

128. *See* U.S. CONST. amend. V.

previously authorized funds are taken away by the AOC and the Chief Justice; nor does the defendant have any opportunity for an appeal or review *after* the funds are removed.<sup>129</sup>

According to the *ABA Guidelines*, the authority designated to review and approve defense counsel's requests for extra-legal resources necessary to defend death penalty defendants and preserve their constitutional rights should be an authority "independent of the judiciary."<sup>130</sup> If such an independent authority were created to administer the indigent defense fund, particularly if it were staffed by knowledgeable indigent defense attorneys, the indigent defense budget would be managed by an entity well-suited to make determinations about appropriate defense funding. Additionally, *ex parte* hearings regarding resources would be unnecessary because the judiciary would no longer be directly involved in the decision to dispense the funds for extra-legal services in individual cases.<sup>131</sup>

The conclusion to the 2004 TBA Study Committee Report on the effectiveness of the representation in Tennessee death penalty cases clearly identified the state's unconstitutional resolution of the funding shortfall: "Tennessee . . . has resolved in favor of

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129. See TENN. SUP. CT. R. 13 § 5(e)(4)–(5) (2006).

130. AM. BAR ASS'N, *supra* note 44, guideline 3.1(B), at 22; see also *id.* guideline 2.1, at 18 (regarding the adoption and implementation of a plan for high quality representation in death penalty cases); *id.* guideline 3.1(A), at 22 (regarding the designation of a responsible agency); *id.* guideline 4.1, at 28 (regarding the defense team and its supporting services).

131. In an order dated July 1, 2004, in *In re* Amendments to Supreme Court Rule 13, No. M2003-02181-SC-RL2-RL (Tenn. Sup. Ct. 2003), the Tennessee Supreme Court decided by one vote, 3-2, to retain the existing rule (Tenn. Sup. Ct. R. 13 § 5) that the trial court presiding over a prosecution of a defendant, who is entitled to representation, may entertain a request for the authorization of funds from the defendant's counsel for needed "investigative or expert or other similar services" in an *ex parte* hearing. See *id.* at 5–7. Dissenting Justice Drowota, joined by Justice Barker, would have limited the right to an *ex parte* hearing to those requests for funds in which (1) pursuant to a constitutional right to due process "an indigent defendant requests funding for a psychiatric expert to evaluate the defendant for the purpose of raising an insanity defense at trial," and (2) pursuant to TENN. CODE ANN. § 40–14–207(b), a post-conviction petitioner makes a request for funds for needed "expert, investigative, and other support services," *id.* at 3 (Drowota, J., dissenting), unless "the general assembly chooses to legislatively overrule or modify" the statute, *id.* at 5 (Drowota, J., dissenting).

the State purse conflicts between the State Treasury and the fundamental constitutional rights of the accused facing a death penalty.”<sup>132</sup>

*D. Tennessee Has No State-Wide System for Expert Death Penalty Defense Counsel to Provide Direct Representation in Death Penalty Cases or to Supervise the: (1) Recruitment of Qualified Death Penalty Defense Counsel to Represent Death Penalty Defendants, (2) Setting of a Standard for Effective Defense Representation in Death Penalty Cases, or (3) Provision of Resource Assistance to Appointed Death Penalty Defense Counsel*

Tennessee currently has no state-wide office or offices capable of providing specialists in death penalty defense at the critical stages of litigation, as contemplated by the *ABA Guidelines*<sup>133</sup> and *The ABA Tennessee Study*.<sup>134</sup> The absence of this capability results in the more frequent appointment of unqualified counsel, the failure to have a proactive recruitment of qualified counsel, a denial of necessary resource assistance to appointed counsel in death penalty trials and appeals, and contribution to the failure of this state to establish a standard of effective representation in death penalty cases. No institutional vehicle is currently available to provide, with any reliable frequency any of these services, all of which are necessary to provide effective representation in death penalty cases.

In past years, Tennessee had a state-wide office that focused on recruiting and assisting attorneys handling capital cases, as well as providing direct capital representation. In 1986, the Sixth Circuit Court of Appeals recognized the inadequacy of representation in death penalty cases in Tennessee and created the previously mentioned Task Force to investigate the problem. In June 1987, the Tennessee Committee issued a report concluding that “the availability of competent, willing lawyers is woefully inade-

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132. TENN. BAR ASS’N, *supra* note 68.

133. AM. BAR ASS’N, *supra* note 44, guideline 3.1(C)(1)(a) and (b), at 22.

134. *The ABA Tennessee Study*, *supra* note 21, at 147–49.

quate,”<sup>135</sup> and recommending that a state death penalty “resource center” be created to address the representation problem.<sup>136</sup>

As a result, the previously mentioned CCRC was created in 1988, operating on state and federal grant funds.<sup>137</sup> The Tennessee Committee Report directed that the resource center’s first priority should be to pursue a recruiting campaign to increase the pool of attorneys who were qualified and available to defend capital cases in Tennessee.<sup>138</sup> The CCRC office was also commissioned by its Board of Directors to provide training, resource materials, and case-specific strategic consultation to attorneys appointed to represent death penalty defendants, and in selected cases, to provide direct representation as counsel of record for capital defendants, appellants, and petitioners in the first, second, and third tiers of litigation in state and federal court.

The staff at the CCRC invested thousands of hours and substantial resources to the recruitment of counsel. In the course of this exercise, the CCRC staff contacted many of the major law firms of this state, who were frequently willing to help. Many of these firms had attorneys who were familiar with complex litigation and who had the resources to provide the support services necessary in these death penalty cases that were chronically underfunded by the state. The staff at the CCRC worked with members of the judiciary to get these newly recruited attorneys appointed to represent defendants in death penalty cases. As the recruited attorneys were appointed and became invested in the cases and their clients, the CCRC staff worked with them and assisted them in their representation. It became apparent to the attorneys on the CCRC staff that lawyers who were accustomed to getting paid for quality work, even attorneys with little experience in criminal defense, were also able to effectively represent death penalty defendants; on the contrary, attorneys who were accustomed to representing indigent criminal defendants were, on average, accustomed to doing less.

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135. REPORT OF THE TENN. COMM. OF THE 6TH CIR. CT. DEATH PENALTY TASK FORCE at 3 (June 1987).

136. *Id.*

137. *See supra* note 27.

138. *See supra* note 27.

The CCRC operated from 1988 to 1995, at which time the grants were rescinded and the office closed.<sup>139</sup> In an apparent attempt to fill a portion of the vacuum left by the termination of the

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139. See 1995 Tenn. Pub. Acts 938 (declared no state funds for appeal of capital cases shall be appropriated for allocation to the Capital Case Resource Center of Tennessee, Inc. or any other non-governmental corporation or organization). Based on media reports and the legislative history of Tennessee Code Annotated section 40-30-205 which created the PCDO, it is obvious that politics played a role in the dismantling of the CCRC. First, the federal funds were rescinded, effective September 15, 1995, when the balance of power shifted in Congress from Democratic to Republican in 1994. See Adam Nagourney & Janet Elder, *Only 25% in Poll approve of the Congress*, N.Y. TIMES, Sept. 21, 2006, available at <http://www.nytimes.com/2006/09/21/us/politics/21poll.html?hp&ex=1158897600&en=ef00c37cf1e7978c&ei=5059&partner=AOL>. Second, Don Sundquist was sworn into the office of Governor in early 1995. Governor Sundquist had run on an aggressive law and order platform; and with the encouragement of prosecutors in the state, he promised to disband the CCRC. See Mark Curriden, *Is Justice Denied? Legal Agency Reaps Blame as a Barrier to Executions*, CHATTANOOGA TIMES FREE PRESS, March 27, 1995, at A1. Gubernatorial candidate Sundquist made the abolition of CCRC one of his primary campaign priorities with rhetoric such as the following:

These are convicted murders who have been condemned to die and yet they are living on the state's dime for decades and the taxpayer is being asked to pay for expensive lawyers who do nothing but fight the public's will. By eliminating the Capital Case Resource Center, you are eliminating a roadblock for the death penalty and cutting the state budget.

*Id.*

While the Sundquist campaign was committed to the dismantling of the CCRC, others did not agree that this was a good idea. For example, in the words of Tennessee Supreme Court Chief Justice Riley Anderson:

The Capital Case Resource Center has the talent, the knowledge, and the resources to handle these cases. Plans to do away with [the CCRC] are shortsighted. The problem is not too many lawyers or too much money, it's the opposite. As a whole, capital defendants are still not receiving adequate representation.

*Id.*

Nevertheless, in the first year of Governor Sundquist's first term, he kept his campaign promise; and the CCRC's funds were rescinded for the state fiscal year beginning July 1, 1995. See 1995 Tenn. Pub. Acts 938 (declaring no state funds for appeal of capital cases shall be appropriated for allocation to the Capital Case Resource Center of Tennessee, Inc. or any other non-governmental corporation or organization).

CCRC, the District Public Defenders Conference (DPDC) created a Capital Division in 1996, consisting of a two-attorney death penalty resource center, that was available to provide some modicum of advice and assistance to death penalty defense counsel at the trial stage and on appeal from trial. This small office provided a very limited resource for the public defenders, whose use of the office was minimal.<sup>140</sup> The DPDC discontinued the Capital Division in 2003. Since that time, no full-time death penalty defense attorneys have been available to provide representation, or even advice and assistance, to death penalty defendants or defense attorneys at the trial or direct appeal stages. This is particularly unfortunate because the trial is the “main event” in death penalty litigation, followed closely in importance by the direct appeal from trial.

Also in an attempt to provide a partial substitute for the CCRC, the previously mentioned PCDO was created by the state legislature in 1996.<sup>141</sup> The PCDO is currently the only state-wide death-penalty-related office in Tennessee. The PCDO is charged with the responsibility of representing Tennessee death row inmates in state post-conviction collateral litigation, but not trials, direct appeals, or federal habeas corpus proceedings.<sup>142</sup> Furthermore, the PCDO is statutorily designated to be counsel in *all* Tennessee capital cases on post-conviction review,<sup>143</sup> and consequently has no control over its continuously mounting caseload. The PCDO has no authority, and indeed no time or resources even if they had the authority, to recruit or assist qualified capital counsel from the private bar or public defenders’ offices. Additionally, for some unknown and unfortunate reason, the PCDO is statutorily

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140. During the tenure of DPDC’s Capital Division, reports from Capital Division staff reflect that attorneys from only approximately one third of the cases pending at trial or on direct appeal contacted the office at all, and less than one half of those attorneys sought assistance past the initial contact. Interview with Kelly Gleason, former attorney for the DPDC Capital Division, in Nashville, Tenn. (November 28, 2007).

141. TENN. CODE ANN. § 40-30-205 (West 2007).

142. *Id.*

143. Tennessee Code Annotated section 40-30-205 has been interpreted to mean that the PCDO is to be appointed counsel in all cases in state post-conviction proceedings unless there is some conflict, such as prior representation of a client or current representation of a co-defendant that would prohibit the involvement of PCDO staff. *See* TENN. CODE ANN. § 40-30-206(a)–207 (2006).

prohibited from providing case-specific resource assistance to death penalty defense lawyers. Even if it had the authority, however, it would not have the resources to provide case-specific assistance to other attorneys.<sup>144</sup>

The recruitment of counsel that was qualified to accept appointments, as well as had the resources to carry the burden, was a priority of the CCRC that has been essentially non-existent since the termination of that office in 1995. The absence of a proactive recruiting entity seeking to identify and expand the pool of lawyers best qualified for appointment in death penalty cases has created an enormous shortage of talent and resources. The absence of any state-wide office providing representation and resource assistance in capital cases at the trial and appellate levels has also contributed to the shortage. Rather than address the shortage problems, instead, the current AOC policy forces as many cases as possible onto overworked individual public defenders and the overwhelmed PCDO—without oversight from any state-wide entity regulating the standard of care, quality control, direct representation, or resource assistance. On the other hand, while more and more cases are being forced on the public defenders, the prosecutors have been staffed at a rate of three times that being provided to the public defenders by the state legislature.<sup>145</sup>

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144. Tennessee Code Annotated section 40-30-206(d)(3) purports to allow the PCDO to “[p]rovide consulting services to all attorneys representing defendants in capital cases on a non-case-specific bases.” TENN. CODE ANN. § 40-30-206(d)(3) (2006). An attorney would be unlikely to seek assistance from the PCDO, however, unless it is about in a case in which he or she is counsel.

145. See *supra* notes 112–13 and accompanying text. While the defenders have been provided the funds to staff twenty-one attorney positions (zero for fiscal year 2005-2006, two for 2006-2007, and nineteen for 2007-2008), the prosecutors have been provided the funds to staff fifty-nine attorney positions (eleven for fiscal year 2005-2006, sixteen for 2006-2007, and thirty for 2007-2008). See *supra* notes 112–13 and accompanying text.

In fiscal year 2004-2005, the prosecutors were funded at a level of \$130 million to \$139 million to prosecute indigent criminal cases, depending on whether you compute the indigent cases to be 75% or 80% of all cases prosecuted. See SPANGENBERG GROUP, RESOURCES OF THE PROSECUTION AND INDIGENT DEFENSE FUNCTIONS IN TENNESSEE, at 13 (2007). In that same fiscal year, only \$56.4 million was provided for the defense of all indigent criminal cases, \$13.5 million of which went to the members of the private bar who were appointed to represent indigent defendants. See *id.* at 16; *infra* Part III.E.1 (re-

The closure of the CCRC has had a significant impact on the availability and quality of review in capital cases. The aforementioned decline of post-conviction relief in Tennessee appellate courts in death penalty cases coincides with the closure of the CCRC and the completion of cases handled by CCRC staff attorneys or attorneys recruited or assisted by the CCRC.<sup>146</sup> While

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guarding the imbalance of resources available to prosecution compared to the resources available to the defense).

146. In the modern era of death penalty litigation, relief was obtained on state post-conviction review in Tennessee death penalty cases in twenty-seven cases, the first of which came in 1988 (Randy Teague) and last of which came in 2002 (Eddie Leroy Harris). With only one exception, all of the attorneys who acted as counsel for Tennessee death penalty petitioners who obtained relief in these twenty-seven death penalty cases were either staff at the CCRC (24%), recruited and assisted by staff at the CCRC (65%), or if not recruited, assisted by staff at the CCRC (29%). *See infra* app. D.

Most of those twenty-seven cases, in which post-conviction relief has been granted, had two attorneys representing the petitioner, for a total of forty-six attorneys who were appointed as counsel on the twenty-seven cases. *See infra* app. D. Among the forty-six attorneys, eleven were staff attorneys from the CCRC, a few of which had more than one case; thirty were attorneys recruited and assisted by the CCRC staff. *See infra* app. D. Only five of the forty seven attorneys were neither a CCRC staff attorney, nor an attorney recruited and assisted by the CCRC; but four of these five consulted with and received assistance on their cases from CCRC staff. *See infra* app. D.

Partially because the cases took a few years to reach the post-conviction review process after the reinstatement of the death penalty in Tennessee in 1977, relief was granted on state post-conviction review for the first time in 1988 in the only death penalty post-conviction case in which relief was granted prior to 1992. *See infra* app. A. The grant of relief of capital post-conviction cases peaked in the mid-1990s and then decreased. *See infra* app. A. In the past few years, relief has simply been nonexistent. In the four and one half years from 2003 through mid-2007, the state courts have granted *no* relief in state post-conviction capital cases. *See infra* app. A. During the eight years from 1992 through the end of 1999, relief was granted on state post-conviction review in twenty-two cases, an average of 2.75 cases per year. *See infra* app. A. During the six-year period from 2000 through the end of 2006, relief was granted in four cases, an average of 0.67 cases per year. *See infra* app. A. It should be noted that relief was granted in several cases based on the ruling in one case, *Middlebrooks v. State*, 840 S.W.2d 317 (Tenn. 1992); seven of these cases occurred on state post-conviction review during the years from 1993 through 1995. *See infra* app. A.

The only attorney who did not have some connection with the CCRC in his representation of a death penalty client, who obtained relief on state post-

multiple factors certainly contributed to this cessation of relief on state post-conviction review, undoubtedly, the closure of the CCRC played a significant part.

The appointment of counsel for Tennessee indigent defendants, including in death penalty cases, is currently within the exclusive province of the judiciary. Unfortunately, however, the courts are more committed to preserving their authority over the appointment function than they are committed to the appointment of the best available counsel when someone's life is at stake. Experience has taught us that, for various reasons, the judiciary has not consistently appointed the best available, or even qualified, counsel in death penalty cases. First, trial judges are under pressure from the AOC and the Supreme Court to appoint the local public defender in death penalty cases, whether or not the public defender is the best available counsel. Second, it is the responsibility of judges to balance inconsistent interests, such as the interests of the constituent public, the media, the prosecution, the defense, the jury, etc. Frequently, this divided allegiance is not conducive to the appointment of the most aggressive and effective defense attorneys who are more likely to be successful for their clients because aggressive defense litigation is not aligned with some of the other interests that the courts serve. Third, the court's obligation to appoint an attorney who will aggressively and effectively represent death penalty defendants is inherently in conflict with the trial court's interest in having its rulings affirmed in that the defendant's counsel will be seeking to reverse, on appeal, decisions made by the trial court adverse to his client.

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conviction review, was Thomas Dillard, counsel for Edward Leroy Harris. *See Harris v. State*, No. M-93-766 (Sevier County Crim. Ct. *order filed* June 18, 2002). Dillard had been appointed by the federal courts to represent Harris in federal habeas corpus proceedings. *See Harris v. Bell*, No. 3:97-CV-00407 (E.D. Tenn. *filed* May 27, 1997). Based on a record developed in federal court and pursuant to the authority of *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), while Harris's habeas petition was pending in federal court, Dillard filed a motion to reopen the post-conviction proceedings in state court in order to raise the issue of Harris's mental retardation; in 2002, Dillard became the last attorney to obtain relief on behalf of a capital post-conviction petitioner in this state. *See Harris v. State*, No. M-93-766 (Sevier County Crim. Ct. *order filed* June 18, 2002).

Authorities such as the *ABA Guidelines*<sup>147</sup> and *The ABA Study Committee*<sup>148</sup> universally recognize that part of the solution is the institution of an independent appointing authority to supervise and administer the defense of capital cases. In practice, the majority of the states in this country have established an authority independent of the judiciary to administer and supervise a state's indigent criminal defense system.<sup>149</sup>

However, as currently structured, the state public defender system is not a unified state-wide system. The local public defender is not appointed by a central state-wide office, but is locally elected by popular vote and is independent of any central state-wide control. The relative failure of the individual defenders to take advantage of the limited resource assistance made available through the now-defunct Capital Division of the DPDC is a function, at least in part, of the independence and autonomy of the individual district public defenders. This independence apparently has advantages for the individual public defenders and they tend to protect it; but, in many districts, this independence has not lent itself to the consistent enforcement, or even the establishment, of an effective standard of care or the appointment of qualified counsel for the representation of indigent death penalty defendants.

*E. Defense in Tennessee is Subordinated to the Prosecution*

The prosecution is legally and ethically bound to do justice, seek the truth, and treat criminal defendants fairly.<sup>150</sup> At the same

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147. See AM. BAR ASS'N, *supra* note 44, guideline 3.1, at 22, which requires that the appointing authority either be a "Defender Organization," which could be a state-wide direct representation, a resource center office, *id.* guideline 3.1(C)(1), at 22, or an "Independent Authority" that is an "entity run by defense attorneys with demonstrated knowledge and expertise in capital representation," *id.* guideline 3.1(C)(2), at 22. In either event, the appointing authority "should be independent of the judiciary and it, not the judiciary or elected officials, should select lawyers for specific cases." *Id.* guideline 3.1(B), at 22.

148. *The ABA Tennessee Study*, *supra* note 21, at ch. 6, pp. 147-53.

149. The Spangenberg Group, *State Indigent Defense Commissions*, at 16 (2006).

150. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."); *Giles v. Maryland*, 386 U.S. 66, 98 (1967) ("The state's obligation is not to convict, but to see that, so far as possible, the truth emerges."); *Berger v. United*

time, the criminal justice system is an adversarial system in which the prosecution strives to prevail over its adversary: the accused citizen and defense counsel. These two prosecutorial goals, to do justice and to prevail over the adversary, are sometimes in conflict. In order to preserve fairness and reliability in the adversarial system, the Due Process Clause requires a “balance of forces between the accused and his accuser.”<sup>151</sup> Parity between the defense function and the prosecution function, therefore, is required to enforce their equal partnership in the criminal justice system. A failure to ensure parity through the subordination of one function to the other violates the constitutional values of separation of powers and the guarantee of due process of law, not to mention an objective sense of fairness.

#### 1. The Imbalance of Resources Devoted to the Prosecution and Defense Functions

Notwithstanding the requirements of due process and the notion of balance between the adversaries, in Tennessee, the defense function is subordinated to the prosecution function. Fiscally, the subordination of the defense to the prosecution occurs not by a small margin. A study was recently conducted by The Spangenberg Group that compared for the first time in Tennessee the resources available in indigent criminal cases for the prosecution versus those available for the defense.<sup>152</sup> The Spangenberg Group Report compared resources for the prosecution and defense in the state’s fiscal year 2004-2005 and found that for indigent criminal cases the defense function received \$56.4 million, which

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States, 295 U.S. 78, 88 (1935) (“[The State’s interest] in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); *see also* State v. Spurlock, 874 S.W.2d 602, 611 (Tenn. Crim. App. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3–12(c) (1993); NAT’L PROSECUTION STANDARDS 1.1 (Nat’l Dist. Attorneys Ass’n 1991).

151. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). In a neutron activation case, the Sixth Circuit found: “[I]f the government sees fit to use this time consuming, expensive means of fact-finding, it must both allow time for a defendant to make similar tests, and in the instance of an indigent defendant, a means to provide for payment for same.” *United States v. Stifel*, 433 F.2d 431, 441 (6th Cir. 1970).

152. SPANGENBERG GROUP, *supra* note 144.

is less than half the \$130 million to \$139 million received by the prosecution.<sup>153</sup> These figures reflect only a portion of the disparity, however, because all of the resources made available to the indigent defense bar for investigative, forensic expert, and other extra-legal expenses were included in the \$56.4 figure, whereas the investigative and forensic expert resources made available to the prosecution by all of the local law enforcement agencies in the ninety-five counties and many municipalities in this state, as well as by the FBI, DEA, and other federal agencies, were not included in the \$130 million to \$139 million figure.<sup>154</sup> Any fair estimate of the resources made available to Tennessee prosecutors by local, county, and federal agencies would easily double the resources available to the defense.

In sum, the prosecution easily has more than four or five times the resources to prosecute indigent criminal cases than the defense bar has to defend them. It is true that the functions of the prosecution are not identical to the functions of the public defenders and assigned private counsel; and, because the functions are not identical, equal resources may not necessarily be required for parity sufficient to reach reliable and fair results in our adversarial system. For that matter, the prosecution may need the resources it receives, or more, in order to effectively perform its function. Nevertheless, the disparity reflected by this large degree of imbalance in available resources between the prosecution and defense is clearly disproportionate for the task involved. This imbalance leads to unfair results for citizens in cases that will determine their

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153. See SPANGENBERG GROUP, *supra* note 144, at 11, 16. All of the \$56.4 million received by the defense, i.e. the public defenders and private assigned counsel, went to the defense of indigent cases. *Id.* at 13. A percentage of the resources received by the prosecution were for the prosecution of defendants who had retained counsel, but the majority of the funds were for the prosecution of indigent defendants. *Id.* at 11. The Spangenberg Group reported that “the average rate of indigency frequently ranges between 75% and 80%.” *Id.* at 2. The Spangenberg Group calculated the resources received by the prosecution at both rates of indigency, 75% (\$130 million) and 80% (\$139 million). *Id.* at 11. In death penalty cases, the percentage of indigent defendants is much higher, and is currently 100% for those who are beyond the trial stage and have been sentenced to death. See *infra* app. C. Any inquiry into the indigent criminal defense system, therefore, includes all but a relatively small percentage of all criminal prosecutions in the state. See *infra* app. C.

154. SPANGENBERG GROUP, *supra* note 144, at 11–12.

right to liberty and life, unavoidably giving an unfair advantage to the prosecution in an adversarial system that purports to require a “balance of forces between the accused and his accuser.”<sup>155</sup>

## 2. The Imbalance of Autonomy and Independence between the Prosecution and Defense

Another example of the prosecutor’s systemic advantage over the defense in Tennessee is that the funding for the prosecution of cases, unlike the funding for indigent defense, is independent from outside control. By customary practice, as well as formal rule, the indigent defense bar is administered and managed by the judiciary concerning all matters with regard to the appointment of counsel and the authorization of funds for any defense services.<sup>156</sup> The prosecutors independently maintain and control their own budgets, however, and control any decisions regarding the assignment of counsel or the financing of the prosecution of cases.<sup>157</sup> This independence and financial freedom that the prosecution enjoys tilts the adversarial playing field even further to its advantage and to the disadvantage of the indigent defendant.<sup>158</sup> The imple-

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155. *Wardius*, 412 U.S. at 474. In a neutron activation case, the Sixth Circuit found: “[I]f the government sees fit to use this time consuming, expensive means of fact-finding, it must both allow time for a defendant to make similar tests, and in the instance of an indigent defendant, a means to provide for payment for same.” *Stifel*, 433 F.2d at 441.

156. TENN. SUP. CT. R. 13 (2006).

157. See TENN. CODE ANN. § 8-7-309(a)(5) (2006).

158. In response to the objections to the most recent proposed amendments to Rule 13 filed with the Tennessee Supreme Court by the various state-wide bar associations, the court entered an order on June 1, 2004 in *In re* Amendments to Sup. Ct. Rule 13, No. M2003-02181-SC-RL-2-RL (Tenn. filed June 1, 2004), <http://www.tsc.state.tn.us/opinions/tsc/rules/proposals/2004/rule13/rule13.pdf>. In the June 1, 2004 order, the court noted:

[The Commentators, i.e. the bar associations,] point[ed] out that the District Attorneys and the State Attorney General’s Office need not seek judicial permission to fund investigative or expert services and that the prosecution is able to rely upon unlimited state and local resources, such as state, local, and federal law enforcement agencies, medical examiners, the Tennessee Bureau of Investigation and its laboratory, and state mental health facilities, and may retain private experts for

mentation of the proposal previously discussed for a defense-administered authority, independent of the judiciary and charged with responsibility for the appointment of counsel and the funding of indigent defense, would eliminate this advantage currently enjoyed by the prosecutors.

3. The Erroneous Presumption of a Legitimate Prosecutorial Interest in the Judicial Administration of the Defense Function: Three Examples

*a. Example One: The Resources Available to the Defense in Individual Cases*

Tennessee prosecutors influence policy decisions and funding issues that should be purely administrative matters concerning only the defense bar, or the defense bar in combination with the judiciary. The judiciary allows and even invites prosecutors to influence administrative matters concerning the appointment of indigent criminal defense counsel and the funding of indigent defense services. The prosecution's unfair and improper influence over such matters was manifest, for example, when an appeal was made to the Tennessee Supreme Court in opposition to proposed changes in Rule 13. In 2004, the TBA and other state-wide bar associations appealed to the Tennessee Supreme Court in opposition to proposed amendments to Rule 13.<sup>159</sup> In response to this appeal, the District Attorney Generals Conference (TDAGC) entered the fray in opposition to measures enabling defense counsel to independently fund their indigent client's defense.<sup>160</sup> The Tennessee Supreme Court accorded standing to the prosecution, the in-court adversary of the indigent defendant, notwithstanding the fact that Rule 13 applies only to administrative issues regarding the legal representation and support services necessary for indigent defense and has no relationship to any case or controversy in which the prosecution is involved.<sup>161</sup>

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consultation and proof without any restriction upon the expert's location or the hourly rate.

*Id.* at 5.

159. *See id.* at 3.

160. *Id.*

161. *Id.*

During the litigation of *In re: Amendments to Supreme Court Rule 13*, the prosecutor's primary concern was the ex parte nature of the hearings on indigent defense counsel's request for funds: "The TDAGC is convinced that the single largest cause of waste, abuse and runaway spending is our current ex parte procedure."<sup>162</sup> The prosecution's proposed cure for this perceived problem was that defense counsel's request for funds necessary for the representation of his or her indigent client should be conducted in open court and subject to the objections of the prosecution.<sup>163</sup>

Neither the prosecution nor the Tennessee Supreme Court found a conflict in the prosecutor's proposal that they should be allowed to stand in opposition to a request by their adversary for resources necessary to defend against the prosecution's charges. Conversely, no one familiar with the system could imagine that defense counsel should or would be allowed to have any say regarding the funds available for the prosecution of defense counsel's clients. The ostensibly realistic prospect of the prosecution's involvement in the preparation of the defense case, juxtaposed against the ostensibly absurd prospect of the defense's involvement in the prosecution's preparation, demonstrates the true imbalance between adversaries as regarded by the judiciary.

Aside from the prosecution's conflict of interest, the procedure sought by the prosecutors would have violated, depending on the facts of the individual cases, the defendant's right to counsel, right to present a defense, and privilege against self-incrimination.<sup>164</sup> In order to defend a request for funds and to persuade the trial court to exercise its discretion to authorize funds, it is necessary for defense counsel to reveal privileged information, including information about the client's anticipated defenses and information received during protected communications with the client. It would be improper and unconstitutional to force defense counsel to reveal such information to the prosecution because it

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162. JAMES W. KIRBY, TENN. DIST. ATTORNEYS GEN. CONFERENCE, AMENDED COMMENTS OF THE STATE OF TENN.'S THIRTY-ONE DIST. ATTORNEYS GEN. ON PROPOSED CHANGES TO SUP. CT. RULE 13 at 2 (submitted 2004) (commenting on the Tennessee Supreme Court's proposed changes to Supreme Court Rule 13), <http://www.tsc.state.tn.us/opinions/tsc/rules/proposals/2003/comm13/Expert/extraExp.pdf>.

163. *Id.*

164. *See* U.S. CONST. amends. VI, V; TENN. CONST. art. I, § 9.

would force defense counsel to choose between the counsel's ethical obligation to preserve the confidentiality of communications with his client and the client's constitutional rights to present a defense to the pending charges.

Because the indigent defendant's right to effective assistance is constitutionally coextensive with the same right for a fee-paying defendant, the proposed procedure also would violate the right to counsel because it would render a fee-paying defendant's right to counsel to be greater than an indigent defendant's rights to counsel.<sup>165</sup> The procedure proposed by the prosecutors allows them to contest the authorization of funds to indigent defendants necessary for their defense, which is unfair to the indigent defendant because the prosecution has no say at all in how fee-paying defendants with retained counsel spend their money in preparation of their defense.

In response to the prosecutor's proposal to abolish *ex parte* hearings for defense fund requests, on July 1, 2004 the Supreme Court came within one vote, 3-2, of abolishing the defendant's rights to *ex parte* hearings to the extent that they then existed.<sup>166</sup> Armed with this close vote by the Supreme Court, the prosecutors took their proposal to the 2006 General Assembly. The TDAGC followed the suggestion of the two dissenting Justices in the Supreme Court's July 1, 2004 Order and asked the State Legislature to abolish *ex parte* hearings.<sup>167</sup> The proposed legislation originally included the abolition of *ex parte* hearings for all criminal cases, including death penalty cases, but was subsequently amended due to constitutional problems unique to death penalty cases<sup>168</sup> so that

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165. See U.S. CONST. amend. VI; TENN. CONST. art. I, § 9.

166. See Order at 5-7, *In re Amendments to Sup. Ct. Rule 13*, No. M2003-02181-SC-RL-2-RL (Tenn. filed June 1, 2004) (majority opinion), <http://www.tsc.state.tn.us/opinions/tsc/rules/proposals/2004/rule13/rule13.pdf>; *Id.* at 1-7 (dissenting opinion).

167. See S. B. 203, 104th Gen. Assem., Reg. Sess. (Tenn. 2006); H. B. 1170, 104th Gen. Assem., Reg. Sess. (Tenn. 2006).

168. The constitutional problems unique to death penalty cases are discussed in the analysis by the Tennessee Supreme Court in its discussion of the indigent defendant's right to *ex parte* hearings in *In re Amendments to Supreme Court Rule 13*. See *supra* note 165 and accompanying text.

capital cases were excluded from its application.<sup>169</sup> The proposed legislation did not pass during the 2006 session of the legislature.

If the decision regarding extra-legal resources were made by an authority “independent of the judiciary,” as directed by *ABA Guideline 3.1(B)*,<sup>170</sup> there would be no *ex parte* hearings; like the prosecutors’ budget, the indigent defense fund would be free from the judiciary’s micro-management. All of this might tend to level the playing field between the prosecutors and the indigent defense as well as more likely allow the decision regarding a grant of funds to be based only on the constitutionally relevant question regarding the defendant’s need.

*b. Example Two: The Compensation of Defense Counsel*

Another example of the subordination of the defense to the prosecution involves the death penalty case of *State v. Courtney Mathews*.<sup>171</sup> In the *Mathews* case, *pro bono publico* interveners represented Mathews’ defense counsel, Isaiah S. Gant, challenging the adequacy of Gant’s rate of compensation for his services at \$40 per hour for out-of-court services and \$50 per hour for in-court services.<sup>172</sup>

Because the matters addressed in the parenthetical litigation concerning Gant’s compensation were unrelated to the prosecutor’s interest in the prosecution of Courtney Mathews, counsel for attorney Gant did not provide to the Montgomery County District Attorneys Office copies of pleadings regarding the compensation rate challenge.<sup>173</sup> The indigent defense fund is part of the judiciary’s budget; therefore, the compensation rate challenge would have potentially affected the interests of the judiciary. Counsel for Gant sent written notification of the challenge to Mr. Charles E. Ferrell, then Director of AOC,<sup>174</sup> inviting him to respond to the

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169. See *supra* note 165 and accompanying text.

170. AM. BAR ASS’N, *supra* note 44, guideline 3.1(B), at 22.

171. *In re Hourly Comp. Rate of Court Appointed Counsel*, 937 S.W.2d 842, 845 (Tenn. 1996).

172. *Id.*

173. *Id.*

174. See *In re Hourly Comp. Rate of Court Appointed Counsel*, Montgomery County Crim. No. 33791 (Transcript of Hearing at ex. 1 held on Mar. 8 and 10, 1995).

challenge and to participate, either personally or through a representative in the hearing that was held before the trial court.<sup>175</sup> Because the AOC did not accept the invitation to participate, the trial court held the hearing on defense counsel's compensation rate *ex parte*.<sup>176</sup>

After hearing two days of proof, the trial court entered a twelve-page order on March 28, 1995 in which it found "that a reasonable hourly compensation rate for appointed counsel, Isaiah S. Gant, in this capital case, is hereby set at \$100.00 per hour without distinction for in-court and out-of-court services."<sup>177</sup> In the March 28, 1995 order, the trial court stated its reasons for holding the hearing *ex parte* without the participation of the prosecution, since the AOC elected not to participate.<sup>178</sup> The trial court stated that it "conducted the hearing on this motion *ex parte* without the involvement of the prosecution" due to "considerations of separation of powers" and "the obligations of the judiciary in this state to administer the criminal justice system," stating that "[t]he compensation of court appointed counsel is ultimately a matter concerning the administration of the criminal justice system, which is within the authority of the judiciary and not the other branches of government. See, S.Ct. R. 13. The prosecution is a part of the executive branch of government."<sup>179</sup> The court also noted: "These matters, at least in capital cases, are to be brought to the attention of the trial court *ex parte*, under seal, and in confidence. See, S.C.T.R. 13(2)(B)(10) and T.C.A. 40-14-207(b)."<sup>180</sup>

The AOC, however, refused to compensate attorney Gant at the \$100 per hour rate indicated in the trial court's March 28, 1995 Order, and instead compensated Gant at the rate indicated in Rule 13, which was \$40 per hour for out-of-court services and \$50 per hour for in-court services.<sup>181</sup> Gant sought review in the Tennessee Supreme Court of the AOC's decision pursuant to a petition for a

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175. *Id.*

176. *See In re Hourly Compensation Rate of Court Appointed Counsel*, Montgomery County Crim. No. 33791 (*order entered* Mar. 28, 1995) at 10.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 11.

181. *In re Hourly Compensation Rate of Court Appointed Counsel*, 937 S.W.2d 842, 845 (Tenn. 1996).

writ of certiorari which was, at the time, authorized by Rule 13(2)(D)(1).<sup>182</sup> The Supreme Court affirmed the decision of the AOC, finding that the AOC was bound by the literal language of Rule 13, which expressly outlined the compensation rate.<sup>183</sup> The Supreme Court went beyond affirming the decision by the AOC, however, and chastised the trial court for holding the hearing *ex parte*.<sup>184</sup> The Court assumed that the prosecution was a legitimate interested party on the question of defense counsel's compensation. In the process, the court failed to address the trial court's rationale for holding an *ex parte* hearing, and ignored the fact that the Director of the AOC was invited to appear and represent the judiciary's interest.<sup>185</sup>

*c. Example Three: The Public Defenders' Caseload and Budgetary Issues*

Another example of the subordination of the defense to the prosecution involves the case filed in the Hamilton County Juvenile Court by the District 11 District Public Defenders Office<sup>186</sup> in which the Public Defender, on May 10, 1995, sought to be allowed to decline appointments "until the caseload for the Office of the District Public Defender is such that allows the Office to provide professionally responsible and effective assistance of counsel to new clients within the mandates of both the constitutional and professional standards."<sup>187</sup> In response to the motion, the juvenile court entered an order denying any relief to the Public Defender and concluding that it was "not any more necessary in this court than in any court within this jurisdiction to relieve the public defender from appointment in any case."<sup>188</sup> An appeal of that deci-

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182. *Id.* at 844.

183. *Id.* at 845.

184. *Id.*

185. *Id.*

186. *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Juv. Ct. *filed* May 10, 2005).

187. Motion of District Public Defender, at 1, *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Juv. Ct. *filed* May 10, 2005).

188. *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton Co. Juv. Ct. *order filed* June 24, 2005) at 2.

sion was taken to the Hamilton County Criminal Court,<sup>189</sup> and remains pending at the time of this writing.

After the appeal of the Hamilton County Juvenile Court's decision was taken by the Public Defender to criminal court, the State Attorney General entered the litigation and filed a motion requesting to intervene in the matter on behalf of the AOC,<sup>190</sup> which had not previously been a party to the litigation. The Attorney General served a copy of its motion on the local District Attorney General.<sup>191</sup> The State Attorney General, by acting on behalf of the AOC and by bringing the local District Attorney into it, had thereby taken the position that it had sufficient interest and standing to maintain that the Hamilton County Public Defender should not be allowed to decline appointments due to excessive caseloads that compromise the constitutional rights of their indigent clients.<sup>192</sup> Effectively, the Attorney General sought intervention into the case on behalf of the AOC, in opposition to the relief sought by the Public Defender, in order to save the state money rather than to insure that the indigent defendants involved were adequately represented. For instance, had the Hamilton County Public Defender been permitted to decline appointments, substitute counsel would have been appointed from the private bar and compensated from the indigent defense fund administered by the AOC.<sup>193</sup> This substitute appointment would cause the AOC to pay out of the indigent defense fund to compensate private counsel on a case by case basis, rather than rely on the service of the staff attorneys of the Public Defender Office who are government employees with fixed salaries regardless of additional appointments. Consequently, the intervention of the Attorney General on behalf of the AOC was for the purpose of saving the state money and, if successful, would

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189. See *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Crim. Ct. filed July 12, 2005).

190. See Motion to Intervene and For a Continuance at 1-2, *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton Co. Crim. Ct. filed May 12, 2006).

191. See *In re* Representation of Juvenile Defendants by the District Public Defender, No. 254747 (Hamilton County Crim. Ct. filed July 12, 2005).

192. *Id.*

193. See TENN. SUP. CT. R. 13(2006); TENN. CODE ANN. § 40-14-207(a) (2006).

discourage the Public Defender's ability to represent their clients due to their excessive caseloads.

For the same reasons that the compensation rate for attorney Gant in the *Mathews* case was an improper concern for the prosecutors of Gant's client, the question of whether the Hamilton County Public Defender should be allowed to decline appointments due to excessive caseloads was also an improper concern for the Attorney General, the local District Attorney General, or any component of the executive branch of state government whose prosecution of the Public Defender's clients would be made easier by overburdening the Public Defender with excessive caseloads.<sup>194</sup> In both instances, the prosecution has maintained a position that, if successful, will make it easier for the prosecution to convict the defendants and more difficult for the defendants to defend themselves for unjust reasons unrelated to their guilt or culpability.

Because the courts' decision in the *Hamilton County* case will affect the indigent defense fund of the judiciary's budget, the AOC has a legitimate interest in the matter. However, it is a violation of the separation of powers, and presents both a conflict of interest and an unfair advantage for the prosecution, which seeks to prosecute the defendants represented by the Public Defender, to represent the AOC. In this process, the judiciary branch, which has the legal responsibility to administer the criminal justice system and protect the rights of the accused, is allowing the executive branch, through the prosecution, to take an unfair advantage of indigent defendants.

The examples, cited above, are only a few isolated instances in Tennessee of the subordination of the defense to the prosecution in a way that further tips the adversarial playing field to the unfair advantage of the prosecution. These few examples are symptomatic, and represent a prevailing institutional mind set that compromises the rights of our citizens, renders our criminal justice system less fair and more unreliable, and violates an objec-

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194. The involvement of the prosecution in this issue is even more problematic given the position of their putative client, the AOC, which was concerned only about the expenditure of state funds. The AOC demonstrated very little concern, if any, for the ethical and professional obligations of the assistant public defenders with the excessive caseloads, and apparently no concern for the constitutional rights of the defendants to effective representation that were being denied.

tive sense of fairness. Perhaps most importantly and of greater concern is that this mind set is not prohibited or resisted, but is condoned and enabled, by the state judiciary.

#### IV. CONCLUSION

The Sixth Amendment does not require the state to provide an indigent defendant with the “best” representation, only “reasonably effective” or “adequate” representation.”<sup>195</sup> The United States Supreme Court<sup>196</sup> and the Sixth Circuit Court of Appeals<sup>197</sup> have specifically held that the *ABA Guidelines* set out the appropriate standard to be applied in order to measure the reasonableness of counsel’s performance pursuant to the *Strickland* standard. The *ABA Guidelines* and *Strickland* require counsel in death penalty cases to apply exceptional legal skills and unique knowledge, training, and experience, as well as to invest the necessary time, effort and sufficient extra-legal investigative and forensic assistance.<sup>198</sup> This standard inevitably requires a quality of representation that looks very much like the “best” representation.

In a very real sense, Tennessee lawyers representing defendants whose lives are at stake have themselves been condemned if they are expected to meet their professional obligations. They are asked to make a choice that no lawyer should have to make. On the one hand, a lawyer can accept the challenge to defend an indigent death row inmate for a relative pittance of compensation while carrying an overwhelming workload, and in the process, risk their personal lives and relationships, as well as compromise their representation of other clients. Or, in the alternative, a lawyer can go through the motions while finessing the representation, and in the process, compromise what should be their core values, violate their ethical obligations as attorneys, and potentially lose their client’s life. Why should they suffer all of this with life at jeopardy when they can work less and make real money litigating over

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195. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

196. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

197. See, e.g., *Haliym v. Mitchell*, 492 F.3d 680, 716–17 (6th Cir. 2007); *Hamblin v. Mitchell*, 2003 FED App. 0457P, 354 F.3d 482, 486 (6th Cir.).

198. See AM. BAR ASS’N, *supra* note 44, guidelines 4.1–6.1, 8.1, 10.4–10.11, at 28–41, 46, 63–106.

property? The answer is that because of the legal difficulty, emotional drain, lack of meaningful compensation, and political unpopularity of death penalty cases, most attorneys who are capable of effectively representing death penalty defendants are understandably unwilling to even try.

Capital defense representation has been found inadequate as a matter of law in several Tennessee death penalty cases.<sup>199</sup> But the legal standard applied in death penalty cases to measure whether representation is constitutionally adequate does little more than ensure that the death row inmate is represented by “a person who happens to be a lawyer.”<sup>200</sup> In the words of the TBA Study Committee, Tennessee’s current system “perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation.”<sup>201</sup> Numerous inmates on Tennessee’s death row were represented by attorneys who had little more to offer their clients than a law license, and some barely that.<sup>202</sup> Many of these death row inmates, therefore, have found themselves in the unfortunate dilemma of receiving representation at trial sufficiently effective to pass legal muster with the courts, but not sufficiently effective to make a difference in the outcome of their cases. Capital defense representation so minimal that it does not take advantage of opportunities to affect the result at the guilt stage, or particularly at the sentencing stage where life is at stake, is simply not enough and should not be tolerated.

In a September 2005 article in the *Tennessee Bar Journal*, former Sixth Circuit Court Chief Judge Gilbert Merritt wrote, “The administration of the death penalty nationwide remains broken and arbitrary, and that seems particularly true in Tennessee.”<sup>203</sup> Though it may wish, intend, or pretend otherwise, Tennessee has not and is not meeting its constitutional obligations to provide equal justice to defendants charged, convicted, and sentenced to death.

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199. See *supra* notes 8–9.

200. *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J. dissenting) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

201. TENN. BAR ASS’N, *supra* note 68.

202. See *supra* Part I.

203. Gilbert S. Merritt, *The Death Penalty in Tennessee: Reforming a Broken System*, TENN. B.J. Sept. 2005, at 22, 22–23, 26–27.