No. 21-7809

IN THE SUPREME COURT OF THE UNITED STATES

URSHAWN ERIC MILLER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

KATHERINE C. REDDING
Senior Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-8120
Katherine.Redding@ag.tn.gov

Counsel for the Respondent

INDEX OF APPENDICES

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN DIVISION

STATE OF TENNESSEE,
Appellee,

VS.

C.C.A. Docket No. W2019-00197-CCA-R3-DD

Madison County Circuit, Division II, No. 16-435

URSHAWN ERIC MILLER,
Appellant.

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT, DIVISION II

BRIEF OF APPELLANT

At Trial and On Appeal:

George Morton Googe, BPR #006178
District Public Defender

Gregory D. Gookin, BPR #023649
Assistant Public Defender
245 W. Sycamore St.
Jackson, TN 38301
(731) 423-6657

ORAL ARGUMENT REQUESTED

Attachment 1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL AMENDMENTS:

TENNESSEE CONSTITUTIONAL PROVISIONS:

UNITED STATES SUPREME COURT CASES:

TENNESSEE SUPREME COURT CASES:

TENNESSEE CODE PROVISIONS:

OTHER AUTHORITY:

INTRODUCTION

MAY IT PLEASE THE COURT:

This is an appeal from Appellant's convictions for First Degree Murder, First Degree Murder in Perpetration of Attempted Especially Aggravated Robbery, Attempted Second Degree Murder, Aggravated Assault, Employing Firearm With Intent to Commit a Dangerous Felony, Attempted Especially Aggravated Robbery, and Evading Arrest. Appellant received a sentence of Death for the First Degree Murder and Felony Murder convictions; for the other offenses, he received a total effective sentence of thirty (30) years, to be served concurrently with the Death sentences.

This case was tried by a jury before the Honorable Donald H. Allen, Judge of the Circuit Court of Madison County, Tennessee, Division II. Appellant properly perfected his appeal to this Court seeking a reversal and/or modification of his conviction and sentence.

The parties will be referred to as "Appellant" and "State."

The record on appeal consists of: the technical record, being three (3) volumes; one (1) supplement to the technical record; the transcript of the jury trial, being thirteen (13) volumes; the transcript of the motion for new trial hearing, being one (1) volume; and thirty-eight (38) exhibits. References to the technical record will be by volume number and page number, e.g., (I, 5). References to the transcripts will be by volume number and page number, e.g., (III, 7).

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to find that Appellant was guilty of First Degree Murder, First Degree (Felony) Murder, Attempted Second Degree Murder, Attempted Especially Aggravated Robbery, Aggravated Assault, and Employing a Firearm During the Attempt to Commit a Dangerous Felony?
2. Whether the trial court erred in denying Appellant's motions to strike jurors Ronald Robinson, Melissa Ann Little, and Joan Graves for cause?
3. Whether the trial court erred in excusing potential jurors John Eads, Grace Milhorn, and Melony Sesti for cause, when Appellant objected to the State's challenges?
4. Whether the trial court erred in not excusing potential juror Dru Crum for cause, when Appellant had exhausted all of his peremptory challenges?
5. Whether the death penalty is a disproportionate punishment in the instant case?
6. Whether the death penalty in general, and lethal injection specifically, constitute cruel and unusual punishment?
7. Whether the aggravating factors found by the jury outweighed the mitigating factors beyond a reasonable doubt?
8. Whether the trial court erred in denying the Appellant's motion *in limine* regarding the introduction of the video of his prior Aggravated Robbery during the penalty phase?

STATEMENT OF THE CASE

Appellant was indicted on October 3, 2016, and charged with several offenses: to wit, First Degree Murder (victim: Ahmad Dhalai), First Degree Murder in Perpetration of Attempted Especially Aggravated Robbery (victim: Ahmad Dhalai), Attempted Especially Aggravated Robbery, Attempted First Degree Murder (victim: Lawrence Austin), Aggravated Assault, Employing a Firearm in the Attempt to Commit a Dangerous Felony, Convicted Felon in Possession of a Handgun[1], Resisting Arrest, and Evading Arrest. (I, 41-51) Appellant was found to be indigent and the Office of the District Public Defender was appointed to represent Appellant. (I, 62)

This case was tried by a jury before the Honorable Donald H. Allen, Circuit Court Judge of Madison County, Tennessee, Division II, upon a plea of not guilty. The trial was held February 26-March 4, 2018. Appellant was convicted as charged of each offense, save for count 4, in which he was convicted of Attempted Second Degree Murder, and count 7, which was dismissed by the State. (II, 315-316, III, 337-343) The jury recommended that a death sentence be imposed for the First Degree Murder convictions, and the Court entered judgments to that effect on March 5, 2018. (II, 315-316) Appellant timely filed a Motion for New Trial on March 29, 2018. (III, 330-332)

The trial court conducted a separate sentencing hearing for the other offenses on May 7, 2018. The trial court imposed the following sentences:

Count 3	Attempted Especially Aggravated Robbery	12 years, Rg. I
Count 4	Attempted Second Degree Murder	12 years, Rg. I
Count 5	Aggravated Assault	6 years, Rg. I

[1] The charge of Convicted Felon in Possession of a Handgun was severed before trial; the State subsequently dismissed this charge. (III, 340)

Count 6	Employing Firearm in the Commission of A Dangerous Felony	6 years, Rg. I
Count 8	Resisting Arrest	6 months[2]
Count 9	Evading Arrest	11 months, 29 days[3]

(III, 337-343) The trial court aligned the sentences such that Appellant would receive a total effective thirty year sentence for the non-capital offenses, and ordered that these sentences be served concurrently to his death sentences in Counts 1 and 2. (III, 337-343) Appellant later filed an Amended Motion for New Trial on October 15, 2018, and the trial court conducted a hearing on the post-trial motions on November 21, 2018. The trial court entered an order denying Appellant's Motion and Amended Motion for New Trial on January 2, 2019. (III, 456-464)

Appellant timely filed a Notice of Appeal on February 1, 2019. (III, 466-469) This case is properly before this Honorable Court.

[2] The judgment for count 8 lists the indicted offense as Resisting Arrest but lists the conviction offense as Attempted Especially Aggravated Robbery. (III, 341) Appellant respectfully requests that this Court order the count be remanded for entry of a corrected judgment.

[3] Appellant does not challenge his convictions for Resisting Arrest and Evading Arrest

STATEMENT OF FACTS

JURY *VOIR DIRE*

The jury *voir dire* lasted from February 26-28, 2019, and the entire jury pool was examined before a jury of twelve and three alternates were selected. A more detailed discussion of each of the facts surrounding each contested individual juror will be presented during the argument portion of Issues 2, 3 and 4.

MOTION *IN LIMINE*

Pre-trial, the defense filed a motion *in limine* regarding the admissibility of a video depicting Appellant's prior Aggravated Robbery crime. (II, 292-294) The trial court held a hearing on the motion and denied it, finding that the State should be able to put on relevant proof of Appellant's prior felony conviction, as it was a statutory aggravating factor. The trial court later entered an order denying this motion *in limine*. (II, 300-301)

STATE'S GUILT/INNOCENCE PHASE PROOF

Jackson Police Officer Kevin Livingston responded to the Bull Market in Jackson, on November 25, 2015. (XIII, 68) Upon arrival, Officer Livingston encountered a man behind the counter inside the business. The man appeared to have been shot in the head, and Officer Livingston witnessed the man pass away inside the business. (XIII, 71) Officer Livingston called for EMS to assist and then began securing the scene. (XIII, 72)

Abdul Saleh worked at the Bull Market alongside some of his relatives, including the victim, Ahmad Dhalai. (XIII, 75) Mr. Abdul Saleh was working at the store on November 25, 2015; Lawrence Austin was working there as a custodian, and Foad Saleh, Abdul's son, and Ahmad Dhalai were also on duty. (XIII, 78) Shortly before 11:00 p.m.,

Mr. Saleh heard a loud pop while he was in the restroom. Upon investigating, he went toward the cash register and found Ahmad Dhalai lying on the ground. (XIII, 79-80) Mr. Saleh also saw a man wearing dark clothing and a hoodie. After retreating for his own safety, Mr. Saleh heard two more "pops." (XIII, 80-81) The other man then fled the store and Mr. Saleh called the police. (XIII, 82)

Mr. Saleh also confirmed that there was video of the shooting incident, and testified regarding the events that were depicted on the video. (XIII, 92-99)

On cross-examination, Mr. Saleh said that he did not see the hooded man holding a handgun, but did see a handgun when he later watched the store surveillance video. (XIII, 103) Mr. Saleh could not ascertain the identity of the assailant due to him wearing a hood and having a mask over his face. (XIII, 105)

Timothy Sinclair, a customer at the Bull Market, was backing out of the parking lot when he observed a person approaching the business from the side. This person was wearing dark clothes, a hoodie, and a mask. (XIII, 115) Mr. Sinclair estimated that this person was a black male. (XIII, 116) When the person entered the Bull Market, he was holding a gun, and Mr. Sinclair observed the person fire a shot. (XIII, 119) After driving away a short distance to escape the danger, Mr. Sinclair gathered himself and called the police. (XIII, 119) While calling the police, he saw the shooter leave the store and walk away toward Arlington Avenue. (XIII, 120-121)

On cross-examination, Mr. Sinclair agreed that he had previously testified in a preliminary hearing and stated that he could not see anything but the assailant's eyes, and could not tell the sex and race of the person. (XIII, 138)

Lawrence Austin worked at the Bull Market doing various tasks that the owners needed completed. (XIII, 145) On November 25, 2015, Mr. Austin was helping to clean up the store when the hooded person entered the store. (XIII, 146) As Mr. Austin was mopping, he heard a voice say "drop it off." (XIII, 147) Initially, Mr. Austin thought it may have been a customer joking around, but he then heard a gunshot. (XIII, 148) Mr. Austin tried to hide behind a refrigerator but realized that someone was shooting at him as well. (XIII, 149) When Mr. Austin turned back around, he saw the hooded person jumping back across the counter and fleeing the store. Mr. Austin briefly left the store to try and see where the shooter ran, but then came back inside the business and saw Mr. Dhalai on the ground with "all this blood." (XIII, 150-151)

On cross-examination, Mr. Austin was confronted with his preliminary hearing testimony. During that hearing, Mr. Austin said that he did not hear anything said by the hooded person. However, Mr. Austin did say that he was certain that he heard "two or three shots." (XIII, 164-165) Mr. Austin previously testified that he was unsure of the race of the person, but said at trial that he believed it was a black person who committed the offenses. (XIII, 167)

Foad Saleh was working at the Bull Market. While on a break, Mr. Saleh was riding his bicycle outside the store and heard two or three gunshots. (XIII, 176) He then saw a black male leaving the store; this man was wearing dark clothing and a hoodie. (XIII, 177) The black male went down Arlington Avenue as Mr. Sinclair testified. (XIII, 180) On cross-examination, Mr. Saleh agreed that he did not see the male come into the store. (XIII, 190)

Lieutenant Shane Beaver of the Jackson Police Department responded to the Bull Market after dispatch reported a shooting call at the business. (XIII, 204) Upon arrival Lieutenant Beaver preserved the crime scene and received a report of the suspect's description and direction of travel. (XIII, 205) A K-9 officer had deployed his dog, Pax, towards the direction of travel, and Lieutenant Beaver followed Pax. (XIII, 207) Other officers assisted in setting up a perimeter in the area of Lion's Field, near the Bull Market. (XIII, 208) Just inside the wood line, Lieutenant Beaver and another officer shined their flashlights on a subject. (XIII, 214) Officers began giving commands to the subject to come out of the woods and surrender, but the subject replied "Fuck you. You're going to have to come in here and get me. Come on in here and get me." (XIII, 218) The subject appeared to be armed or concealing a weapon. (XIII, 218) Lieutenant Beaver felt at that point that he might have to use deadly force against this subject. (XIII, 220)

The suspect began to move away from Lieutenant Beaver and in the direction of the K-9 officer. As the officers heard the suspect attempt to climb over a chain link fence near the baseball field, Pax was once again deployed and made contact with the subject. (XIII, 226-227) As Lieutenant Beaver approached the subject, he observed that the person, who he identified as Appellant, was choking Pax. (XIII, 228) Pax's handler, Officer Jeremy Stines, then struck Appellant in the head with his service weapon to allow Pax to get free. (XIII, 230) Appellant continued to resist officers until Officer Hamilton utilized his taser to effectuate an arrest of Appellant. (XIII, 231)

Sergeant Brandon Moss, the K-9 Unit Commander, responded to the Bull Market with his dog, Kyra. (XIV, 247) Upon arrival, Sergeant Moss assisted the other officers

in setting up a perimeter around the Lion's Field area. (XIV, 247) Sergeant Moss challenged the suspect to surrender, but the suspect refused to comply and made threats to harm the officers. (XIV, 255) Sergeant Moss testified very similarly to Lieutenant Beaver regarding the sequence of events leading to the arrest of Appellant. (XIV, 256-262) After Appellant was in custody, Kyra located a cell phone and a .38 caliber handgun in the woods. (XIV, 265)

Officer Jeremy Stines testified that Pax, in addition to tracking the suspect from the Bull Market, also located a pair of pants and a shirt in the woods. (XIV, 290) Officer Stines testified similarly to the other officers regarding the apprehension of Appellant. (XIV, 290-298)

Officer Kyle Hamilton assisted in the arrest of Appellant. Officer Hamilton felt that Appellant continued to resist arrest after choking Pax, so Officer Hamilton deployed his taser to make Appellant compliant. (XIV, 325-327) Officer Hamilton explained that the taser has video and audio capabilities and narrated the playing of the video for the jury. (XIV, 328-335) After concluding the arrest, Officer Hamilton searched the immediate area where Appellant was located and found a set of keys. (XIV, 336)

Officer Julie Mullikin participated in transporting Appellant to jail; she also collected his clothing after he was taken to the hospital to have his dog bites treated. (XIV, 353-363)

Dr. Thomas Deering performed the autopsy of Ahmad Dhalai. During his autopsy, Dr. Deering found that Mr. Dhalai had suffered a gunshot wound to his head, and noted an exit wound as well. (XIV, 384) The point of entry of the gunshot was to the right side, behind his ear. (XIV, 385) Such a wound would fracture the skull and

injure the brain. (XIV, 385) Dr. Deering opined that the cause of Mr. Dhalai's death was a gunshot wound to the head, and his manner of death was homicide. (XIV, 425)

On cross-examination, Dr. Deering felt that Mr. Dhalai would have been rendered unconscious immediately after suffering such a wound, and that his death would likely have been very quick. (XIV, 430)

Officer James Stafford responded to the area of Lion's Field and took several photographs of several items of evidence found in the woods near where Appellant was arrested. (XV, 23-25) Officer Stafford identified items of clothing, gloves, and a white piece of "T-shirt-type material." (XV, 45-52) Upon examining the handgun that was found by K-9 Kyra, Officer Stafford saw that it appeared the weapon had been fired three (3) times. (XV, 70)

Investigator Marvin Rodish, formerly of the Jackson Police Department, processed the crime scene at the Bull Market. Behind the wall where Mr. Dhalai had been working the cash register, a projectile was found. (XV, 84) Investigator Rodish found another projectile that appeared to be from Mr. Dhalai. (XV, 96) Finally, Investigator Rodish collected as evidence clothing, gloves, and a firearm that had been recovered by other officers. (XV, 99-106)

Investigator Dan Long participated in a search of Appellant's residence at 199 Campbell Street in Jackson. (XV, 166) During the search, Investigator Long used the keys found near Appellant when he was arrested to see if they would fit the lock of the residence and Appellant's car. (XV, 167) Officers recorded this attempt and the video, which was played for the jury, showed that the various keys did fit the house lock and

vehicle. (XV, 168-171) In Appellant's bedroom, Investigator Long found a torn white t-shirt and a billfold. (XV, 178-180)

The parties stipulated regarding an aerial map showing that the distance from Appellant's residence to the Bull Market was .97 miles. (XV, 222) The parties also stipulated that the cell phone found in the woods was that of Appellant, per AT&T subscriber information. (XVI, 440)

Lieutenant Chris Chestnut met with Appellant at the jail after his arrest and obtained a DNA buccal swab from him. (XV, 235)

Tennessee Bureau of Investigation (TBI) Special Agent/Forensic Scientist Kristyn Meyers testified as an expert in the field of forensic biology. Special Agent Meyers swabbed, for skin cells, a 38 caliber handgun that was submitted to the TBI. (XVI, 276)

Dr. Eric Warren, formerly of TBI, testified as an expert in the field of ballistics and firearms identification and analysis. Dr. Warren examined the 38 caliber handgun that was received from the Jackson Police Department. (XVI, 309) As part of his analysis, Dr. Warren studied the spent projectiles collected by Jackson Police Department officers, and he opined that all three (3) projectiles were 38 caliber. However, he could not say definitively that the projectiles were fired through the submitted 38 caliber handgun. (XVI, 321)

The State next called, in succession, Earl Eley, Michael Turbeville, and Chad Johnson of the TBI, who all testified that they were involved in the receiving or transporting of various pieces of evidence in Appellant's case. (XVI, 332-354)

TBI Special Agent Charly Castelbuono testified as an expert in forensic biology/DNA identification and analysis. In this role, Special Agent Castelbuono first

examined the piece of a white t-shirt found in the woods when Appellant was arrested. Special Agent Castelbuono said that, in her opinion, the blood found on this fragment was that of Appellant. (XVI, 366) In addition, Appellant was found to be the "major contributor" of DNA found in the gloves found in the woods, although Special Agent Castelbuono found that the DNA profile obtained was consistent with a mixture of more than one individual. (XVI, 368-370) Appellant was also found to be the "major contributor" of DNA found in swabs of the interior of a sweatshirt found in the woods. (XVI, 371-372) Similarly, Special Agent Castelbuono found Appellant to be the "major contributor" of DNA found on the 38 special handgun, although the partial profile obtained was consistent with a mixture of at least three individuals. (XVI, 374)

Special Agent Rielly Gray testified as an expert in microanalysis. Special Agent Gray examined the gloves submitted as evidence; in her analysis, she found that the gloves contained the presence of particles identified as gunshot primer residue." (XVI, 404)

Special Agent Miranda Gaddes was qualified as an expert in microanalysis. She compared the white fabric found in the woods to the torn white T-shirt found in Appellant's residence. In Special Agent Gaddes's opinion, these two items had been joined at one time. Special Agent Gaddes based her opinion on a microscopic analysis of the fracture lines of the two pieces of fabric. (XVI, 415-416)

Susan Clark and Samuel Frederick, employees of the TBI, both testified regarding the chain of custody of certain items of evidence that were submitted to the TBI laboratory. (XVI, 426-439)

The State's final witness was Ali Dhalai. Mr. Ali Dhalai is the cousin of the decendent, Ahmad Dhalai. Mr. Ali Dhalai introduced the "life photograph" of Mr. Ahmad Dhalai. (XVI, 453-454)

DEFENSE GUILT/INNOCENCE PHASE PROOF

The defense presented no proof at trial.

SENTENCING HEARING PROOF

The State called three witnesses in its case-in-chief: Ali Dhalai, Captain Jeff Fitzgerald, and Alison Deaton. Each witness' testimony will be discussed in more detail during the presentation of Issue 7. Similarly, the testimony of defense witnesses Dr. James Walker and Dr. Keith Caruso, and the testimony of State's rebuttal witness Dr. Kimberly Brown will be discussed in detail below.

ARGUMENT

I. The evidence was insufficient to support a verdict of premeditated First Degree Murder, Felony Murder, Attempted Especially Aggravated Robbery, Attempted Second Degree Murder, Aggravated Assault, or Employing a Firearm During the Commission of a Dangerous Felony.

When evaluating the sufficiency of the evidence, this Court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Keough*, 18 S.W.3d 175, 180-81 (Tenn. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)) This Court is required to afford the prosecution the strongest legitimate view of the evidence in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Keough*, 18 S.W.3d at 181 (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)) Questions regarding the credibility of the witnesses, the weight to be given the evidence, and any factual issues raised by the evidence are resolved by the trier of fact. *Bland*, 958 S.W.2d at 659. A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982)

FIRST DEGREE MURDER

First Degree Murder is defined in T.C.A. § 39-13-202(a)(1) as follows:

(a) First degree murder is:

(1) A premeditated and intentional killing of another.

T.C.A. § 39-13-202(a)(1).

Whether a defendant has acted with premeditation is a question for the finder of fact to determine, and it may be inferred from the manner and circumstances of the killing. *State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). The following factors may be considered in deciding whether the murder was premeditated: the procurement and use of a deadly weapon upon an unarmed victim, the defendant's declarations of his intent to kill, the infliction of multiple wounds, defendant's calmness immediately after the killing; and a particularly cruel killing. *See State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992).

In the instant case, the evidence was insufficient to support a verdict of First Degree Murder against Appellant. One of the State's major arguments in favor of premeditated murder was Appellant's statement to Mr. Dhalai "drop that off or I'm gonna shoot you dead in the head." However, this statement could merely have been offered as a tactic to convince Mr. Dhalai to hand over the cash register money instead of as a threat to violence. Although the evidence shows that Mr. Dhalai was shot in the head, the proof shows that Appellant reacted quickly to Mr. Dhalai walking away from the cash register, lending an interpretation that this was a knowing killing, thus constituting Second Degree Murder. In addition, the State did not prove beyond a reasonable doubt the identity of the Defendant as the person who committed the crime. All of the evidence used to convict Appellant was circumstantial rather than direct. No witness from the Bull Market could definitively identify Appellant as the perpetrator, and no evidence was introduced to show that Appellant confessed at any time to the charged offenses. For these reasons, the conviction for First Degree Murder should be voided and judgment of, at most, Second Degree Murder should be entered against Appellant.

FIRST DEGREE MURDER IN PERPETRATION OF A FELONY

Pursuant to T.C.A. § 39-13-202(a)(2):

(a) First Degree Murder is:

> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, physical abuse in violation of § 71-6-119, aggravated neglect of an elderly or vulnerable adult in violation of § 39-15-508, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy…

T.C.A. § 39-13-202(a)(2). Pursuant to subsection (b), "[n]o culpable mental state is required for conviction under subdivision (a)(2) or (a)(3), except the intent to commit the enumerated offenses or acts in those subdivisions." T.C.A. § 39-13-202(b). Our Supreme Court has stated that "consideration of such factors as time, place, and causation is helpful in determining whether a murder was committed 'in the perpetration of' a particular felony." *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn.1999) (citing *State v. Lee*, 969 S.W.2d 414, 416 (Tenn.Crim.App.1997)). "The killing may precede, coincide with, or follow the felony and still be considered as occurring 'in the perpetration of' the felony offense, so long as there is a connection in time, place, and continuity of action." *Buggs*, 995 S.W.2d at 106.

The State's proof was insufficient to prove Appellant guilty of this offense. The killing of the victim, Mr. Dhalai, preceded Appellant's completion of the Attempted Especially Aggravated Kidnapping. In the video from Bull Market, the hooded suspect is heard making a demand for money, firing an errant shot, then firing the fatal shot into Mr. Dhalai's head. Only then does the suspect jump the counter and attempt to gain entry into the cash register before then fleeing the business. Appellant contends that the connection between the demand for money and the killing is not close enough to support

a conviction for First Degree Murder in Perpetration of Attempted Especially Aggravated Kidnapping. For these reasons, Appellant's conviction should be reversed and dismissed.

ATTEMPED ESPECIALLY AGGRAVATED ROBBERY

The offense of Especially Aggravated Robbery is defined in T.C.A. § 39-13-403. Its two elements are that the perpetrator accomplished a robbery, as defined in § 39-13-401, with a deadly weapon and that the victim suffered serious bodily injury. Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401.

Criminal attempt is defined in T.C.A. § 39-12-101:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> > (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
> >
> > (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
> >
> > (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a). As described at trial by various witnesses, Appellant was convicted of entering the Bull Market and demanding money, followed by firing two

shots in the direction of Mr. Ahmad Dhalai. However, this proof was entirely circumstantial, and the State did not introduce sufficient evidence to identify Appellant as the person who committed the offenses. No witness within the store could give a description of the suspect other than it appeared to be a black male. Appellant moves this Court to reverse and dismiss his conviction for this offense.

ATTEMPED SECOND DEGREE MURDER

T.C.A. § 39-12-101, as listed above, describes what constitutes a Criminal Attempt. Second Degree Murder is defined as "the knowing killing of another." T.C.A. § 39-13-210(a)(1). To support this charge against Mr. Lawrence Austin, the State relied on the surveillance video as well as the testimony of Mr. Austin himself. According to Mr. Austin, the shooter never made any direct statements or threats to him; it appeared that the suspect was inside the store to perpetrate a robbery. Further, the suspect fired just one time in Mr. Austin's general direction; after firing, the suspect jumped the counter to try and steal money, rather than following Mr. Austin or trying to shoot at him again. For these reasons, coupled with the State's failure to prove identity beyond a reasonable doubt, Appellant moves this Court to reverse and dismiss this conviction.

AGGRAVATED ASSAULT

Appellant was also convicted of this offense as an alternative theory of the crime, with the victim being Lawrence Austin. Aggravated Assault, as applied in the instant case, is proscribed by T.C.A. § 39-13-102. In pertinent part:

(a)(1) A person commits aggravated assault who:

(A) Intentionally or knowingly commits an assault as defined in § 39-13-101, and the assault:

(iii) Involved the use or display of a deadly weapon.

T.C.A. § 39-13-101 governs the criminal offense of Assault:

(a) A person commits assault who:

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury.

T.C.A. § 39-13-102(a)(1)(A)(iii), 39-13-101(a)(2). Similar to his argument regarding Attempted Second Degree Murder, Appellant would ask this Court to consider the State's insufficient proof regarding his identity as the person who shot at Mr. Lawrence Austin. This conviction should be reversed and dismissed for the same reasons.

EMPLOYING A FIREARM DURING ATTEMPT TO COMMIT A DANGEROUS FELONY

This offense is defined in T.C.A. § 39-17-1324(b):

(b) It is an offense to employ a firearm or antique firearm during the:

(1) Commission of a dangerous felony;

(2) Attempt to commit a dangerous felony…

T.C.A. § 39-17-1324. Attempted Second Degree Murder is defined as a "dangerous felony" in § 39-17-1324(i)(1)(B).

The State did not introduce sufficient proof, beyond a reasonable doubt, for the jury to convict Appellant of this offense. As Appellant was not properly identified as the perpetrator who entered the store and shot at Mr. Austin, he should not have been convicted of this offense. In addition, as stated in the argument regarding the conviction for Attempted Second Degree Murder, Mr. Austin was not the victim of the dangerous felony. No specific overtures or discussions were had between the assailant and Mr.

Austin, casting doubt on whether the assailant had designs on trying to kill Mr. Austin, rather than merely firing wildly in Mr. Austin's direction while he tried to complete the robbery. For these reasons, this Court should reverse and dismiss Appellant's conviction for this offense.

II. **The trial court erred in denying Appellant's motion to challenge prospective jurors Ronald Robinson, Melissa Little, and Joan Graves for cause.**

Both Article 1, Section 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. The process of *voir dire* allows not only the trial court but also the parties an opportunity to ensure that "jurors are competent, unbiased, and impartial." *State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993). In particular, "[t]he right of challenge for cause was designed to exclude from the jury triers whose bias or prejudice rendered them unfit, and peremptory challenge was intended to exclude those suspected of bias or prejudice." *Manning v. State*, 155 Tenn. 266, 292 S.W. 451, 455 (1927).

In assessing a juror's impartiality following a challenge for cause, the trial court should inquire "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); see also *State v. Harold W. Humphreys*, 70 S.W.3d 752, 765 (Tenn. Crim. App. 2001).

A determination of the qualifications of a juror rests within the discretion of the trial court and will not be overturned absent a showing of an abuse of that discretion. *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). Indeed, the Tennessee Supreme Court has observed that a trial court's findings of impartiality may be overturned only for "manifest error." *Howell*, 868 S.W.2d at 248.

Failure to challenge for cause or if said challenge is not sustained, failure to use any available peremptory challenge to remove the objectionable juror, precludes reliance upon the juror's disqualification upon appeal. See, *Wooten v. State*, 99 Tenn. 189, 41 S.W. 813 (1897), and earlier cases cited therein, and *Tittsworth v. State*, 503 S.W.2d 523 (Tenn. Crim. App. 1973)

In *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the United States Supreme Court iterated the following regarding "automatic death penalty" jurors:

> "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. **If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."**

Morgan v. Illinois, 504 U.S. 719, 729 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992) (emphasis added)

Ronald Robinson

Prospective Juror Ronald Robinson was questioned by the parties and by the Court. During his *voir dire*, the State asked Mr. Robinson about a comment he wrote on his jury questionnaire regarding having to spend tax dollars keeping a prisoner incarcerated in the event of his being sentenced to life without parole. (VIII, 70) Mr. Robinson said that, in such cases, his Biblical beliefs led him to feel that "we need to go ahead with the death penalty in some cases like that." (VIII, 70) He said that he could fairly consider life without parole as a punishment. (VIII, 70) Mr. Robinson then said

that he agreed that "[t]aking the life is appropriate for taking a life in a murder case." (VIII, 72) Mr. Robinson then agreed with this belief applied to only "some" murder cases. (VIII, 72)

Upon questioning by the defense, Mr. Robinson said that he believed the death penalty was the appropriate punishment for a murder that was "premeditated." Mr. Robinson also agreed that "an eye for an eye" was an appropriate characterization of his view on this issue. (VIII, 75-77) Finally, Mr. Robinson said that he would take into account if a defendant had "mental problems" in deciding the appropriate sentence, but that if a defendant was "of sound mind" then that person should "absolutely" receive the death penalty. (VIII, 78)

On further examination by the State, Mr. Robinson said that he would fairly consider all three forms of punishment in the event Appellant was convicted of First Degree Murder. (VIII, 81) Upon being questioned by the trial court, Mr. Robinson said that he would not consider a robbery of a store "and the person was shot and killed" to be a premeditated act. (VIII, 83) At the conclusion of this questioning, the defense moved to challenge Mr. Robinson for cause; the trial court denied the challenge for cause, stating that the court felt that Mr. Robinson could fairly consider all three forms of punishment and would not automatically impose the death penalty in the event of a First Degree Murder conviction. (VIII, 86-88) The defense then exercised a peremptory challenge to excuse Mr. Robinson. (IX, 310)

Melissa Little

Ms. Little agreed that she was familiar with the lead prosecutor, as her brother worked for the District Attorney's office and her husband was a retired Jackson Police

officer. (IX, 271) Ms. Little said that she had no problem with imposing the death penalty, but also agreed that she felt the death penalty was appropriate in "some murder cases." (IX, 272) She initially stated that she felt that someone who participated in "a self defense murder situation" would perhaps not be deserving of the death penalty. (IX, 273)

When questioned by the defense, Ms. Little stated that she had no legal or moral issue with the death penalty. (IX, 277) She also referred to a potential hardship due to having an elderly mother and her own medical issues, but felt that both would be something she could manage if selected for the jury. (IX, 278-281)

The defense moved to challenge Ms. Little for cause, noting her strong ties to law enforcement, her family and medical issues, and her comments regarding a defendant having to show her that he acted in self-defense to avoid receiving the death penalty. (IX, 282-283) The trial court denied the challenge for cause, stating that her medical issues did not rise to the level of affecting Ms. Little's ability to concentrate or make decisions. The trial court also found that nothing in Ms. Little's questionnaire or verbal responses to counsel would give concern that she could not fairly consider all three sentencing options in the event of a First Degree Murder conviction. (IX, 284) The defense later challenged Ms. Little using a peremptory challenge.

Joan Graves

The prosecutor began his questioning of Ms. Graves by advising the defense and the trial court that he had attended school with all three of Ms. Graves' daughters, and had graduated with one, who he referred to by her first name. (XII, 30) However, the prosecutor advised that he had not seen her daughters in quite some time. (XII, 31) Ms.

Graves had previously served on a capital case jury, and recalled that the jury had voted to impose a life without parole sentence. (XII, 36) Ms. Graves struggled with looking at photographs during that prior case, and said she would do her best to view any video evidence introduced during the instant case. (XII, 33-34) Her husband also had heart problems and diabetes and Ms. Graves had no family nearby to help care for him if she was sequestered. (XII, 41-42, 49)

Ms. Graves said that she would trust the lead prosecutor in the case because of her knowledge of his character and, in her opinion, that "he's lived up to his boyhood representation." (XII, 43) She felt that, in her prior capital case, she and her fellow jurors voted for a sentence of life without parole because much of the evidence was circumstantial. (XII, 45) Defense counsel also asked Ms. Graves if she was inclined to vote for the death penalty and she said that she was; however, when the trial court questioned her, she said she could consider each possible sentence. (XII, 54-55)

The defense challenged her for cause; however, the trial court denied this request, stating that Ms. Graves said she could consider all three forms of punishment and would listen to all of the evidence. (XII, 55-58) The defense then exercised a peremptory challenge to excuse Ms. Graves. (XII, 58)

In each of these three instances, the trial court erred in failing to excuse the prospective juror for cause. Mr. Robinson's default position, absent a showing of an "unclear mind," was that a defendant who committed a premeditated murder should "absolutely" be put to death. While Mr. Robinson, upon rehabilitation by the State, said that he could fairly consider each form of possible punishment, his statements during questioning reveal that he was clearly inclined towards a principle of "an eye for an eye."

Ms. Melissa Little, who had clear and concrete ties to law enforcement, said that she had no legal or moral issue with the death penalty, and seemed from her answers to be predisposed towards a death sentence instead of considering more ameliorative punishments. In addition, Ms. Little had clear medical issues and family hardships with her elderly mother that served as a further basis to excuse her for cause.

Finally, Ms. Joan Graves, who spoke glowingly of the lead prosecutor and would be inclined to trust him, also had served on a capital jury some years prior. In that case, Ms. Graves recalled that the suspect was granted life without parole only due to some evidentiary issues, and that, if selected in this case, she would be inclined to favor the death penalty if Appellant was convicted of First Degree Murder.

Failing to excuse these three jurors for cause was obvious error and forced Appellant to exercise a peremptory challenge in each instance.

III. The trial court erred in granting, over defense objection, the State's request to challenge prospective jurors John Eads, Grace Milhorn, and Melony Sesti for cause.

"Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." *Uttecht v. Brown*, 551 U.S. 1, 22, 127 S.Ct. 2218, 2231, 167 L.Ed.2d 1014 (2007) In addition, Appellant directs this court to the case law and other authority discussed in Issue II in support of his argument in this Issue.

John Eads

Mr. Eads acknowledged that he had given seemingly contradictory answers on his jury questionnaire. (IX, 412-414) At one point, Mr. Eads agreed that he could fairly consider all three forms of punishment for First Degree Murder. (IX, 411) He also told the State that the death penalty "never ought to be imposed." (IX, 413) Mr. Eads went on to say that he did not feel that anyone should be put to death. (IX, 414)

During questioning by the defense, Mr. Eads said that he could consider all three forms of punishment if instructed to do so by the law. (IX, 417) Mr. Eads then said he could probably not consider the death penalty in the instant case unless he learned that Appellant had killed multiple people "on a murderous outrage." (IX, 418)

The State challenged Mr. Eads for cause, noting his contradictory answers and his seemingly ability to understand the questions being asked of him. (IX, 423) The trial court granted the State's challenge for cause, over Appellant's objection, stating that his answers were inconsistent. (IX, 424)

Grace Milhorn

Ms. Milhorn stated that she did not believe she could vote to give someone the death penalty, but she felt that it would be an appropriate punishment in certain cases. (X, 234) She went on to say that, although she would prefer to vote for something less severe than the death penalty, if she was selected for the jury then she could do it. (X, 236) Shortly thereafter, Ms. Milhorn said that she would "disregard" the death penalty. (X, 237)

During questioning by the defense, Ms. Milhorn said that she did not want to impose the death penalty, but that "if I had to and it was a situation where it was proved then I could." (X, 242) The trial court asked Ms. Milhorn to confirm her position, and she said "if I see that he did intentionally and was vicious and whatever and all of that or would be a threat to someone else I probably could [impose the death penalty]." (X, 243-244)

The State moved to excuse Ms. Milhorn for cause, pointing to her answers regarding the death penalty "being all over the place." (X, 247) The trial court granted the State's motion over defense objection, stating that "early on" in the questioning, Ms. Milhorn had said that she couldn't impose the death penalty if given other sentencing options. (X, 248)

Melony Sesti[4]

Ms. Sesti brought the parties' attention to an issue with not having anyone to watch her fifteen year old son if she was sequestered as a juror. (XI, 386) She also remarked that her husband instructed her "don't get sequestered." (XI, 389) Ms. Sesti

[4] The transcript spells Ms. Sesti's first name as "Melanie," but defense counsel recalls from trial that her first name was "Melony." The defense intends no disrespect, either way, to Ms. Sesti.

advised the prosecutor that she had indicated both that she had no feelings about the death penalty, but elsewhere in her questionnaire said that she did not think the death penalty ever ought to be imposed. (XI, 392) She further acknowledged writing on her questionnaire that if "other punishment was available, I may lean that way." (XI, 394)

During questioning by the defense, Ms. Sesti thought that she could listen to all of the proof in a hypothetical sentencing hearing and make her decision based off of that. (XI, 397) The State challenged for cause, basing its request on the juror being "incapable or unwilling to give us an answer to any of these questions." (XI, 400) Over defense objection, the Court granted the State's challenge, noting its own uncertainty regarding whether Ms. Sesti could vote for the death penalty. (XI, 400)

The trial court erred in granting the State's challenges for cause of each of these three potential jurors. Mr. Eads did struggle with his responses to questions, but ultimately said that he would consider all three forms of punishment against Appellant. Any conscientious potential juror could be conflicted about what he would do when placed in this hypothetical situation, and Mr. Eads said he did not favor the death penalty but could consider it if selected. Ms. Milhorn did not necessarily want to impose a death sentence, but would consider all options as instructed by the trial court. Early in her questioning, she said she would not consider the death penalty, but she was sufficiently rehabilitated by defense counsel to the point where a challenge for cause should not have been granted by the trial court. Finally, Ms. Sesti said she might not lean towards the death penalty as a punishment, but she later said that she could consider it if instructed to do so by the court. Excusing all of these jurors for cause, over defense objection,

constituted error by the trial court and deprived Appellant of his right to a fair trial, as he had to exercise peremptory challenges to excuse each of them.

IV. The trial court erred in refusing to excuse prospective juror Dru Crum for cause, when Appellant had already exhausted his peremptory challenges.

Appellant directs this court to the case law and other authority discussed in Issue II in support of his argument in this Issue. In addition, Appellant would direct this Court to the proposition that "it is only where a defendant exhausts all of his peremptory challenges and is thereafter forced to accept an incompetent juror can a complaint about the jury selection process have merit. *State v. Coury*, 697 S.W.2d 373, 379 (Tenn. Crim. App. 1985) (citing *Hale v. State*, 198 Tenn. 461, 281 S.W.2d 51 (1955); *McCook v. State*, 555 S.W.2d 411, 413 (Tenn. Crim. App. 1977))"

Dru Crum

Ms. Crum said that she was not inclined to consider life with parole, but would have to hear evidence before making such a decision. (XII, 217) She elaborated that she might favor parole if someone repented of their actions and "the Lord got hold of them." (XII, 220) Ms. Crum, under questioning by the trial court, then said she would consider each option "evenly." (XII, 225) The defense challenged for cause, noting that Ms. Crum's initial feelings were that she was not inclined to vote for a life with parole sentence. (XII, 228) The trial court did not grant this challenge for cause, noting that Ms. Crum did say she was open to considering all three forms of punishment. The defense, having exhausted its peremptory challenges, could not excuse Ms. Crum, and she was selected for the jury. (XII, 229) Appellant had utilized all of his peremptory challenges and was therefore forced to accept this juror who was not inclined to consider all three forms of punishment.

The trial court erred in failing to challenge Ms. Crum for cause, when her *voir dire* answers revealed that she would only favor life with parole if the defendant was to repent. It is clear from the transcript, as referred to above, that Ms. Crum was not seriously inclined to listen to the trial court's instructions regarding consideration of each of the three forms of punishment if Appellant was found guilty of First Degree Murder. Appellant was forced to keep Ms. Crum on the jury since all fifteen peremptory challenges had been exhausted at the time she was subjected to individual *voir dire*. Having Ms. Crum on the jury meant that Appellant was tried by someone who was not even inclined to consider a life with parole sentence in the event of a conviction for First Degree Murder. The Court's denial of Defendant's challenge for cause of juror Dru Crum, when all peremptory challenges had already been exhausted, denied defendant's right to due process and equal protection, a fair and impartial jury trial, and against cruel and unusual punishment, under the U. S. Constitution, Amendments Five, Six, Eight, and Fourteen, and the Tennessee Constitution, Article I, sections 6, 8, and 17. See *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)

V. The death penalty is a disproportionate punishment in the instant case.

Under T.C.A. § 39-13-206(c)(1)(D), a proportionality review of a death sentence is conducted by the appellate courts. As the Tennessee Supreme Court has previously stated, comparative review of capital cases insures rationality and consistency in the imposition of the death penalty. *State v. Barber*, 753 S.W.2d 659 at 665–66 (Tenn. 1988). In light of the jurisprudential background against which our statutory provision was adopted, combined with the General Assembly's use of the word "disproportionate," it is clear that the Court's function in performing comparative review is not to search for proof that a defendant's death sentence is perfectly symmetrical, but to identify and invalidate the aberrant death sentence. *Id.*; *State v. Groseclose*, 615 S.W.2d 142, 150 (Tenn. 1981) (trial court reports are designed to prevent the arbitrary or capricious imposition of the death penalty). If the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993) Even if a defendant receives a death sentence when the circumstances of the offense are similar to those of an offense for which a defendant has received a life sentence, the death sentence is not disproportionate where the Court can discern some basis for the lesser sentence. See *State v. Carter*, 714 S.W.2d 241, 251 (Tenn. 1986). Moreover, where there is no discernible basis for the difference in sentencing, the death sentence is not necessarily disproportionate. This Court is not required to determine that a sentence less than death was never imposed in a case with similar characteristics. On the contrary, the Court's duty under the similarity standard is to assure that no aberrant death sentence is affirmed. *State v. Webb*, 680 A.2d

147 at 203 (Conn. 1996). "Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." Cf. *Gregg v. Georgia*, 428 U.S. 153 at 203, 96 S.Ct. 2909 at 2939 (1976).

The following factors have been used by Tennessee courts in choosing and comparing cases for proportionality review: 1) the means and manner of death; 2) the motivation for killing; 3) the place of death; 4) the similarity of the victims and treatment of the victims; 5) the absence or presence of premeditation, provocation, and justification; and 6) the injury to and effects on non-decedent victims. *State v. Hall*, 976 S.W.2d 121, 135 (Tenn.1998) In comparing defendants, we consider the following traits: 1) prior criminal history; 2) age, race, and gender; 3) mental, emotional, and physical condition; 4) role in the murder; 5) cooperation with authorities; 6) remorse; 7) knowledge of helplessness of the victim; and 8) capacity for rehabilitation. *Id.*

In the instant case, Appellant was convicted of shooting an unarmed convenience store clerk in the commission of a robbery. The proof at trial showed that the Appellant made threats to shoot the clerk if money was not immediately handed over, and that the victim would have died nearly instantaneously, per the testimony of Dr. Deering. (XIV, 430)

Appellant, a black male, was twenty-six (26) years old at the time of the offenses. (XXII, 6) Appellant had received a general equivalency diploma, and his intellectual quotient (IQ) score was estimated at between 76-85 (per defense experts) and 86 (per State's expert). (XXII, 6) Defense experts and the State's expert testified at the penalty

phase that Appellant had anti-social personality disorder and cannabis use disorder. (XXII, 7) No evidence was introduced regarding Appellant cooperating with authorities, and the trial court's report evidenced that Appellant did not demonstrate remorse throughout the trial. (XXII, 5) Appellant acknowledges that this Court has often and repeatedly held that the death penalty was not aberrant for a defendant who shot a randomly chosen victim during a robbery. However, he requests this Court to find that, based upon the unique circumstances of this case (i.e., Appellant's mental health diagnoses and the fact that the victim did not suffer extensively due to the nature of his wound), that the death penalty imposed in this matter is disproportionate. Accordingly, Appellant's sentence for First Degree Murder and Felony Murder should be reduced to Life Without Parole.

VI. The death penalty in general, and lethal injection specifically, constitute cruel and unusual punishment.

The defendant contends that the death penalty in general, and lethal injection in particular, violate the United States and Tennessee constitutions' prohibition on cruel and unusual punishment. U.S. Const. Amendment VIII, Tenn. Const. Article I, Section 16. Counsel acknowledges that both of these arguments have been considered and rejected by the United States Supreme Court, see *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (reaffirming that "capital punishment is constitutional" and upholding Kentucky's lethal injection protocol), and the Tennessee Supreme Court, see, e.g., *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012) ("This Court has held, and repeatedly affirmed, that capital punishment itself does not violate the state and federal constitutions."); *State v. Banks*, 271 S.W.3d 90, 108 (Tenn. 2008) (rejecting specific claim that lethal injection is cruel and unusual); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005) ("[W]e conclude that the petitioner has failed to establish that the lethal injection protocol is cruel and unusual punishment under the United States or Tennessee constitutions.").

Notwithstanding the above-cited authority, Appellant asks this Court to reconsider earlier precedent and find that capital punishment, as practiced and applied, and the use of lethal injection to effectuate the death penalty, constitute "cruel and unusual punishment" and should be invalidated as punishment for those convicted of First Degree Murder and Felony Murder in this State.

VII. The aggravating factors found by the jury did not outweigh the mitigating factors beyond a reasonable doubt.

In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, the relevant inquiry is whether a rational trier of fact, taking the evidence in the light most favorable to the prosecution, could have found the existence of the aggravating circumstances beyond a reasonable doubt. *State v. Dotson*, 450 S.W.3d 1, 78 (Tenn. 2014) (citing *State v. Jordan*, 325 S.W.3d 1, 66-67 (Tenn. 2010); *State v. Rollins*, 188 S.W.3d 553, 571 (Tenn. 2006)) In addition, the aggravating circumstances applicable to each first degree murder conviction must outweigh any mitigating circumstances beyond a reasonable doubt. T.C.A. § 39–13–206(c)(1)(C).

During the penalty phase, the State first introduced into evidence a certified copy of the judgment of Appellant's prior conviction for Aggravated Robbery. (XVIII, 220) Captain Jeff Fitzgerald of the Madison County Sheriff Department testified that he was the lead investigator in the previous case. (XVIII, 223) Upon developing Appellant as a suspect, Captain Fitzgerald took a statement from him. The statement was read for the jury; in his statement, Appellant admitted going to a gas station with some associates and robbing the clerk at gunpoint. (XVIII, 224-229) Captain Fitzgerald agreed with defense counsel that Appellant's decision to give a statement was voluntary, and that his mother was with him when he gave the statement. (XVIII, 231-233)

Alison Deaton was working at the convenience store when Appellant committed an armed robbery on September 26, 2008. (XVIII, 236) Ms. Deaton recalled that, just before 11:00 p.m., several men came in and threatened to shoot her unless she relinquished her money. The men jumped the counter, took the money from the cash

register, and fled the premises. Ms. Deaton identified and narrated a video from the business. (XVIII, 238-245)

Ali Dhalai testified regarding the victim, Mr. Ahmad Dhalai, and the effect his death had on their family. Mr. Ali Dhalai said that Ahmad Dhalai was a very helpful and considerate person, and that the effect of his death had been "heartbreaking." (XVIII, 253-256)

The defense called Dr. James Stanley Walker, Ph.D., testified that he was board-certified in clinical psychology, neuropsychology, and forensic psychology. (XVIII, 261) Dr. Walker met with Appellant on two occasions and performed a battery of tests on him. (XVIII, 264) At the age of eight, Appellant was found to have an IQ of 78, which Dr. Walker said was in the seventh percentile as compared to the average child. (XVIII, 267) In January 2017, Appellant's IQ was measured at 86. (XVIII, 267) Dr. Walker also testified as to Appellant's very low scores on attention, memory, and mental processing tests. (XVIII, 269)

Dr. Walker also opined that Appellant had cognitive disorders, cannabis use disorder, post-traumatic stress disorder (PTSD), and anti-social personality disorder (ASPD). (XVIII, -270-277) Dr. Walker explained that these disorders can be attributed both to external influences and genetics. (XVIII, 279-281) Appellant was seriously mistreated as a child, and he had family members who were suffering from severe substance abuse issues. (XVIII, 281-283) Dr. Walker confirmed that he did not learn about these issues from Appellant, but rather from reviewing interviews conducted with Appellant's relatives. (XVIII, 285)

On cross-examination, Dr. Walker agreed that Appellant had previously been identified as "malingering" when he was evaluated previously. (XVIII, 291) Dr. Walker said that Appellant did not fit the classical definition of someone with PTSD, but that he had likely become numb to his prior traumatic experiences. (XVIII, 298-299)

Dr. Keith Caruso, M.D., also testified for the defense. Dr. Caruso, a psychiatrist, conducted interviews with Appellant on two separate occasions. (XIX, 328) Dr. Caruso testified similarly to Dr. Walker regarding Appellant's upbringing, genetic predisposition, and various mental health disorders. (XIX, 330-332) Dr. Caruso stressed that Appellant did not malinger with him during their interviews. (XIX, 338-339)

In rebuttal, the State called Dr. Kimberly Brown, Ph.D. Dr. Brown conducted an interview with Appellant in December 2017. (XIX, 379) Pursuant to her evaluation, Dr. Brown agreed with Drs. Walker and Caruso that Appellant had cannabis use disorder and ASPD. (XIX, 381) Dr. Brown said that Appellant did not meet the criteria for having PTSD. (XIX, 381)

On cross-examination, Dr. Brown conceded that she had not done many evaluations for capital case sentencing issues, and further agreed that she had not worked with as many PTSD patients as Dr. Caruso had through his time with Veterans' Affairs. (XIX, 396-397) She said that Appellant likely had some trauma from abuse he experienced as a child. (XIX, 407-409)

At the conclusion of the sentencing proof, the trial court instructed the jury on the following two (2) aggravating circumstances, pursuant to T.C.A. § 39-13-204 (i)(2) and (7):

1. The Defendant was previously convicted of one or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person;
2. The murder was knowingly committed, solicited, directed, or aided by the Defendant while the Defendant had a substantial role in committing or attempting to commit or was fleeing after having a substantial role in committing or attempting to commit any especially aggravated robbery.

(XX, 54)

The trial court also instructed the jury on the following mitigating factors, pursuant to T.C.A. § 39-13-204(i):

1. There are choices other than sentence of death.
2. Life without parole means that Urshawn Miller will never be released from prison.
3. If Mr. Miller is sentenced to life without possibility of parole, he will die in prison.
4. Mr. Miller has a mother, two aunts, an uncle, a brother, a sister, and other close family members. Mr. Miller's execution would have a devastating lifetime impact on all of these family members.
5. If Mr. Miller is executed, his execution will not undue [sic] the harm suffered by Mr. Dhalai's family, but life without parole will provide Mr. Miller the time to reflect on Mr. Dhalai's death for the rest of his life.

6. Mr. Miller suffers from mental disorders due to circumstances beyond his control, including genetics, abuse, neglect, trauma, and other upbringing and environmental factors.

7. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of the Defendant's character or record of any aspect of the circumstances of the offense favorable to the Defendant, which is supported by the evidence.

(XX, 56-57) After deliberations, the jury returned with a finding that the State had proven both aggravating factors, and that the two (2) aggravating factors outweighed any mitigating factors submitted by the defense. Consequently, the jury found that Appellant should be sentenced to death for both First Degree Murder and Felony Murder. (XX, 80-87)

The two aggravating factors found by the jury did not outweigh the multitude of mitigating factors put forth by the defense. All of the experts agreed that Appellant did experience serious trauma growing up, and that his IQ was lower than that of the average person. While Dr. Brown did not agree that Appellant had PTSD, she did agree that he exhibited at least some of the symptoms, and she agreed with Drs. Walker and Caruso that Appellant had ASPD. Clearly, a sentence of life without parole would mean that Appellant would not be released from prison, and such a lengthy sentence would offer Appellant the opportunity to reflect on his crimes and perhaps demonstrate remorse and healing. Appellant did have a prior conviction for Aggravated Robbery, but he admitted to that offense and gave a statement to law enforcement. For all of these reasons,

Appellant asks this Court to reweigh the aggravating and mitigating factors and find that Appellant's sentence should be modified to life without parole for his convictions for First Degree Murder and Felony Murder.

VIII. The trial court erred in denying the defense's motion *in limine* regarding introduction of the video of his prior Aggravated Robbery at the penalty phase, when the defense offered to stipulate to the prior conviction.

T.C.A. § 39-13-204(c) governs the admissibility of evidence in a capital case sentencing hearing:

> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor.

T.C.A. § 39-13-204(c). In *State v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001), the Tennessee Supreme Court stated:

> [I]n general, § 39–13–204(c) should be interpreted to allow trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing. The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the

> rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Sims, 45 S.W.3d at 14.

Appellant, through counsel, filed a pre-trial motion *in limine*, arguing that the video from Appellant's prior Aggravated Robbery case should not be shown to the jury in the sentencing hearing. (II, 292-294) The State filed a response in opposition, citing to T.C.A. § 39-13-204(c) as part of its basis of authority. (II, 295-296) The trial court entered an order denying Appellant's motion on March 2, 2019. (II, 300)

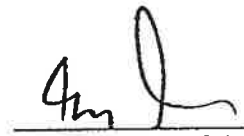
The sentencing statute appears to allow facts from the underlying conviction. Notwithstanding the authority cited to by the State, and the current case law on this issue, Appellant submits that the trial court erred in its ruling that the contested video would be admissible at the sentencing hearing. In this case, due to the close similarity and graphic nature of the video of the instant crime and the video of the previous crime, the video of the previous crime should not have been admitted as evidence at the sentencing hearing. In both cases, Appellant was shown to have entered a convenience store, shortly before closing, while wearing a mask and brandishing a firearm. In addition, the video depicts at least some of the suspects jumping the counter in an attempt to take money from the cash register. The shocking effect of the two videos, combined, violated Appellant's right to a fair sentencing hearing. See U.S. Constitution, Amendments V, VIII, and XIV; Tenn. Const. Article I, §§ 6, 8, and 17. Further, this prejudice outweighed any probative value, especially in light of the fact that there were other ways to prove the commission of Appellant's prior offense. This is especially noteworthy considering Appellant

essentially offered, in the motion *in limine*, to concede the fact of the conviction, and that the judgment of conviction and Appellant's written statement in that case were available to prove the conviction and criminal acts alleged in that prior case. (II, 292-294) The combined effect of this rule also likely caused the jury to give undue weight to the aggravating factor regarding Appellant's prior crime of violence. For those reasons, Appellant moves this Court to find that the trial court erred in denying his motion *in limine*.

CONCLUSION

Appellant prays that this Court find that the evidence was insufficient for the jury to find him guilty of any of the offenses for which he was convicted. Appellant also asks this court to note the structural issues with jury selection, the failure to grant his motion *in limine*, and the disproportionate implementation of the death penalty against him as avenues for relief from his death sentences. Finally, Appellant asks this Court to reweigh the application of the aggravating and mitigating factors in his case. Appellant requests that this Court grant him a verdict of dismissal, modify his death sentences to life without parole, or grant him a new trial.

RESPECTFULLY SUBMITTED,



GREGORY D. GOOKIN, BPR #023649
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

The undersigned, Gregory D. Gookin, hereby certifies that a true and exact copy of this pleading has been served via U.S. Mail, postage pre-paid, on the following parties, this the 26th day of August, 2019:

Mr. Jody Pickens
District Attorney General
26th Judicial District
P.O. Box 2825
Jackson, TN 38302

Mr. Nicholas Spangler
Assistant Attorney General
Criminal Justice Division
P.O. Box 20207
Nashville, TN 37202-0207

Mr. Urshawn Eric Miller
TOMIS #00455407
Riverbend Maximum Security Institution
7475 Cockrill Bend Boulevard
Nashville, TN 37209-1048

GREGORY D. GOOKIN
ASSISTANT PUBLIC DEFENDER

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE, APPELLEE,	)	
v.	)	No. W2019-00197-CCA-R3-DD
	)	Madison Co. Circuit Court No. 16-435
URSHAWN ERIC MILLER, APPELLANT.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE MADISON COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANT URSHAWN ERIC MILLER

GEORGE MORTON GOOGE
BPR #06178
DISTRICT PUBLIC DEFENDER

GREGORY D. GOOKIN, BPR #023649
Assistant Public Defender
26th Judicial District
245 W. Sycamore Street
Jackson, TN 38301
(731) 423-6657

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE, APPELLEE,	)	
v.	)	No. W2019-00197-CCA-R3-DD
	)	Madison Co. Circuit Court No. 16-435
URSHAWN ERIC MILLER, APPELLANT.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE MADISON COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANT URSHAWN ERIC MILLER

GEORGE MORTON GOOGE
BPR #06178
DISTRICT PUBLIC DEFENDER

GREGORY D. GOOKIN, BPR #023649
Assistant Public Defender
26th Judicial District
245 W. Sycamore Street
Jackson, TN 38301
(731) 423-6657

Attachment 2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TENNESSEE SUPREME COURT CASES:

TENNESSEE COURT OF CRIMINAL APPEALS CASES:

STATUTORY AUTHORITY:

REPLY BRIEF OF APPELLANT URSHAWN ERIC MILLER

The appellant, Urshawn Eric Miller, through counsel, files this reply[1], responding specifically to issues II, IV, and VIII. Issue II involves the defense utilizing three of its peremptory challenges on prospective jurors Ronald Robinson, Melissa Little, and Joan Graves after the trial court refused to excuse any of these three for cause. The supplemental record (Vol. 30) reflects that the defense utilized peremptory challenges for each of these three individuals. After the Appellant had exhausted all of his peremptory challenges, he attempted to have potential juror Dru Crum challenged for cause; the trial court denied this challenge for cause (Issue IV). Because the Appellant had exercised all of his peremptory challenges, he was forced to accept Ms. Crum, who was not inclined to consider a sentence of life with parole unless a defendant later repented of his actions and became religious (Issue IV). Issue VIII addresses the trial court allowing the State to play the video of the Appellant's prior Aggravated Robbery during the sentencing hearing.

Issue II: The trial court erred in denying Appellant's motion to challenge prospective jurors Ronald Robinson, Melissa Little, and Joan Graves for cause.

The State argues that Ronald Robinson's *voir dire* responses reflect a "general willingness" to follow the law regarding all three forms of punishment for a First Degree Murder conviction. (St. Br., 25-26) This argument does not reflect the specific instances where Mr. Robinson indicated his true feelings about capital punishment. For instance, Mr. Robinson did not favor spending tax dollars on keeping a convicted murderer in jail for the rest of his or her lifetime. (VIII, 70) In addition, he contended that a premeditated murder should result in the imposition of the death penalty, as it comported with his religious beliefs of "an eye for an eye." (VIII, 75-77)

[1] The abbreviation "St. Br." is used herein where references are made to Appellee's brief in this matter. Other references will be the same as in Appellant's initial brief.

This Biblically-based view of capital punishment during jury selection was also at issue in *State v. Kiser*, a case strikingly similar to the instant case. *See State v. Kiser*, No. E2005-02406-CCA-R3-DD, 2007 WL 4207903, at *21-24 (Tenn. Crim. App. Nov. 9, 2007).

In that case, the Defendant requested that two prospective jurors be excused for cause due to their opinions regarding the death penalty. *Id.* Similar to the instant case, in *Kiser*, the first prospective juror (Morris) used the same "an eye for an eye" phrase as prospective juror Robinson. *Id.* at *21. The second prospective juror (Parsons) "twice reaffirmed" his belief that the death penalty was the only appropriate punishment for first degree murder. *Id.* at *22. The trial court declined to excuse either juror for cause, and the Defendant was forced to use peremptory challenges to have both jurors excused. *Id.* The defense did not request that one of the jurors (Caldwell) be removed for cause. The defense did not exercise a peremptory challenge on juror Volz, nor did the defense request that she be removed for cause. The Defendant also appealed on the basis that the trial court refused to remove two other jurors based on their "close personal ties to law enforcement." *Id.* at *22-23. The Court of Criminal Appeals expressed concern with one of the juror's views on the death penalty, but found no reversible error by the trial court, stating, "In any event, even if the trial court erred by refusing to remove Morris or Parsons for cause, the error is reversible only if Caldwell or Volz were incompetent to serve on the jury. We note that although the record reflects that the appellant used all of his peremptory challenges, he never requested that Caldwell or Volz be removed from the jury for cause." *Id.* at *24. The State also asserts that the trial court was within its discretion to deny the defense's challenge for cause of Melissa Little. (St. Br., 26-27) While Ms. Little did agree that she could and would follow the sentencing law and fairly consider all three forms of punishment, her initial comments during *voir dire* reveal her actual feelings about the death penalty. As mentioned in Appellant's initial brief,

Ms. Little said that she had "no problem" with imposing the death penalty. (IX, 272) This lack of reluctance to impose a death sentence upon a defendant demonstrates that Ms. Little tended towards imposing capital punishment rather than legitimately considering life or life without parole. Additionally, Ms. Little remarked that, if a defendant could prove that he or she had committed murder in "self defense," then that defendant would "perhaps" not deserve the death penalty. (IX, 273) Again, when a prospective juror actually voices their views on capital punishment, rather than merely answering "yes" or "no" to leading rehabilitative questions, a court should consider the prospective juror's own words to be their true feelings on the matter.

The State next contends that the trial court correctly ruled that prospective juror Joan Graves should not be excused for cause. (St. Br., 28-29) Ms. Graves spoke so reverently of the lead prosecutor that this factor, taken alone, should have served as grounds to excuse her from jury service. (XII, 43) Ms. Graves also was in the unique situation of having previously served as a juror on a case wherein the State was seeking the death penalty. Per Ms. Graves's testimony, that jury voted on a sentence of life without parole mainly because the evidence was "circumstantial." (XII, 45) Finally, Ms. Graves said that she was "inclined" to vote for the death penalty, but told the trial court that she would fairly consider all three forms of punishment. (XII, 54-55) A conscientious trial court usually asks the jurors if they know any of the parties, witnesses, or attorneys involved in the case. When, as here, a prospective juror has personal knowledge of an attorney's character, the trial court should have erred on the side of protecting the Appellant's right to a fair trial and excused Ms. Graves.

Issue IV: The trial court erred in refusing to excuse prospective juror Dru Crum for cause, when Appellant had already exhausted his peremptory challenges.

Dru Crum's willingness to impose a sentence short of the death penalty hinged on a defendant's repenting of his or her crimes and accepting God's influence. (XII, 220) Although Ms. Crum did claim that she would fairly consider all three punishments, her initial comments reveal that she was placing a burden on the Appellant from the outset of the case. She essentially was requiring that the Appellant, if convicted, demonstrate some outward form of contrition before she could impose a sentence short of the death penalty. As the Appellant had exhausted all of his peremptory challenges by the time Ms. Crum was seated, he was forced to accept a juror who, in her own words, favored the death penalty unless the Appellant satisfied her self-imposed standards of repenting for his alleged crimes.

Here, unlike the defense in *Kiser*, the Appellant did challenge prospective jurors Ronald Robinson, Melissa Little, and Joan Graves for cause. The trial court denied the Appellant's legitimate challenges for cause, thus forcing the Appellant to exercise his peremptory challenges if he wanted to remove those three jurors. After the trial court's denial, the Appellant used a peremptory challenge to excuse each prospective juror. After using all fifteen of his challenges, the Appellant was left with no option but to have Dru Crum on the jury. Ms. Crum's statements regarding her preference for the death penalty meant that the Appellant started his trial with the knowledge that one of the jurors would likely give him the death penalty in the event of his conviction for First Degree Murder. Appellant asks this Court to grant him a new trial based upon the unfairly impaneled jury in his capital case.

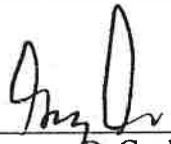
Issue VIII: The trial court erred in denying the defense's motion *in limine* regarding introduction of the video of his prior Aggravated Robbery at the penalty phase, when the defense offered to stipulate to the prior conviction.

The State's brief relies primarily upon Tenn. Code Ann. § 39-13-204(c), which does grant trial judges significant discretion in the admissibility of evidence at a capital sentencing hearing. (St. Br., 43) However, that discretion is not unfettered. *State v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001) (emphasis added). Even in the presence of § 39-13-204(c), trial courts are still required to examine the proposed evidence for "reliability, relevance, value, and prejudicial effect." *Id.*; *State v. Clayton,* No. W2015–00158–CCA–R3–DD, 2016 WL 7395628, at *26 (Tenn. Crim. App. Aug. 18, 2016). The Tennessee Supreme Court has long discussed the possibility that photographs and videos may have a prejudicial effect. *See State v. Banks*, 564 S.W.2d 947 (Tenn. 1978); *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990); *State v. Middlebrooks*, 840 S.W.2d 317, 331 (Tenn. 1992).

While the courts have frequently ruled in favor of admitting such evidence, both the state Supreme Court and the intermediate court continue to assess the prejudicial effect. Thus, trial courts must still "preserve fundamental fairness and protect the rights of both the defendant and the victim's family" in the sentencing phase of a capital case. *Sims*, 45 S.W.3d at 14. As a result, evidence that is unfairly prejudicial should still be excluded. While the state has a duty to put on proof that is often inherently prejudicial to the defendant, "prejudice becomes unfair when the primary purpose of the evidence is to elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror." *State v. Collins*, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998) (citation omitted).

However, that was the precise purpose for which the State introduced the video recording of a previous aggravated robbery involving the Appellant. The State was able to establish sufficient proof for the aggravating circumstance of a prior violent felony in a number of different ways. The defense was even amenable to a stipulation that such a felony occurred, and the judgment of conviction would have established this prior felony. The State's sole purpose for admitting the video was to inflame the passions of the jury and elicit feelings of contempt and horror towards the Appellant. In the absence of any legitimate reason to submit this proof, the trial court should have excluded the video from the capital sentencing hearing. Due to its inclusion in the evidence available to the jury, the Appellant was unfairly prejudiced and therefore did not receive the benefit of a fair sentencing hearing, as is his right under both the state and federal constitutions.

RESPECTFULLY SUBMITTED,



Gregory D. Gookin, BPR # 023649
Assistant Public Defender
245 W. Sycamore Street
Jackson, TN 38301
(731) 423-6657

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via e-mail to Mr. Nicholas Spangler, Assistant Attorney General of Tennessee, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202-0207, this the 6th day of January, 2020.

GREGORY D. GOOKIN

Electronically RECEIVED on October 30, 2020
Appellate Court Clerk

Electronically FILED on October 30, 2020
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE,
Appellee,

VS. C.C.A. Docket No. W2019-00197-SC-DDT-DD

Madison County Circuit, Division II, No. 16-435

URSHAWN ERIC MILLER,
Appellant.

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE TENNESSEE COURT OF CRIMINAL APPEALS

BRIEF OF APPELLANT URSHAWN ERIC MILLER

At Trial and On Appeal:

George Morton Googe, BPR #006178
District Public Defender

Gregory D. Gookin, BPR #023649
Assistant Public Defender
245 W. Sycamore St.
Jackson, TN 38301
(731) 423-6657

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL AMENDMENTS:

TENNESSEE CONSTITUTIONAL PROVISIONS:

UNITED STATES SUPREME COURT CASES:

TENNESSEE SUPREME COURT CASES:

TENNESSEE COURT OF CRIMINAL APPEALS CASES:

TENNESSEE CODE PROVISIONS:

OTHER AUTHORITY:

INTRODUCTION

MAY IT PLEASE THE COURT:

This is an appeal from Appellant's convictions for First Degree Murder, First Degree Murder in Perpetration of Attempted Especially Aggravated Robbery, Attempted Second Degree Murder, Aggravated Assault, Employing Firearm With Intent to Commit a Dangerous Felony, Attempted Especially Aggravated Robbery, and Evading Arrest. Appellant received a sentence of Death for the First Degree Murder and Felony Murder convictions; for the other offenses, he received a total effective sentence of thirty (30) years, to be served concurrently with the Death sentences. Appellant's convictions and death sentence were affirmed by the Tennessee Court of Criminal Appeals on September 18, 2020.

This case was tried by a jury before the Honorable Donald H. Allen, Judge of the Circuit Court of Madison County, Tennessee, Division II. Appellant properly perfected his appeal to this Court seeking a reversal and/or modification of his conviction and sentence.

The parties will be referred to as "Appellant" and "State."

The record on appeal consists of: the technical record, being three (3) volumes; one (1) supplement to the technical record; the transcript of the jury trial, being thirteen (13) volumes; the transcript of the motion for new trial hearing, being one (1) volume; and thirty-eight (38) exhibits. References to the technical record will be by volume number and page number, e.g., (I, 5). References

to the transcripts will be by volume number and page number, e.g., (III, 7).

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to find that Appellant was guilty of First Degree Murder, First Degree (Felony) Murder, Attempted Second Degree Murder, Attempted Especially Aggravated Robbery, Aggravated Assault, and Employing a Firearm During the Attempt to Commit a Dangerous Felony?
2. Whether the trial court erred in denying Appellant's motions to strike jurors Ronald Robinson, Melissa Ann Little, and Joan Graves for cause?
3. Whether the trial court erred in excusing potential jurors John Eads, Grace Milhorn, and Melony Sesti for cause, when Appellant objected to the State's challenges?
4. Whether the trial court erred in not excusing potential juror Dru Crum for cause, when Appellant had exhausted all of his peremptory challenges?
5. Whether the death penalty is a disproportionate punishment in the instant case?
6. Whether the death penalty in general, and lethal injection specifically, constitute cruel and unusual punishment?
7. Whether the aggravating factors found by the jury outweighed the mitigating factors beyond a reasonable doubt?

8. Whether the trial court erred in denying the Appellant's motion *in limine* regarding the introduction of the video of his prior Aggravated Robbery during the penalty phase?

STATEMENT OF THE CASE

Appellant was indicted on October 3, 2016, and charged with several offenses: to wit, First Degree Murder (victim: Ahmad Dhalai), First Degree Murder in Perpetration of Attempted Especially Aggravated Robbery (victim: Ahmad Dhalai), Attempted Especially Aggravated Robbery, Attempted First Degree Murder (victim: Lawrence Austin), Aggravated Assault, Employing a Firearm in the Attempt to Commit a Dangerous Felony, Convicted Felon in Possession of a Handgun[1], Resisting Arrest, and Evading Arrest. (I, 41-51) Appellant was found to be indigent and the Office of the District Public Defender was appointed to represent Appellant. (I, 62)

This case was tried by a jury before the Honorable Donald H. Allen, Circuit Court Judge of Madison County, Tennessee, Division II, upon a plea of not guilty. The trial was held February 26-March 4, 2018. Appellant was convicted as charged of each offense, save for count 4, in which he was convicted of Attempted Second Degree Murder, and count 7, which was dismissed by the State. (II, 315-316, III, 337-343) The jury recommended that a death sentence be imposed for the First Degree Murder convictions, and the Court entered judgments to that effect on March 5, 2018. (II, 315-316) Appellant timely filed a Motion for New Trial on March 29, 2018. (III, 330-332)

---

[1] The charge of Convicted Felon in Possession of a Handgun was severed before trial; the State subsequently dismissed this charge. (III, 340)

The trial court conducted a separate sentencing hearing for the other offenses on May 7, 2018. The trial court imposed the following sentences:

Count 3	Attempted Especially Aggravated Robbery	12 years
Count 4	Attempted Second Degree Murder	12 years
Count 5	Aggravated Assault	6 years
Count 6	Employing Firearm in the Commission of A Dangerous Felony	6 years
Count 8	Resisting Arrest	6 months[2]
Count 9	Evading Arrest	11 months, 29 days[3]

(III, 337-343) The trial court aligned the sentences such that Appellant would receive a total effective thirty year sentence for the non-capital offenses, and ordered that these sentences be served concurrently to his death sentences in Counts 1 and 2. (III, 337-343) Appellant later filed an Amended Motion for New Trial on October 15, 2018, and the trial court conducted a hearing on the post-trial motions on November 21, 2018. The trial court entered an order denying Appellant's Motion and Amended Motion for New Trial on January 2, 2019. (III, 456-464)

Appellant timely filed a Notice of Appeal on February 1, 2019. (III, 466-469) The Court of Criminal Appeals issued an opinion on

---

[2] The Court of Criminal Appeals' opinion remanded this count to the trial court for the purpose of entering an amended judgment.
[3] Appellant does not challenge his convictions for Resisting Arrest and Evading Arrest.

September 18, 2020, affirming Appellant's convictions and death sentence. This case is properly before this Honorable Court.

STATEMENT OF FACTS

JURY *VOIR DIRE*

The jury *voir dire* lasted from February 26-28, 2019, and the entire jury pool was examined before a jury of twelve and three alternates were selected. A more detailed discussion of each of the facts surrounding each contested individual juror will be presented during the argument portion of Issues 2, 3 and 4.

MOTION *IN LIMINE*

Pre-trial, the defense filed a motion *in limine* regarding the admissibility of a video depicting Appellant's prior Aggravated Robbery crime. (II, 292-294) The trial court held a hearing on the motion and denied it, finding that the State should be able to put on relevant proof of Appellant's prior felony conviction, as it was a statutory aggravating factor. The trial court later entered an order denying this motion *in limine*. (II, 300-301)

STATE'S GUILT/INNOCENCE PHASE PROOF

Jackson Police Officer Kevin Livingston responded to the Bull Market in Jackson, on November 25, 2015. (XIII, 68) Upon arrival, Officer Livingston encountered a man behind the counter inside the business. The man appeared to have been shot in the head, and Officer Livingston witnessed the man pass away inside the business. (XIII, 71) Officer Livingston called for EMS to assist and then began securing the scene. (XIII, 72)

Abdul Saleh worked at the Bull Market alongside some of his relatives, including the victim, Ahmad Dhalai. (XIII, 75) Mr. Abdul

Saleh was working at the store on November 25, 2015; Lawrence Austin was working there as a custodian, and Foad Saleh, Abdul's son, and Ahmad Dhalai were also on duty. (XIII, 78) Shortly before 11:00 p.m., Mr. Saleh heard a loud pop while he was in the restroom. Upon investigating, he went toward the cash register and found Ahmad Dhalai lying on the ground. (XIII, 79-80) Mr. Saleh also saw a man wearing dark clothing and a hoodie. After retreating for his own safety, Mr. Saleh heard two more "pops." (XIII, 80-81) The other man then fled the store and Mr. Saleh called the police. (XIII, 82)

Mr. Saleh also confirmed that there was video of the shooting incident, and testified regarding the events that were depicted on the video. (XIII, 92-99)

On cross-examination, Mr. Saleh said that he did not see the hooded man holding a handgun, but did see a handgun when he later watched the store surveillance video. (XIII, 103) Mr. Saleh could not ascertain the identity of the assailant due to him wearing a hood and having a mask over his face. (XIII, 105)

Timothy Sinclair, a customer at the Bull Market, was backing out of the parking lot when he observed a person approaching the business from the side. This person was wearing dark clothes, a hoodie, and a mask. (XIII, 115) Mr. Sinclair estimated that this person was a black male. (XIII, 116) When the person entered the Bull Market, he was holding a gun, and Mr. Sinclair observed the person fire a shot. (XIII, 119) After driving away a short distance to escape the danger, Mr. Sinclair gathered himself and called the

police. (XIII, 119) While calling the police, he saw the shooter leave the store and walk away toward Arlington Avenue. (XIII, 120-121)

On cross-examination, Mr. Sinclair agreed that he had previously testified in a preliminary hearing and stated that he could not see anything but the assailant's eyes, and could not tell the sex and race of the person. (XIII, 138)

Lawrence Austin worked at the Bull Market doing various tasks that the owners needed completed. (XIII, 145) On November 25, 2015, Mr. Austin was helping to clean up the store when the hooded person entered the store. (XIII, 146) As Mr. Austin was mopping, he heard a voice say "drop it off." (XIII, 147) Initially, Mr. Austin thought it may have been a customer joking around, but he then heard a gunshot. (XIII, 148) Mr. Austin tried to hide behind a refrigerator but realized that someone was shooting at him as well. (XIII, 149) When Mr. Austin turned back around, he saw the hooded person jumping back across the counter and fleeing the store. Mr. Austin briefly left the store to try and see where the shooter ran, but then came back inside the business and saw Mr. Dhalai on the ground with "all this blood." (XIII, 150-151)

On cross-examination, Mr. Austin was confronted with his preliminary hearing testimony. During that hearing, Mr. Austin said that he did not hear anything said by the hooded person. However, Mr. Austin did say that he was certain that he heard "two or three shots." (XIII, 164-165) Mr. Austin previously testified that he was unsure of the race of the person, but said at trial that he

believed it was a black person who committed the offenses. (XIII, 167)

Foad Saleh was working at the Bull Market. While on a break, Mr. Saleh was riding his bicycle outside the store and heard two or three gunshots. (XIII, 176) He then saw a black male leaving the store; this man was wearing dark clothing and a hoodie. (XIII, 177) The black male went down Arlington Avenue as Mr. Sinclair testified. (XIII, 180) On cross-examination, Mr. Saleh agreed that he did not see the male come into the store. (XIII, 190)

Lieutenant Shane Beaver of the Jackson Police Department responded to the Bull Market after dispatch reported a shooting call at the business. (XIII, 204) Upon arrival Lieutenant Beaver preserved the crime scene and received a report of the suspect's description and direction of travel. (XIII, 205) A K-9 officer had deployed his dog, Pax, towards the direction of travel, and Lieutenant Beaver followed Pax. (XIII, 207) Other officers assisted in setting up a perimeter in the area of Lion's Field, near the Bull Market. (XIII, 208) Just inside the wood line, Lieutenant Beaver and another officer shined their flashlights on a subject. (XIII, 214) Officers began giving commands to the subject to come out of the woods and surrender, but the subject replied "Fuck you. You're going to have to come in here and get me. Come on in here and get me." (XIII, 218) The subject appeared to be armed or concealing a weapon. (XIII, 218) Lieutenant Beaver felt at that point that he might have to use deadly force against this subject. (XIII, 220)

The suspect began to move away from Lieutenant Beaver and in the direction of the K-9 officer. As the officers heard the suspect attempt to climb over a chain link fence near the baseball field, Pax was once again deployed and made contact with the subject. (XIII, 226-227) As Lieutenant Beaver approached the subject, he observed that the person, who he identified as Appellant, was choking Pax. (XIII, 228) Pax's handler, Officer Jeremy Stines, then struck Appellant in the head with his service weapon to allow Pax to get free. (XIII, 230) Appellant continued to resist officers until Officer Hamilton utilized his taser to effectuate an arrest of Appellant. (XIII, 231)

Sergeant Brandon Moss, the K-9 Unit Commander, responded to the Bull Market with his dog, Kyra. (XIV, 247) Upon arrival, Sergeant Moss assisted the other officers in setting up a perimeter around the Lion's Field area. (XIV, 247) Sergeant Moss challenged the suspect to surrender, but the suspect refused to comply and made threats to harm the officers. (XIV, 255) Sergeant Moss testified very similarly to Lieutenant Beaver regarding the sequence of events leading to the arrest of Appellant. (XIV, 256-262) After Appellant was in custody, Kyra located a cell phone and a .38 caliber handgun in the woods. (XIV, 265)

Officer Jeremy Stines testified that Pax, in addition to tracking the suspect from the Bull Market, also located a pair of pants and a shirt in the woods. (XIV, 290) Officer Stines testified similarly to the other officers regarding the apprehension of Appellant. (XIV, 290-298)

Officer Kyle Hamilton assisted in the arrest of Appellant. Officer Hamilton felt that Appellant continued to resist arrest after choking Pax, so Officer Hamilton deployed his taser to make Appellant compliant. (XIV, 325-327) Officer Hamilton explained that the taser has video and audio capabilities and narrated the playing of the video for the jury. (XIV, 328-335) After concluding the arrest, Officer Hamilton searched the immediate area where Appellant was located and found a set of keys. (XIV, 336)

Officer Julie Mullikin participated in transporting Appellant to jail; she also collected his clothing after he was taken to the hospital to have his dog bites treated. (XIV, 353-363)

Dr. Thomas Deering performed the autopsy of Ahmad Dhalai. During his autopsy, Dr. Deering found that Mr. Dhalai had suffered a gunshot wound to his head, and noted an exit wound as well. (XIV, 384) The point of entry of the gunshot was to the right side, behind his ear. (XIV, 385) Such a wound would fracture the skull and injure the brain. (XIV, 385) Dr. Deering opined that the cause of Mr. Dhalai's death was a gunshot wound to the head, and his manner of death was homicide. (XIV, 425)

On cross-examination, Dr. Deering said that Mr. Dhalai would have been rendered unconscious immediately after suffering such a wound, and that his death would likely have been very quick. (XIV, 430)

Officer James Stafford responded to the area of Lion's Field and took photographs of several items of evidence found in the woods near where Appellant was arrested. (XV, 23-25) Officer

Stafford identified items of clothing, gloves, and a white piece of "T-shirt-type material." (XV, 45-52) Upon examining the handgun that was found by K-9 Kyra, Officer Stafford saw that it appeared the weapon had been fired three times. (XV, 70)

Investigator Marvin Rodish, formerly of the Jackson Police Department, processed the crime scene at the Bull Market. Behind the wall where Mr. Dhalai had been working the cash register, a projectile was found. (XV, 84) Investigator Rodish found another projectile that appeared to be from Mr. Dhalai. (XV, 96) Finally, Investigator Rodish collected as evidence clothing, gloves, and a firearm that had been recovered by other officers. (XV, 99-106)

Investigator Dan Long participated in a search of Appellant's residence at 199 Campbell Street in Jackson. (XV, 166) During the search, Investigator Long used the keys found near Appellant when he was arrested to see if they would fit the lock of the residence and Appellant's car. (XV, 167) A video recorded by officers showed that the various keys did fit the house lock and vehicle. (XV, 168-171) In Appellant's bedroom, Investigator Long found a torn white t-shirt and a billfold. (XV, 178-180)

The parties stipulated regarding an aerial map showing that the distance from Appellant's residence to the Bull Market was .97 miles. (XV, 222) The parties also stipulated that the cell phone found in the woods was that of Appellant, per AT&T subscriber information. (XVI, 440)

Lieutenant Chris Chestnut met with Appellant at the jail after his arrest and obtained a DNA buccal swab from him. (XV, 235)

Tennessee Bureau of Investigation (TBI) Special Agent/Forensic Scientist Kristyn Meyers testified as an expert in the field of forensic biology. Special Agent Meyers swabbed, for skin cells, a 38 caliber handgun that was submitted to the TBI. (XVI, 276)

Dr. Eric Warren, formerly of TBI, testified as an expert in the field of ballistics and firearms identification and analysis. Dr. Warren examined the 38 caliber handgun that was received from the Jackson Police Department. (XVI, 309) As part of his analysis, Dr. Warren studied the spent projectiles collected by Jackson Police Department officers, and he opined that all three (3) projectiles were 38 caliber. However, he could not say definitively that the projectiles were fired through the submitted 38 caliber handgun. (XVI, 321)

The State next called, in succession, Earl Eley, Michael Turbeville, and Chad Johnson of the TBI, who all testified that they were involved in the receiving or transporting of various pieces of evidence in Appellant's case. (XVI, 332-354)

TBI Special Agent Charly Castelbuono testified as an expert in forensic biology/DNA identification and analysis. In this role, Special Agent Castelbuono first examined the piece of a white t-shirt found in the woods when Appellant was arrested. Special Agent Castelbuono said that, in her opinion, the blood found on this

fragment was that of Appellant. (XVI, 366) In addition, Appellant was found to be the "major contributor" of DNA found in the gloves found in the woods, although Special Agent Castelbuono found that the DNA profile obtained was consistent with a mixture of more than one individual. (XVI, 368-370) Appellant was also found to be the "major contributor" of DNA found in swabs of the interior of a sweatshirt found in the woods. (XVI, 371-372) Similarly, Special Agent Castelbuono found Appellant to be the "major contributor" of DNA found on the 38 special handgun, although the partial profile obtained was consistent with a mixture of at least three individuals. (XVI, 374)

Special Agent Rielly Gray testified as an expert in microanalysis. Special Agent Gray examined the gloves submitted as evidence; in her analysis, she found that the gloves contained the presence of particles identified as gunshot primer residue." (XVI, 404)

Special Agent Miranda Gaddes was qualified as an expert in microanalysis. She compared the white fabric found in the woods to the torn white T-shirt found in Appellant's residence. In Special Agent Gaddes's opinion, these two items had been joined at one time. Special Agent Gaddes based her opinion on a microscopic analysis of the fracture lines of the two pieces of fabric. (XVI, 415-416)

Susan Clark and Samuel Frederick, employees of the TBI, both testified regarding the chain of custody of certain items of evidence that were submitted to the TBI laboratory. (XVI, 426-439)

The State's final witness was Ali Dhalai. Mr. Ali Dhalai is the cousin of the decendent, Ahmad Dhalai. Mr. Ali Dhalai introduced the "life photograph" of Mr. Ahmad Dhalai. (XVI, 453-454)

DEFENSE GUILT/INNOCENCE PHASE PROOF

The defense presented no proof at trial.

SENTENCING HEARING PROOF

The State called three witnesses in its case-in-chief: Ali Dhalai, Captain Jeff Fitzgerald, and Alison Deaton. Each witness' testimony will be discussed in more detail during the presentation of Issue 7. Similarly, the testimony of defense witnesses Dr. James Walker and Dr. Keith Caruso, and the testimony of State's rebuttal witness Dr. Kimberly Brown will be discussed in detail below.

ARGUMENT

I. The evidence was insufficient to support a verdict of premeditated First Degree Murder, Felony Murder, Attempted Especially Aggravated Robbery, Attempted Second Degree Murder, Aggravated Assault, or Employing a Firearm During the Commission of a Dangerous Felony.

When evaluating the sufficiency of the evidence, this Court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Keough*, 18 S.W.3d 175, 180-81 (Tenn. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)) This Court is required to afford the prosecution the strongest legitimate view of the evidence in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Keough,* 18 S.W.3d at 181 (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)) Questions regarding the credibility of the witnesses, the weight to be given the evidence, and any factual issues raised by the evidence are resolved by the trier of fact. *Bland*, 958 S.W.2d at 659. A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982)

FIRST DEGREE MURDER

First Degree Murder is defined in T.C.A. § 39-13-202(a)(1) as follows:

(a) First Degree Murder is:

(1) A premeditated and intentional killing of another.

T.C.A. § 39-13-202(a)(1).

Whether a defendant has acted with premeditation is a question for the finder of fact to determine, and it may be inferred from the manner and circumstances of the killing. *State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). The following factors may be considered in deciding whether the murder was premeditated: the procurement and use of a deadly weapon upon an unarmed victim, the defendant's declarations of his intent to kill, the infliction of multiple wounds, defendant's calmness immediately after the killing; and a particularly cruel killing. *See State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Brown*, 836 S.W.2d 530, 541-42 (Tenn. 1992).

In the instant case, the evidence was insufficient to support a verdict of First Degree Murder against Appellant. One of the State's major arguments in favor of premeditated murder was Appellant's statement to Mr. Dhalai "drop that off or I'm gonna shoot you dead in the head." However, this statement could merely have been offered as a tactic to convince Mr. Dhalai to hand over the cash register money instead of as a threat to violence. Although the evidence shows that Mr. Dhalai was shot in the head, the video shows that Appellant reacted quickly to Mr. Dhalai walking away

from the cash register, supporting an inference that this was, at most, a knowing killing, thus constituting Second Degree Murder. In addition, the State did not prove beyond a reasonable doubt the identity of the Defendant as the person who committed the crime. All of the evidence used to convict Appellant was circumstantial rather than direct. No witness from the Bull Market could definitively identify Appellant as the perpetrator, and no evidence was introduced to show that Appellant confessed at any time to the charged offenses. For these reasons, the conviction for First Degree Murder should be voided and judgment of, at most, Second Degree Murder should be entered against Appellant.

FIRST DEGREE MURDER IN PERPETRATION OF A FELONY

Pursuant to T.C.A. § 39-13-202(a)(2):

(a) First Degree Murder is:

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, physical abuse in violation of § 71-6-119, aggravated neglect of an elderly or vulnerable adult in violation of § 39-15-508, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy...

T.C.A. § 39-13-202(a)(2). Pursuant to subsection (b), "[n]o culpable mental state is required for conviction under subdivision (a)(2) or (a)(3), except the intent to commit the enumerated offenses or acts

in those subdivisions." T.C.A. § 39-13-202(b). Our Supreme Court has stated that "consideration of such factors as time, place, and causation is helpful in determining whether a murder was committed 'in the perpetration of' a particular felony." *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn.1999) (citing *State v. Lee*, 969 S.W.2d 414, 416 (Tenn.Crim.App.1997)). "The killing may precede, coincide with, or follow the felony and still be considered as occurring 'in the perpetration of' the felony offense, so long as there is a connection in time, place, and continuity of action." *Buggs*, 995 S.W.2d at 106.

The State's proof was insufficient to prove Appellant guilty of this offense. The killing of the victim, Mr. Dhalai, preceded Appellant's completion of the Attempted Especially Aggravated Kidnapping. In the video from Bull Market, the hooded suspect is heard making a demand for money, firing an errant shot, then firing the fatal shot into Mr. Dhalai's head. Only then does the suspect jump the counter and attempt to gain entry into the cash register before then fleeing the business. Appellant contends that the connection between the demand for money and the killing is not close enough to support a conviction for First Degree Murder in Perpetration of Attempted Especially Aggravated Kidnapping. For these reasons, Appellant's conviction should be reversed and dismissed.

ATTEMPED ESPECIALLY AGGRAVATED ROBBERY

The offense of Especially Aggravated Robbery is defined in T.C.A. § 39-13-403. Its two elements are that the perpetrator

accomplished a robbery, as defined in § 39-13-401, with a deadly weapon and that the victim suffered serious bodily injury. Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401.

Criminal attempt is defined in T.C.A. § 39-12-101:

(a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a). As described at trial by various witnesses, Appellant was convicted of entering the Bull Market and demanding money, followed by firing two shots in the direction of Mr. Ahmad Dhalai. However, this proof was entirely circumstantial, and the State did not introduce sufficient evidence to identify Appellant as the person who committed the offenses. No

witness within the store could give a description of the suspect other than it appeared to be a black male. Appellant moves this Court to reverse and dismiss his conviction for this offense.

ATTEMPED SECOND DEGREE MURDER

T.C.A. § 39-12-101, as listed above, describes what constitutes a Criminal Attempt. Second Degree Murder is defined as "the knowing killing of another." T.C.A. § 39-13-210(a)(1). To support this charge against Mr. Lawrence Austin, the State relied on the surveillance video as well as the testimony of Mr. Austin himself. According to Mr. Austin, the shooter never made any direct statements or threats to him; it appeared that the suspect was inside the store to perpetrate a robbery. Further, the suspect fired just one time in Mr. Austin's general direction; after firing, the suspect jumped the counter to try and steal money, rather than following Mr. Austin or trying to shoot at him again. For these reasons, coupled with the State's failure to prove identity beyond a reasonable doubt, Appellant moves this Court to reverse and dismiss this conviction.

AGGRAVATED ASSAULT

Appellant was also convicted of this offense as an alternative theory of the crime, with the victim being Lawrence Austin. Aggravated Assault, as applied in the instant case, is proscribed by T.C.A. § 39-13-102. In pertinent part:

(a)(1) A person commits aggravated assault who:

(A) Intentionally or knowingly commits an assault as defined in § 39-13-101, and the assault:

(iii) Involved the use or display of a deadly weapon.

T.C.A. § 39-13-101 governs the criminal offense of Assault:

(a) A person commits assault who:

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury.

T.C.A. § 39-13-102(a)(1)(A)(iii), 39-13-101(a)(2). Similar to his argument regarding Attempted Second Degree Murder, Appellant would ask this Court to consider the State's insufficient proof regarding his identity as the person who shot at Mr. Lawrence Austin. This conviction should be reversed and dismissed for the same reasons.

EMPLOYING A FIREARM DURING ATTEMPT TO COMMIT A DANGEROUS FELONY

This offense is defined in T.C.A. § 39-17-1324(b):

(b) It is an offense to employ a firearm or antique firearm during the:

(1) Commission of a dangerous felony;

(2) Attempt to commit a dangerous felony...

T.C.A. § 39-17-1324. Attempted Second Degree Murder is defined as a "dangerous felony" in § 39-17-1324(i)(1)(B).

The State did not introduce sufficient proof, beyond a reasonable doubt, for the jury to convict Appellant of this offense. As Appellant was not properly identified as the perpetrator who entered the store and shot at Mr. Austin, he should not have been convicted of this offense. In addition, as stated in the argument regarding the conviction for Attempted Second Degree Murder, Mr.

Austin was not the victim of the dangerous felony. No specific overtures or discussions were had between the assailant and Mr. Austin, casting doubt on whether the assailant had designs on trying to kill Mr. Austin, rather than merely firing wildly in Mr. Austin's direction while he tried to complete the robbery. For these reasons, this Court should reverse and dismiss Appellant's conviction for this offense.

II. The trial court erred in denying Appellant's motion to challenge prospective jurors Ronald Robinson, Melissa Little, and Joan Graves for cause.

Both Article 1, Section 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. The process of *voir dire* allows not only the trial court but also the parties an opportunity to ensure that "jurors are competent, unbiased, and impartial." *State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993). In particular, "[t]he right of challenge for cause was designed to exclude from the jury triers whose bias or prejudice rendered them unfit, and peremptory challenge was intended to exclude those suspected of bias or prejudice." *Manning v. State*, 155 Tenn. 266, 292 S.W. 451, 455 (1927).

In assessing a juror's impartiality following a challenge for cause, the trial court should inquire "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); see also *State v. Humphreys*, 70 S.W.3d 752, 765 (Tenn. Crim. App. 2001).

A determination of the qualifications of a juror rests within the discretion of the trial court and will not be overturned absent a showing of an abuse of that discretion. *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). Indeed, the Tennessee Supreme

Court has observed that a trial court's findings of impartiality may be overturned only for "manifest error." *Howell*, 868 S.W.2d at 248.

Failure to challenge for cause or if said challenge is not sustained, failure to use any available peremptory challenge to remove the objectionable juror, precludes reliance upon the juror's disqualification upon appeal. See, *Wooten v. State*, 99 Tenn. 189, 41 S.W. 813 (1897), and earlier cases cited therein, and *Tittsworth v. State*, 503 S.W.2d 523 (Tenn. Crim. App. 1973)

In *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the United States Supreme Court iterated the following regarding "automatic death penalty" jurors:

> "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. **If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."**

Morgan v. Illinois, 504 U.S. 719, 729 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992) (emphasis added)

"The Tennessee Constitution guarantees every accused 'a trial by a jury free of ... disqualification on account of some bias or partiality toward one side or the other of the litigation.'" *State v.*

Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (quoting *Toombs v. State*, 270 S.W.2d 649, 650 (Tenn. 1954)) "When a juror has a relationship with a witness or party or prior knowledge of a witness or party, the impartiality of the jury may be compromised. Particularly where the relationship is close or where the relationship involves a party or key witness, the disqualification of a juror or reversal of a conviction may be warranted." *State v. Smith*, No. M2014-00059-CCA-R3-CD, 2015 WL 100452, at *7 (Tenn. Crim. App. Jan. 7, 2015).

Ronald Robinson

Prospective Juror Ronald Robinson was questioned by the parties and by the Court. During his *voir dire*, the State asked Mr. Robinson about a comment he wrote on his jury questionnaire regarding having to spend tax dollars keeping a prisoner incarcerated in the event of his being sentenced to life without parole. (VIII, 70) Mr. Robinson said that, in such cases, his Biblical beliefs led him to feel that "we need to go ahead with the death penalty in some cases like that." (VIII, 70) He said that he could fairly consider life without parole as a punishment. (VIII, 70) Mr. Robinson then said that he agreed that "[t]aking the life is appropriate for taking a life in a murder case." (VIII, 72) Mr. Robinson then agreed with this belief applied to only "some" murder cases. (VIII, 72)

Upon questioning by the defense, Mr. Robinson said that he believed the death penalty was the appropriate punishment for a murder that was "premeditated." Mr. Robinson also agreed that

"an eye for an eye" was an appropriate characterization of his view on this issue. (VIII, 75-77) Finally, Mr. Robinson said that he would take into account if a defendant had "mental problems" in deciding the appropriate sentence, but that if a defendant was "of sound mind" then that person should "absolutely" receive the death penalty. (VIII, 78)

On further examination by the State, Mr. Robinson said that he would fairly consider all three forms of punishment in the event Appellant was convicted of First Degree Murder. (VIII, 81) Upon being questioned by the trial court, Mr. Robinson said that he would not consider a robbery of a store "and the person was shot and killed" to be a premeditated act. (VIII, 83) At the conclusion of this questioning, the defense moved to challenge Mr. Robinson for cause; the trial court denied the challenge for cause, stating that the court felt that Mr. Robinson could fairly consider all three forms of punishment and would not automatically impose the death penalty in the event of a First Degree Murder conviction. (VIII, 86-88) The defense then exercised a peremptory challenge to excuse Mr. Robinson. (IX, 310)

Melissa Little

Ms. Little agreed that she was familiar with the lead prosecutor, as her brother worked for the District Attorney's office and her husband was a retired Jackson Police officer. (IX, 271) Ms. Little said that she had no problem with imposing the death penalty, but also agreed that she felt the death penalty was appropriate in "some murder cases." (IX, 272) She initially stated

that she felt that someone who participated in "a self-defense murder situation" would perhaps not be deserving of the death penalty. (IX, 273)

When questioned by the defense, Ms. Little stated that she had no legal or moral issue with the death penalty. (IX, 277) She also referred to a potential hardship due to having an elderly mother and her own medical issues, but felt that both would be something she could manage if selected for the jury. (IX, 278-281)

The defense moved to challenge Ms. Little for cause, noting her strong ties to law enforcement, her family and medical issues, and her comments regarding a defendant having to show her that he acted in self-defense to avoid receiving the death penalty. (IX, 282-283) The trial court denied the challenge for cause, stating that her medical issues did not rise to the level of affecting Ms. Little's ability to concentrate or make decisions. The trial court also found that nothing in Ms. Little's questionnaire or verbal responses to counsel would give concern that she could not fairly consider all three sentencing options in the event of a First Degree Murder conviction. (IX, 284) The defense later challenged Ms. Little using a peremptory challenge.

Joan Graves

The prosecutor began his questioning of Ms. Graves by advising the defense and the trial court that he had attended school with all three of Ms. Graves' daughters, and had graduated with one, who he referred to by her first name. (XII, 30) However, the prosecutor advised that he had not seen her daughters in quite

some time. (XII, 31) Ms. Graves had previously served on a capital case jury, and recalled that the jury had voted to impose a life without parole sentence. (XII, 36) Ms. Graves struggled with looking at photographs during that prior case, and said she would do her best to view any video evidence introduced during the instant case. (XII, 33-34) Her husband also had heart problems and diabetes and Ms. Graves had no family nearby to help care for him if she was sequestered. (XII, 41-42, 49)

Ms. Graves said that she would trust the lead prosecutor in the case because of her knowledge of his character and, in her opinion, that "he's lived up to his boyhood representation." (XII, 43) She felt that, in her prior capital case, she and her fellow jurors voted for a sentence of life without parole because much of the evidence was circumstantial. (XII, 45) Defense counsel also asked Ms. Graves if she was inclined to vote for the death penalty and she said that she was; however, when the trial court questioned her, she said she could consider each possible sentence. (XII, 54-55)

The defense challenged her for cause; however, the trial court denied this request, stating that Ms. Graves said she could consider all three forms of punishment and would listen to all of the evidence. (XII, 55-58) The defense then exercised a peremptory challenge to excuse Ms. Graves. (XII, 58)

In each of these three instances, the trial court erred in failing to excuse the prospective juror for cause. Mr. Robinson's default position, absent a showing of an "unclear mind," was that a defendant who committed a premeditated murder should

"absolutely" be put to death. While Mr. Robinson, upon rehabilitation by the State, said that he could fairly consider each form of possible punishment, his statements during questioning reveal that he was clearly inclined towards a principle of "an eye for an eye."

The Court of Criminal Appeals' opinion does not sufficiently address Ms. Little's personal familiarity with the prosecutor. The Court of Criminal Appeals only refers to this by way of a quote in *State v. Taylor*, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983): "This Court has held that the "relationship of jurors to people connected with law enforcement . . . does not give rise to an inherently prejudicial situation in and of itself."

In *Taylor*, the defense alleged that "juror Barbara Poindexter's brother is Jim Parks, Chief Deputy Sheriff in Haywood County, Tennessee, and that juror Martha LaFrain's father, Billy Chandler, was the chief jailer at the Haywood County Work Farm for many years." When the jurors were questioned about their potential relationships relevant to the trial, Poindexter and LaFrain failed to volunteer their alleged connections to the deputy sheriff and jailer. The CCA then held that the defense had waived the issue because he did not object to the jurors' failure to respond. In other words, the CCA never held that such a relationship would still allow a juror to sit on the panel.

In the case at bar, Appellant did not waive the issue, as he inquired into the nature of Ms. Little's familiarity with the prosecutor. More importantly, Appellant established that Ms. Little

was familiar with the prosecutor in this case because her brother worked for the DA's office. Thus, the Court of Criminal Appeal's citation to *Taylor* is wholly inapt. In addition, the Court of Criminal Appeals never actually analyzed Ms. Little's answers about that relationship. The Court of Criminal Appeals only addressed her views on the death penalty. Being familiar with the prosecutor in the very case the juror is sitting on is different than a relationship with law enforcement *generally*. *Toombs v. State*, 270 S.W.2d 649, 651-52 (Tenn. 1954) Furthermore, *Taylor* does not answer the question about Ms. Little's potential bias because the issue was deemed waived in that case. When one combines Ms. Little's familiarity with the prosecutor and her equivocal views on the death penalty, the scales should have tipped in favor of exclusion for cause.

Ms. Joan Graves spoke glowingly of the lead prosecutor, would be predisposed to trust him, and had served on a capital jury some years prior. Ms. Graves recalled that, in that previous case, the suspect was granted life without parole only due to some evidentiary issues, and that, if selected in this case, she would be inclined to favor the death penalty if Appellant was convicted of First Degree Murder.

Under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), prospective jurors may be excused for cause only if their views about the death penalty would 'prevent or substantially impair' the performance of their duties as a juror in accordance with their instructions and their oath. *State v. Thomas*, 158 S.W.3d 361, 378

(Tenn. 2005); see also *State v. Hutchison*, 898 S.W.2d 161, 167 (Tenn. 1994) "However, a juror's bias need not be proven with 'unmistakable clarity' to justify a challenge for cause." *Thomas*, 158 S.W.3d 361 at 378 (quoting *Hutchison*, 898 S.W.2d at 167) A juror's bias may be actually shown to exist or may be presumed from the circumstances. *State v. Hugueley*, 185 S.W.3d 356, 378 (Tenn. 2006)

In *Toombs v. State*, 270 S.W.2d 649, 651-52 (Tenn. 1954), the Tennessee Supreme Court granted a new trial based on a juror's failure to disclose that he was a first cousin and friend of the prosecutor's wife. Even without specific questions and answers on the nature of the relationship, the court thought that was too close a connection to "the man who was seeking [the defendants'] conviction at the hands of this jury." *Id.* at 651. If the *Toombs* juror's familiarity with the prosecutor's wife was too close, then Ms. Graves' personal familiarity and "trust" (therefore, bias) toward the prosecutor himself was too close.

Failing to excuse these three jurors for cause was obvious error and forced Appellant to exercise a peremptory challenge in each instance.

III. The trial court erred in granting, over defense objection, the State's request to challenge prospective jurors John Eads, Grace Milhorn, and Melony Sesti for cause.

"Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." *Uttecht v. Brown*, 551 U.S. 1, 22, 127 S.Ct. 2218, 2231, 167 L.Ed.2d 1014 (2007) In addition, Appellant directs this court to the case law and other authority discussed in Issue II in support of his argument in this Issue.

John Eads

Mr. Eads acknowledged that he had given seemingly contradictory answers on his jury questionnaire. (IX, 412-414) At one point, Mr. Eads agreed that he could fairly consider all three forms of punishment for First Degree Murder. (IX, 411) He also told the State that the death penalty "never ought to be imposed." (IX, 413) Mr. Eads went on to say that he did not feel that anyone should be put to death. (IX, 414)

During questioning by the defense, Mr. Eads said that he could consider all three forms of punishment if instructed to do so by the law. (IX, 417) Mr. Eads then said he could probably not consider the death penalty in the instant case unless he learned that Appellant had killed multiple people "on a murderous outrage." (IX, 418)

The State challenged Mr. Eads for cause, noting his contradictory answers and his seeming inability to understand the questions being asked of him. (IX, 423) The trial court granted the State's challenge for cause, over Appellant's objection, stating that his answers were inconsistent. (IX, 424)

Grace Milhorn

Ms. Milhorn stated that she did not believe she could vote to give someone the death penalty, but she felt that it would be an appropriate punishment in certain cases. (X, 234) She went on to say that, although she would prefer to vote for something less severe than the death penalty, if she was selected for the jury then she could do it. (X, 236) Shortly thereafter, Ms. Milhorn said that she would "disregard" the death penalty. (X, 237)

During questioning by the defense, Ms. Milhorn said that she did not want to impose the death penalty, but that "if I had to and it was a situation where it was proved then I could." (X, 242) The trial court asked Ms. Milhorn to confirm her position, and she said "if I see that he did intentionally and was vicious and whatever and all of that or would be a threat to someone else I probably could [impose the death penalty]." (X, 243-244)

The State moved to excuse Ms. Milhorn for cause, pointing to her answers regarding the death penalty "being all over the place." (X, 247) The trial court granted the State's motion over defense objection, stating that "early on" in the questioning, Ms. Milhorn had said that she could not impose the death penalty if given other sentencing options. (X, 248)

Melony Sesti[4]

Ms. Sesti stated that she had concern with not having anyone to watch her fifteen year old son if she was sequestered as a juror. (XI, 386) She also remarked that her husband instructed her "don't get sequestered." (XI, 389) Ms. Sesti advised the prosecutor that she had indicated both that she had no feelings about the death penalty, but elsewhere in her questionnaire said that she did not think the death penalty ever ought to be imposed. (XI, 392) She further acknowledged writing on her questionnaire that if "other punishment was available, I may lean that way." (XI, 394)

During questioning by the defense, Ms. Sesti thought that she could listen to all of the proof in a hypothetical sentencing hearing and make her decision based off of that. (XI, 397) The State challenged for cause, basing its request on the juror being "incapable or unwilling to give us an answer to any of these questions." (XI, 400) Over defense objection, the Court granted the State's challenge, noting its own uncertainty regarding whether Ms. Sesti could vote for the death penalty. (XI, 400)

The trial court erred in granting the State's challenges for cause of each of these three potential jurors. Mr. Eads did struggle with his responses to questions, but ultimately said that he would consider all three forms of punishment against Appellant. Any

---

[4] The transcript spells Ms. Sesti's first name as "Melanie," but defense counsel recalls from trial that her first name was "Melony." The defense intends no disrespect, either way, to Ms. Sesti.

conscientious potential juror could be conflicted about what he would do when placed in this hypothetical situation, and Mr. Eads said he did not favor the death penalty but could consider it if selected.

Ms. Milhorn did not necessarily want to impose a death sentence, but would consider all options as instructed by the trial court. Early in her questioning, she said she would not consider the death penalty, but she was sufficiently rehabilitated by defense counsel to the point where a challenge for cause should not have been granted by the trial court. Ms. Milhorn gave varied answers about her views on the death penalty. Many people have never been asked to offer their views about capital punishment, and many of these jurors may have given further thought to the topic even after submitting their juror questionnaires. Then, when the prospective jurors are asked about their questionnaires and views on capital punishment, they are meeting with several attorneys, a judge, and a criminal defendant charged with murder. Thus, Ms. Milhorn's (admittedly) varying answers to her views on the death penalty can be placed in a proper context. In addition, Jurors Robinson, Little, and Graves also gave inconsistent answers to questions about their views on capital punishment. The only real difference with Ms. Milhorn is that her answers evidenced a hesitancy to vote for the death penalty (although she said she could fairly consider it), while the other three jurors were revealed to have no issue with capital punishment and in factor favored it as a punishment in a First Degree Murder case. The arbitrary nature of the trial court's

granting of the State's challenge for cause of Ms. Milhorn, despite the lack of any meaningful difference between her answers and those of Mr. Robinson, Ms. Little, and Ms. Graves, was apparent when considering the nature of their answers as described above.

Similarly, Ms. Sesti said she might not lean towards the death penalty as a punishment, but she later said that she could consider it if instructed to do so by the court.

Excusing all of these jurors for cause, over defense objection, thus constituted reversible error by the trial court and deprived Appellant of his right to a fair trial, as he had to exercise peremptory challenges to excuse each of them.

IV. The trial court erred in refusing to excuse prospective juror Dru Crum for cause, when Appellant had already exhausted his peremptory challenges.

Appellant directs this court to the case law and other authority discussed in Issue II in support of his argument in this Issue. In addition, Appellant would direct this Court to the proposition that "it is only where a defendant exhausts all of his peremptory challenges and is thereafter forced to accept an incompetent juror can a complaint about the jury selection process have merit. *State v. Coury*, 697 S.W.2d 373, 379 (Tenn. Crim. App. 1985) (citing *Hale v. State*, 198 Tenn. 461, 281 S.W.2d 51 (1955); *McCook v. State*, 555 S.W.2d 411, 413 (Tenn. Crim. App. 1977))"

Dru Crum

Ms. Crum said that she was not inclined to consider life with parole, but would have to hear evidence before making such a decision. (XII, 217) She elaborated that she might favor parole if someone repented of their actions and "the Lord got hold of them." (XII, 220) Ms. Crum, under questioning by the trial court, then said she would consider each option "evenly." (XII, 225) The defense challenged for cause, noting that Ms. Crum's initial feelings were that she was not inclined to vote for a life with parole sentence. (XII, 228) The trial court did not grant this challenge for cause, noting that Ms. Crum did say she was open to considering all three forms of punishment. The defense, having exhausted its peremptory challenges, could not excuse Ms. Crum, and she was

selected for the jury. (XII, 229) Appellant had utilized all of his peremptory challenges and was therefore forced to accept this juror who was not inclined to consider all three forms of punishment.

The trial court erred in failing to challenge Ms. Crum for cause, when her *voir dire* answers revealed that she would only favor life with parole if the defendant was to repent. It is clear from the transcript, as referred to above, that Ms. Crum was not seriously inclined to listen to the trial court's instructions regarding consideration of each of the three forms of punishment if Appellant was found guilty of First Degree Murder. Appellant was forced to keep Ms. Crum on the jury since all fifteen peremptory challenges had been exhausted at the time she was subjected to individual *voir dire*. Having Ms. Crum on the jury meant that Appellant was tried by someone who was not even inclined to consider a life with parole sentence in the event of a conviction for First Degree Murder. The Court's denial of Defendant's challenge for cause of juror Dru Crum, when all peremptory challenges had already been exhausted, denied defendant's right to due process and equal protection, a fair and impartial jury trial, and against cruel and unusual punishment, under the U. S. Constitution, Amendments Five, Six, Eight, and Fourteen, and the Tennessee Constitution, Article I, sections 6, 8, and 17. See *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)

V. The death penalty is a disproportionate punishment in the instant case.

Under T.C.A. § 39-13-206(c)(1)(D), a proportionality review of a death sentence is conducted by the appellate courts. As the Tennessee Supreme Court has previously stated, comparative review of capital cases insures rationality and consistency in the imposition of the death penalty. *State v. Barber*, 753 S.W.2d 659 at 665–66 (Tenn. 1988). In light of the jurisprudential background against which our statutory provision was adopted, combined with the General Assembly's use of the word "disproportionate," it is clear that the Court's function in performing comparative review is not to search for proof that a defendant's death sentence is perfectly symmetrical, but to identify and invalidate the aberrant death sentence. *Id.*; *State v. Groseclose*, 615 S.W.2d 142, 150 (Tenn. 1981) (trial court reports are designed to prevent the arbitrary or capricious imposition of the death penalty). If the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993) Even if a defendant receives a death sentence when the circumstances of the offense are similar to those of an offense for which a defendant has received a life sentence, the death sentence is not disproportionate where the Court can discern some basis for the lesser sentence. See *State v. Carter*, 714 S.W.2d 241, 251 (Tenn. 1986). Moreover, where there is no discernible basis for the difference in sentencing, the

death sentence is not necessarily disproportionate. This Court is not required to determine that a sentence less than death was never imposed in a case with similar characteristics. On the contrary, the Court's duty under the similarity standard is to assure that no aberrant death sentence is affirmed. *State v. Webb*, 680 A.2d 147 at 203 (Conn. 1996). "Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." Cf. *Gregg v. Georgia*, 428 U.S. 153 at 203, 96 S.Ct. 2909 at 2939 (1976).

Mandatory Proportionality Review

In every capital case, the appellate courts "are statutorily required to review the Defendant's sentence of death in order to determine whether it is excessive or disproportionate to the penalty imposed in similar cases." *State v. Jones*, 568 S.W.3d 101, 141 (Tenn. 2019) (citing Tenn. Code Ann. 39-13-206(c)(1)(D)). This proportionality review includes an examination of "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved." *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002). Specifically, the Court must consider:

(1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or

presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims.

State v. Reid, 164 S.W.3d 286, 316 (Tenn. 2005) (citing *State v. Bland*, 958 S.W.2d 651, 667 (Tenn. 1997)). The Court also must consider "several factors about the defendant, including his (1) record of prior criminal activity; (2) age, race, and gender; (3) mental, emotional, and physical conditions; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." *Jones*, 568 S.W.3d at 142 (citing *Reid*, 164 S.W.3d at 316-17).

The proportionality review does not require that every defendant and every crime be identical in every respect. *State v. Thomas*, 158 S.W.3d 361, 383 (Tenn. 2005). However, a death sentence is disproportionate and must be reversed "if 'the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed.'" *State v. Dotson*, 450 S.W.3d 1, 81 (Tenn. 2014) (emphasis added) (quoting *Bland*, 958 S.W.2d at 665).

1. Court of Criminal Appeals' Proportionality Review

In reviewing the proportionality of Appellant's death sentence, the Court of Criminal Appeals erred by conducting a piecemeal comparison of circumstances in other cases that are not consistent with the circumstances of Appellant's case. The court first cited three prior "cases where the victim was shot during the

course of a robbery of the victim's place of employment and Defendant had at least one prior conviction for a violent felony." *Miller*, 2020 WL 5626227, at *24 (citing *State v. Reid*, 91 S.W.3d 247, 287 (Tenn. 2002); *State v. Smith*, 993 S.W.2d 6, 18 (Tenn. 1999); *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983)). While this generic description—on its face—is similar to Appellant's situation, the Court of Criminal Appeals failed to acknowledge significant differences in the factual circumstances of the shootings:

- In *Reid*, "the defendant repeatedly shot two unresisting employees as they were lying face down on the floor." One victim was "shot at close range four times in the back of the head and once in the back." Another victim was "shot at close range twice in the back of the head and once in the back." The Tennessee Supreme Court concluded that "[t]he number of wounds suggested that the defendant manually reloaded his .32 caliber revolver during the assault," and that "[b]oth the robbery and the murders appear to be premeditated, intentional, and well-planned, lacking any indicia of impulsiveness." *Reid*, 91 S.W.3d at 287.

- In *Smith*, the defendant and his accomplices committed two murders at two different convenient stores during a spree of robberies and killings that occurred just forty-five minutes apart. A third victim's ribs were broken during one of the incidents. Multiple shots were fired by multiple shooters at both locations. *Smith*, 993 S.W.2d at 9-12, 18.

The court also ignored significant differences in the prior felonies committed by the defendant in *Smith*, who "had been convicted of three (3) prior felony offenses involving violence or the threat of violence; namely, two (2) robberies and [one (1)] first degree murder." *Smith*, 993 S.W.2d at 30. For all these reasons, Reid and Smith are neither consistent with nor comparable to Appellant or the circumstances of his crime.

Only the third case cited by the Court of Criminal Appeals, *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983), is sufficiently similar to Mr. Miller's case for potential comparison. Even *Harries*, however, is inapt. In *Harries*, the defendant fired a single shot to the head of an eighteen-year-old convenience store clerk, killing her. *Harries*, 657 S.W.2d at 416. The defendant also fired once at (but missed) another employee before completing his robbery of the store. *Id.* The defendant's prior criminal record included "an armed robbery and kidnapping and an unarmed robbery and a mail fraud scheme." *Id.* at 417.

Notably, the defendant in *Harries* had a far more extensive criminal record than Appellant, who has only one prior conviction for aggravated robbery. In addition, the *Harries* case predates the statutory proportionality review for death sentences, making it far less persuasive for comparison purposes. And finally, the *Harries* case is now nearly 40 years old; the fact that this is the only prior Tennessee decision that the Court of Criminal Appeals cited with a similar single-shot killing during a convenience store robbery

shows that this kind of crime is no longer the type of crime for which the death penalty is being imposed in modern cases. See, e.g., *State v. Black*, 815 S.W.2d 166, 194 (Tenn. 1991) (Reid and Daughtrey, JJ., concurring and dissenting) ("Comparative proportionality review is a means of insuring against the arbitrary imposition of the death penalty and assuring that capital sentencing in Tennessee reflects the 'evolving standard of decency' in this state.").

Therefore, neither *Reid* nor *Smith* nor *Harries* supports the imposition of the death penalty in this case, "where the victim was shot during the course of a robbery of the victim's place of employment," the victim's death was instantaneous, and Appellant had only one prior conviction for a violent felony that occurred more than five years earlier than the instant case. *Miller*, 2020 WL 5626227, at *24.

The Court of Criminal Appeals next cited *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993). In that case, the "defendant murdered the clerk of a convenience store by shooting him in the head during the course of a robbery." *Miller*, 2020 WL 5626227, at *24. Although the circumstances of the shooting itself were similar to those in Appellant's case, the defendant in *Howell* had committed two "cold-blooded execution-style murder[s]" within twenty-four hours of each other; he had "committed an armed robbery in Florida" less than thirty days after the two murders; he had "engaged in a shoot-out with police officers" that resulted in a conviction for attempted murder; and he had yet another prior conviction for armed robbery.

Howell, 868 S.W.2d at 262. Despite the substantial differences between this extensive criminal history and Appellant's one prior felony conviction, the Court of Criminal Appeals cited *Howell* to find, "[a]s in this case, Defendant did not cooperate with the police, showed no remorse, and had previously been convicted of violent felonies, including another robbery." *Miller*, 2020 WL 5626227, at *24. Such comparison is clearly misplaced. In addition to the obvious differences in the defendants' criminal histories, Appellant's use of profanity and verbal "death threats"—the only facts cited in this case for the finding that Appellant did not assist the police in his own arrest—have absolutely nothing in common with the defendant in *Howell*, who engaged in a shoot-out with police officers and was convicted of attempted murder for his violent actions used to escape capture. Compare *Miller*, 2020 WL 5626227, at *2, *22-23, with *Howell*, 868 S.W.2d at 262.

The only potential comparisons remaining from the *Howell* case are the lack of remorse and the presentation of "mitigation proof related to Defendant's childhood environment and psychological testing." *Miller*, 2020 WL 5626227, at *24. In *Howell*, this mitigation evidence "was interpreted to demonstrate brain damage," which a psychologist testified would have "impaired the defendant's judgment and ability to appreciate his conduct was wrong. Extensive medical testing, however, failed to show the claimed brain damage." *Howell*, 868 S.W.2d at 262 (emphasis added). The mitigation proof in *Howell*, therefore, was thoroughly

discredited by objective medical evidence. By contrast, the competing experts in this case agreed that Appellant "had a disadvantaged childhood, including exposure to marijuana in the womb, poverty, an abusive stepfather, poor performance in school, and a family history of both substance abuse and criminal behavior." *Miller*, 2020 WL 5626227, at *22. Appellant "also suffered a trauma when he was shot in the back and again when he was held at gunpoint as a teenager." *Id.* Although "the experts disagreed about whether this caused [Appellant] to be emotionally numb and distant towards other people," they did agree that he suffers from antisocial personality disorder and cannabis use disorder. *Id.* Therefore, the mitigation proof in Appellant's case was obviously more credible and carried significantly more weight than the mitigation proof in *Howell*. This leaves only the lack of remorse as a common circumstance between *Howell* and Appellant's case; this single circumstance—one that frequently exists in all types of non-capital criminal cases—is not sufficient to render Appellant's death sentence proportional rather than an aberration.

Finally, the Court of Criminal Appeals cited four cases in support of upholding "the death penalty in cases involving defendants who presented evidence of mitigating circumstances substantially similar to that presented by Defendant in this case, including evidence of their backgrounds, poor childhood environments, parents who used drugs, and similar circumstances." *Miller*, 2020 WL 5626227, at *24 (citing *State v.*

Odom, 336 S.W.3d 541, 574 (Tenn. 2001); *Thomas*, 158 S.W.3d at 383; *State v. Davis*, 141 S.W.3d 600, 621 (Tenn. 2004); and *State v. Hines*, 919 S.W.2d 573 (Tenn. 1995)).

For purposes of proportionality review, however, it makes little sense to compare cases on the basis of mitigating factors alone. Though not required, mitigation proof will be presented in nearly every capital case. See *Davidson v. State*, 453 S.W.3d 386, 402 (Tenn. 2014). Indeed, the failure of defense counsel to adequately investigate and present mitigation evidence during the penalty phase of a capital trial has been deemed ineffective assistance of counsel. See, e.g., *Davidson*, 453 S.W.3d at 402-06; *Adkins v. State*, 911 S.W.2d 334, 356-57 (Tenn. Crim. App. 1994). Because the same or similar mitigation proof is presented in nearly every capital case, all death sentences would be found proportional if the appellate court were to compare only the existence of mitigating factors. And yet that is precisely what the Court of Criminal Appeals has done in Appellant's case—cite a few of the countless other capital cases where the defendants had poor childhood environments and difficult upbringings to make the superficial conclusion that the death sentence is nevertheless warranted in all such cases.

The inadequacy of this mitigation-only comparison undertaken by the Court of Criminal Appeals is illustrated by even a cursory review of the other circumstances in *Odom*, *Thomas*, *Davis*, and *Hines*. The defendant in *Odom* forcibly raped and repeatedly stabbed a 78-year-old woman, whose lungs filled with

blood during the one to two hours it took for her to die from her injuries. *Odom*, 336 S.W.3d at 548-50. The defendant in *Thomas* shot his victim execution-style in the back of the head, but the victim did not immediately die from the gunshot wound; instead, he suffered "profound weakness" in his abdomen and legs due to the damage to his spinal cord, he suffered "a loss of bladder and bowel control due to nerve damage," he underwent numerous surgeries and needed constant care and medical attention, he was unable to work or use the bathroom on his own, and he "finally died" more than two years later from a bladder condition and resulting infection, all of which could be directly tied back to the gunshot wound caused by the defendant. *Thomas*, 158 S.W.3d at 373-74.

The defendant in *Davis* "played a major role" in the kidnapping and murder of two victims who were shot multiple times in the head, even after one of them begged for his life. *Davis*, 141 S.W.3d at 620-21. The defendant in that case also had "prior convictions for two violent felonies, including one for first degree murder." *Id.* at 621. Finally, in *Hines*, the defendant stabbed the victim, a motel maid, multiple times with a sharp object. *Hines*, 919 S.W.2d at 577. "[A]ll the lethal wounds were inflicted at about the same time and [the victim's] death would have occurred within four to six minutes, most of which time the victim would have remained conscious." *Id.* Most disturbingly, "[a]bout the time of death, and shortly after the infliction of the lethal wounds to the chest, the defendant . . . inserted a flat object through the victim's vaginal

orifice into the vaginal pouch until the instrument penetrated the vaginal dome and passed into the abdominal cavity." *Id.*

In each of these four cases, the imposition of a death sentence despite the existence of mitigating circumstances was clearly supported by the vicious nature of the crimes and the extensive suffering of the victims. In Appellant's case, however, the victim died instantaneously from a single gunshot wound to the head. There was only one decedent, and there was no rape, no stabbing, and no suffering. These factual differences in the circumstances of the crimes render meaningless any purported comparison of the mitigating circumstances argued at the penalty phase.

In summary, by comparing only one or two circumstances at a time, the Court of Criminal Appeals failed to determine whether Appellant's case, "taken as a whole," is sufficiently similar to other cases where the death penalty has been imposed or is "plainly lacking" in circumstances warranting death. See *Dotson*, 450 S.W.3d at 81; *Bland*, 958 S.W.2d at 665. In other words, it will always be possible to cherry-pick some of the same or similar circumstances that existed in prior capital cases, even though the circumstances as a whole might lead to a different conclusion. Though Appellant acknowledges that no two cases will be identical in every respect, he respectfully suggests that the majority of the same or similar circumstances should be present in any individual case to which his death sentence is compared. Otherwise, the appellate court cannot be sure that the imposition of the death penalty is not an aberration on balance of all the circumstances

"taken as a whole." See *Bland*, 958 S.W.2d at 665. In short, the type of piecemeal comparison conducted by the Court of Criminal Appeals does not fulfill the letter or the spirit of the mandatory proportionality review. Moreover, as discussed above, a closer review of the facts in each of the cases cited in the court's proportionality review reveal why those cases are simply inapplicable to the circumstances in Appellant's case.

2. De Novo Proportionality Review

When this Court conducts its own proportionality review, it will find that Appellant's death sentence is an aberration. This is true regardless of whether the Court employs the current standards for its statutory proportionality review or compares circumstances from the broader, pre-*Bland* pool of first degree murder cases as advocated by Justice Lee. See, e.g., *Jones*, 568 S.W.3d at 146-47 (Lee, J., concurring). Simply put, Appellant's background and the nature of this crime more closely resemble those first degree murder cases in which the defendants have not received the death penalty than those who have received the death penalty.

Notably, the cases cited by the State in its brief to the Court of Criminal Appeals are not any more useful for comparative proportionality review than the cases that were cited in the Court of Criminal Appeals' opinion. In the section of its brief for the mandatory proportionality review, the State cited *Odom, Carter, Chalmers, Howell, McKay, Coleman, Faulkner, McKinney, Keough,* and *Smith.* (State's CCA Br. 55-56.) *Odom, Carter, Chalmers, Howell, McKay,* and *Coleman* were cited by the State as upholding

a death sentence "where the murder was committed in the course of a robbery, and there was at least one other aggravating circumstance." (State's CCA Br. 55.) The circumstances in *Odom* and *Howell* have already been distinguished above.

In *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003), contrary to the State's implication, the defendant did not simply kill someone in the course of a robbery. In that case, the defendant and an accomplice "kicked in" the victims' apartment door, operating under the mistaken belief that the victims were drug dealers. *Id.* at 898-99. Even after they realized they were at the wrong location, the defendant ransacked the apartment while his partner raped the adult female victim. *Id.* at 899. The defendant shot and killed the adult male victim, "at point-blank range with a sawed-off shotgun," "while [the victim] was crouching in his daughter's bedroom closet." *Id.* The defendant then shot and killed the adult female victim after she begged for her life. Id. Friends of the victims later found their young daughter physically uninjured but "lying in a pool of blood in the closet with her dead father." *Id.*

In *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000), the defendant was sentenced to death for his role in "jumping" two men and killing one of them. *Id.* at 915-16. The defendant admitted that he and his friends tried to rob the victims and "made them strip." *Id.* at 916. The defendant, who admitted that he had fired his gun at least six times, also had "previous convictions for attempted especially aggravated robbery and attempted first degree murder

[in] a criminal episode occurring on the same date as the present offenses." *Id.* In addition to exhibiting more severe violent behavior than Appellant's, the defendant in that case also failed to put on the kind of mitigating evidence that existed in Appellant's childhood and background; to the contrary, Chalmers' mother testified that he "had never given her any trouble." *Id.*

State v. McKay, 680 S.W.2d 447 (Tenn. 1984), predates the statutory proportionality review and, like Harries, does not represent the evolving standards of decency in this state with regard to the imposition of the death penalty. See *Black*, 815 S.W.2d at 194. In any event, the case is inapposite. In *McKay*, there were two defendants tried jointly after they shot and killed two victims and shot and wounded a third. *Id.* at 449. "The jury found [one defendant] guilty of three aggravating circumstances and [the other defendant] guilty of four aggravating circumstances." *Id.* at 448. Appellant's jury found the existence of only two aggravating circumstances, and there was only one decedent. And unlike the substantial mitigating evidence presented on Appellant's behalf, in *McKay* there were "no mitigating circumstances as to either defendant." Id.

State v. Coleman, 619 S.W.2d 112 (Tenn. 1981), is even more outdated than *McKay* and *Harries*. The defendant in *Coleman*, who "had been convicted for assault with intent to commit robbery with a deadly weapon, assault with intent to commit murder in the first degree, kidnapping, and robbery with a deadly weapon," had a

much more extensive criminal record than Appellant. *Id.* at 115. As in *McKay*, but again unlike Appellant's case, the jury in Coleman found multiple aggravating circumstances and no mitigating circumstances. *Id.*

The State next cited *Faulkner, McKinney, Chalmers, Keough,* and *Smith* in support of its claim that this Court "has also repeatedly upheld death sentences based only on the prior-violent-felony aggravator." (State's CCA Br. 55-56.) It is first important to point out that no death sentence has ever been upheld "based only on the prior-violent-felony aggravator." Every capital case requires a comparative proportionality review of the defendant and the crime, which includes an examination of numerous circumstances such as the manner, means, and place of death; the motivation for the killing; the victim's age, physical condition, and psychological condition; the absence or presence of premeditation, provocation, and justification; the effects upon non-decedent victims; the defendant's prior criminal record; his age, race, and gender; his mental, emotional, and physical condition; his role in the murder and cooperation with authorities; his level of remorse and knowledge of the victim's helplessness; and his potential for rehabilitation. See *Jones*, 568 S.W.3d at 142 (citing *Reid*, 164 S.W.3d at 316-17); *Reid*, 164 S.W.3d at 316 (citing *Bland*, 958 S.W.2d at 667).

Presumably, the State intended to claim that this Court has upheld death sentences in cases where the only aggravating factor

was a prior violent felony conviction. While this may be true, the Court cannot look at a sole aggravating factor in a vacuum when reviewing a sentence of death; the mandatory proportionality review still requires that the comparative cases be reviewed for circumstances "taken as a whole." The circumstances in *Chalmers* and *Smith* have already been distinguished above.

In *State v. Faulkner*, 154 S.W.3d 48 (Tenn. 2005), the defendant "had a prior criminal history including convictions for second degree murder, assault with intent to commit first degree murder, assault with intent to commit robbery, assault with intent to commit voluntary manslaughter, and robbery." *Id.* at 63. This extensive criminal history is vastly different from Appellant's single prior conviction for aggravated robbery, which was committed more than five years before the events of his current case. In addition, the defendant in *Faulkner* "brutally killed his wife by hitting her in the head and face with a skillet. . . . In an attack that lasted at least six minutes, Faulkner struck his wife at least thirteen times, completely crushing her face. The victim was alive and breathing during a portion of the attack . . . ." *Id.* at 63. Again, these circumstances are completely incomparable to the circumstances of Appellant's crime.

In *State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002), the defendant had a prior conviction for aggravated robbery, as well as prior "juvenile adjudications for aggravated assault." Id. at 300-01. Unlike the victim in Appellant's case, the victim in *McKinney*

survived for more than a month after he was shot by the defendant. *Id.* at 299. During that time, the victim suffered "paralysis and an inability to breathe" because "[t]he gunshot to his neck had transected his spine"; the victim had to be "placed on an artificial ventilator and contracted pneumonia and other infections." *Id.* The defendant in *McKinney* also failed to offer the kind of mitigating evidence that existed in Appellant's childhood and background; to the contrary, McKinney's stepfather testified that he was "a normal boy who had caused no problems and who got along well with his siblings" when he was growing up. *Id.* at 301.

Finally, in *State v. Keough*, 18 S.W.3d 175 (Tenn. 2000), the defendant had two prior violent felony convictions: one for manslaughter and one for "assault to commit voluntary manslaughter." Id. at 180. The defendant in *Keough* was convicted of stabbing his wife to death with a bayonet. Id. "A forensic pathologist testified that the victim . . . sustained a large stab wound at the top of her breastbone, which penetrated almost six inches into her chest cavity. The wound inflicted upon her probably did not immediately render her unconscious; death probably occurred within two to five minutes." Id. Like the circumstances in *Chalmers*, *Smith*, *Faulkner*, and *McKinney*, the circumstances in *Keough* are simply not comparable to the circumstances in Appellant's case. In all of these cases, even if the Court ignores the disparities in the nature of the crimes themselves, the prior-violent-felony aggravator relied upon by the State is wholly inapt. Unlike

all these other defendants, Appellant has only one prior conviction for aggravated robbery, he presented significant mitigating circumstances that were confirmed by the State's expert, and the victim of this murder died instantaneously without suffering.

In summary, even under the existing standards for comparative proportionality review, Appellant urges this Court to compare "other cases involving similar defendants and similar crimes," to determine whether his case, "taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." *State v. Willis*, 496 S.W.3d 653, 733 (Tenn. 2016) (emphasis added) (quoting *Dotson*, 450 S.W.3d at 81). Notably, it cannot be mere coincidence that the three cases bearing the closest resemblance to Appellant's case—*Harries*, *McKay*, and *Coleman*—all predate the statutory proportionality review. The only rational conclusion to be drawn from such comparisons is that imposing the death penalty in these kinds of cases no longer represents the evolving standards of decency in this state. See *Black*, 815 S.W.2d at 194 (Reid and Daughtrey, JJ., concurring and dissenting) ("Comparative proportionality review is a means of insuring against the arbitrary imposition of the death penalty and assuring that capital sentencing in Tennessee reflects the 'evolving standard of decency' in this state.").

After a careful review of all the cases cited by the State and the Court of Criminal Appeals, Appellant respectfully suggests that the only way to uphold a sentence of death in this case is to ignore

the evolution of death penalty cases over the last 40 years and to conduct the type of piecemeal analysis erroneously employed by the Court of Criminal Appeals. If this Court instead conducts a meaningful proportionality review of this case taken as a whole—rather than cherry-picking various circumstances from different (and some outdated) cases to amalgamate a superficial comparison, as the Court of Criminal Appeals did—then it should find that Appellant's death sentence must be vacated.

VI. The death penalty in general, and lethal injection specifically, constitute cruel and unusual punishment.

The defendant contends that the death penalty in general, and lethal injection in particular, violate the United States and Tennessee constitutions' prohibition on cruel and unusual punishment. U.S. Const. Amendment VIII, Tenn. Const. Article I, Section 16. Counsel acknowledges that both of these arguments have been considered and rejected by the United States Supreme Court, see *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (reaffirming that "capital punishment is constitutional" and upholding Kentucky's lethal injection protocol), and the Tennessee Supreme Court, see, e.g., *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012) ("This Court has held, and repeatedly affirmed, that capital punishment itself does not violate the state and federal constitutions."); *State v. Banks*, 271 S.W.3d 90, 108 (Tenn. 2008) (rejecting specific claim that lethal injection is cruel and unusual); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 309 (Tenn. 2005) ("[W]e conclude that the petitioner has failed to establish that the lethal injection protocol is cruel and unusual punishment under the United States or Tennessee constitutions.").

Notwithstanding the above-cited authority, Appellant asks this Court to reconsider earlier precedent and find that capital punishment, as practiced and applied, and the use of lethal injection to effectuate the death penalty, constitute "cruel and unusual punishment" and should be invalidated as punishment for

those convicted of First Degree Murder and Felony Murder in this State.

VII. The aggravating factors found by the jury did not outweigh the mitigating factors beyond a reasonable doubt.

In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, the relevant inquiry is whether a rational trier of fact, taking the evidence in the light most favorable to the prosecution, could have found the existence of the aggravating circumstances beyond a reasonable doubt. *State v. Dotson*, 450 S.W.3d 1, 78 (Tenn. 2014) (citing *State v. Jordan*, 325 S.W.3d 1, 66-67 (Tenn. 2010); *State v. Rollins*, 188 S.W.3d 553, 571 (Tenn. 2006)) In addition, the aggravating circumstances applicable to each first degree murder conviction must outweigh any mitigating circumstances beyond a reasonable doubt. T.C.A. § 39–13–206(c)(1)(C).

During the penalty phase, the State first introduced into evidence a certified copy of the judgment of Appellant's prior conviction for Aggravated Robbery. (XVIII, 220) Captain Jeff Fitzgerald of the Madison County Sheriff Department testified that he was the lead investigator in the previous case. (XVIII, 223) Upon developing Appellant as a suspect, Captain Fitzgerald took a statement from him. The statement was read for the jury; in his statement, Appellant admitted going to a gas station with some associates and robbing the clerk at gunpoint. (XVIII, 224-229) Captain Fitzgerald agreed with defense counsel that Appellant's decision to give a statement was voluntary, and that his mother was with him when he gave the statement. (XVIII, 231-233)

Alison Deaton was working at the convenience store when Appellant committed an armed robbery on September 26, 2008. (XVIII, 236) Ms. Deaton recalled that, just before 11:00 p.m., several men came in and threatened to shoot her unless she relinquished her money. The men jumped the counter, took the money from the cash register, and fled the premises. Ms. Deaton identified and narrated a video from the business. (XVIII, 238-245)

Ali Dhalai testified regarding the victim, Mr. Ahmad Dhalai, and the effect his death had on their family. Mr. Ali Dhalai said that Ahmad Dhalai was a very helpful and considerate person, and that the effect of his death had been "heartbreaking." (XVIII, 253-256)

The defense called Dr. James Stanley Walker, Ph.D., who was board-certified in clinical psychology, neuropsychology, and forensic psychology. (XVIII, 261) Dr. Walker met with Appellant on two occasions and performed a battery of tests on him. (XVIII, 264) At the age of eight, Appellant was found to have an IQ of 78, which Dr. Walker said was in the seventh percentile as compared to the average child. (XVIII, 267) In January 2017, Appellant's IQ was measured at 86. (XVIII, 267) Appellant also received very low scores on attention, memory, and mental processing tests. (XVIII, 269)

Dr. Walker also opined that Appellant had cognitive disorders, cannabis use disorder, post-traumatic stress disorder (PTSD), and anti-social personality disorder (ASPD). (XVIII, 270-277) Dr. Walker explained that these disorders can be attributed

both to external influences and genetics. (XVIII, 279-281) Appellant was seriously mistreated as a child, and he had family members who were suffering from severe substance abuse issues. (XVIII, 281-283) Dr. Walker confirmed that he did not learn about these issues from Appellant, but rather from reviewing interviews conducted with Appellant's relatives. (XVIII, 285)

On cross-examination, Dr. Walker agreed that Appellant had previously been identified as "malingering" when he was evaluated previously. (XVIII, 291) Dr. Walker said that Appellant did not fit the classical definition of someone with PTSD, but that he had likely become numb to his prior traumatic experiences. (XVIII, 298-299)

Dr. Keith Caruso, M.D., also testified for the defense. Dr. Caruso, a psychiatrist, conducted interviews with Appellant on two separate occasions. (XIX, 328) Dr. Caruso testified similarly to Dr. Walker regarding Appellant's upbringing, genetic predisposition, and various mental health disorders. (XIX, 330-332) Dr. Caruso stressed that Appellant did not malinger with him during their interviews. (XIX, 338-339)

In rebuttal, the State called Dr. Kimberly Brown, Ph.D. Dr. Brown conducted an interview with Appellant in December 2017. (XIX, 379) Pursuant to her evaluation, Dr. Brown agreed with Drs. Walker and Caruso that Appellant had cannabis use disorder and ASPD. (XIX, 381) Dr. Brown said that Appellant did not meet the criteria for having PTSD. (XIX, 381)

On cross-examination, Dr. Brown conceded that she had not done many evaluations for capital case sentencing issues, and further agreed that she had not worked with as many PTSD patients as Dr. Caruso had through his time with Veterans' Affairs. (XIX, 396-397) She said that Appellant likely had some trauma from abuse he experienced as a child. (XIX, 407-409)

At the conclusion of the sentencing proof, the trial court instructed the jury on the following two (2) aggravating circumstances, pursuant to T.C.A. § 39-13-204 (i)(2) and (7):

1. The Defendant was previously convicted of one or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person;
2. The murder was knowingly committed, solicited, directed, or aided by the Defendant while the Defendant had a substantial role in committing or attempting to commit or was fleeing after having a substantial role in committing or attempting to commit any especially aggravated robbery.

(XX, 54)

The trial court also instructed the jury on the following mitigating factors, pursuant to T.C.A. § 39-13-204(i):

1. There are choices other than sentence of death.
2. Life without parole means that Urshawn Miller will never be released from prison.
3. If Mr. Miller is sentenced to life without possibility of parole, he will die in prison.

4. Mr. Miller has a mother, two aunts, an uncle, a brother, a sister, and other close family members. Mr. Miller's execution would have a devastating lifetime impact on all of these family members.
5. If Mr. Miller is executed, his execution will not undue [sic] the harm suffered by Mr. Dhalai's family, but life without parole will provide Mr. Miller the time to reflect on Mr. Dhalai's death for the rest of his life.
6. Mr. Miller suffers from mental disorders due to circumstances beyond his control, including genetics, abuse, neglect, trauma, and other upbringing and environmental factors.
7. Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing. That is, you shall consider any aspect of the Defendant's character or record of any aspect of the circumstances of the offense favorable to the Defendant, which is supported by the evidence.

(XX, 56-57) After deliberations, the jury returned with a finding that the State had proven both aggravating factors, and that the two (2) aggravating factors outweighed any mitigating factors submitted by the defense. Consequently, the jury found that Appellant should be sentenced to death for both First Degree Murder and Felony Murder. (XX, 80-87) The Court of Criminal Appeals subsequently found that the aggravating factor regarding the murder being committed while Appellant had a substantial role

in attempting to commit a robbery was inapplicable to the felony murder conviction. See *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992) That aggravating factor was thus vacated as it pertained to the felony murder conviction. See *State v. Miller*, 2020 WL 5626227, at *32.

The two aggravating factors found by the jury for the First Degree Murder conviction, and the one aggravating factor pertaining to the Felony Murder conviction, did not outweigh the multitude of mitigating factors put forth by the defense. All of the experts agreed that Appellant did experience serious trauma growing up, and that his IQ was lower than that of the average person. While Dr. Brown did not agree that Appellant had PTSD, she did agree that he exhibited at least some of the symptoms, and she agreed with Drs. Walker and Caruso that Appellant had ASPD. Clearly, a sentence of life without parole would mean that Appellant would not be released from prison, and such a lengthy sentence would offer Appellant the opportunity to reflect on his crimes and perhaps demonstrate remorse and healing. Appellant did have a prior conviction for Aggravated Robbery, but he admitted to that offense and gave a statement to law enforcement. For all of these reasons, Appellant asks this Court to reweigh the aggravating and mitigating factors and find that Appellant's sentence should be modified to life without parole for his convictions for First Degree Murder and Felony Murder.

VIII. The trial court erred in denying the defense's motion *in limine* regarding introduction of the video of his prior Aggravated Robbery at the penalty phase, when the defense offered to stipulate to the prior conviction.

T.C.A. § 39-13-204(c) governs the admissibility of evidence in a capital case sentencing hearing:

> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor.

T.C.A. § 39-13-204(c). In *State v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001), the Tennessee Supreme Court stated:

> [I]n general, § 39–13–204(c) should be interpreted to allow trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing. The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Sims, 45 S.W.3d at 14.

Appellant filed a pre-trial motion *in limine*, arguing that the video from Appellant's prior Aggravated Robbery case should not be shown to the jury in the sentencing hearing. (II, 292-294) The State filed a response in opposition, citing to T.C.A. § 39-13-204(c) as its basis of authority. (II, 295-296) The trial court entered an order denying Appellant's motion on March 2, 2019. (II, 300)

T.C.A. § 39-13-204(c) appears to allow presentation of facts from a previous violent conviction. Notwithstanding the authority

cited to by the State, and the current case law on this issue, Appellant submits that the trial court erred in its ruling that the contested video would be admissible at the sentencing hearing. In this case, due to the close similarity and graphic nature of the video of the instant crime and the video of the previous crime, the video of the previous crime should not have been admitted as evidence at the sentencing hearing. In both cases, Appellant was shown to have entered a convenience store, shortly before closing, while wearing a mask and brandishing a firearm. In addition, the video depicts at least some of the suspects jumping the counter in an attempt to take money from the cash register. The shocking effect of the two videos, combined, violated Appellant's right to a fair sentencing hearing. See U.S. Constitution, Amendments V, VIII, and XIV; Tenn. Const. Article I, §§ 6, 8, and 17. Further, this prejudice outweighed any probative value, especially in light of the fact that there were other ways to prove the commission of Appellant's prior offense. This is especially noteworthy considering Appellant offered, in the motion *in limine*, to concede the prior conviction, and that the judgment of conviction and Appellant's written statement in that case were available to prove the conviction and criminal acts alleged in that prior case. (II, 292-294) The combined effect of this rule also likely caused the jury to give undue weight to the aggravating factor regarding Appellant's prior crime of violence. For those reasons, Appellant moves this Court to find that the trial court erred in denying his motion *in limine*.

CONCLUSION

Appellant prays that this Court find that the evidence was insufficient for the jury to find him guilty of any of the offenses for which he was convicted. Appellant also asks this court to note the structural issues with jury selection, the failure to grant his motion *in limine*, and the disproportionate implementation of the death penalty against him as avenues for relief from his death sentences. Finally, Appellant asks this Court to reweigh the application of the aggravating and mitigating factors in his case. Appellant requests that this Court grant him a verdict of dismissal, modify his death sentences to life without parole, or grant him a new trial.

RESPECTFULLY SUBMITTED,

/s/ Gregory D. Gookin
GREGORY D. GOOKIN, BPR #023649
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that this Brief consists of 16071 words and complies with the requirements set forth in Section 3, Rule 3.02 of Tennessee Supreme Court Rule 46.

I further certify that the Tennessee Attorney General's Office (c/o Nick Spangler, Nick.Spangler@ag.tn.gov) is a registered user of the e-filing system and will automatically receive electronic service of this document pursuant to Section 4, Rule 4.01 of Tennessee Supreme Court Rule 46.

/s/ Gregory D. Gookin

Gregory D. Gookin
Assistant Public Defender