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Homicide defendants' paths through the Tennessee criminal justice system: The impact of prosecutorial discretion as a social justice issue

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HOMICIDE DEFENDANTS' PATHS THROUGH THE TENNESSEE CRIMINAL JUSTICE SYSTEM: THE IMPACT OF PROSECUTORIAL DISCRETION AS A SOCIAL JUSTICE ISSUE

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Carol B. Berz

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To the Graduate Council:

I am submitting herewith a dissertation written by Carol B. Berz entitled "Homicide Defendants' Paths Through the Tennessee Criminal Justice System: The Impact of Prosecutorial Discretion as a Social Justice Issue." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Social Work.

Jane C. Kronick, Major Professor

We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

Associate Vice Chancellor
and Dean of The Graduate School

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ABSTRACT

The purpose of this study was to determine whether or not Tennessee prosecution of capital defendants is legally and therefore socially just, as determined by constitutional standards. The conceptual framework included the following aspects:

1. A decision tree was constructed representing the critical stages of the prosecutorial process and the possible outcomes at each juncture of the decision-making process.

2. Given the possible outcomes at each juncture, the probabilities of capital cases being disposed of at a given level of disposition were determined.

3. Finally, there was a determination of the effects of race, gender, economic status, criminal history and locale on the probable outcomes.

The criteria for interpretation were based on the standards of arbitrariness, discrimination and cruel and inhumane treatment as set forth by the United States Supreme Court in the case of Furman v. Georgia (1972).

The defendants from three hundred firearm-homicide incidents in East Tennessee individually were traced through the criminal justice system from homicide event, through the prosecutorial process, to ultimate retribution

by the state. An analysis of the results indicated systematic whim and caprice and a lack of equal protection of law for those of differing race, gender, economic status and jurisdiction. However, race was not the overriding factor, as previous studies have held, nor was any of the research variables more important than any other in determining outcome. Rather, there appeared to be a combination of legal and extralegal factors that, depending on the level of case disposition, combined to form a systematic bias, the key factor of which was unbridled prosecutorial discretion. The decision-making suggested bureaucratic pragmatism and local concepts of social justice rather than adherence to law.

The Tennessee Supreme Court had no substantial basis for its findings that the death penalty was imposed by the state without arbitrariness or disparate impact or inhumanity, as Rule 12 safeguards were all but absent. As a result, the court's claim of strict, routine review of all the cases could not be considered valid. Indeed, the death penalty was imposed so infrequently, even for the most heinous crimes, as to be cruel and inhumane per se, according to Furman standards.

It was concluded that the imposition of the death penalty in East Tennessee, from 1977-1987, was unconstitutional and therefore legally and socially unjust.

If social work continues to concern itself exclusively with its own knowledge, its own value system, its own research perspectives, then the mirror image it will see reflected will be in accord with the profession's concept of itself. If, on the other hand, such knowledge, values, and research are analyzed in terms of their political interconnections, then the comparison between professional and political objectives offers some basis for evaluating the extent to which professional objectives are, in essence, camouflage or reality. More specifically, professional self-awareness implies not only how social work conceives of itself, but, also, the role that it plays as a profession in the continually shifting power alignments in the body politic (Bitensky, 1973, p. 129).

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CHAPTER I

INTRODUCTION

> The question of capital punishment has been the subject of endless discussion and will probably never be settled so long as men believe in punishment. [The] reasons why it cannot be settled are plain. There is first of all no agreement as to the objects of punishment. Next there is no way to determine the results of punishment. [Moreover] questions of this sort, or perhaps any sort, are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled, they do not stay settled, for the emotions change as new stimuli are applied to the machine (Darrow, 1922, p. 166)

There continues to be public debate about whether or not capital punishment is dispensed in our society in an unbiased fashion. Allegedly the United States is the execution capital of the Western world, with about 2,600 prisoners on death rows across the country awaiting the outcomes of their direct appeals (Lewis, 1990; Kunstler, 1992). The year 1992 promised to be a peak execution year, as more states put more prisoners to death than in any other year since 1976, when capital punishment was reinstated (Carelli, 1992). In fact, the number falls short only of that in 1935, another time of economic stress (Clines, 1992).

Topping the list is the southern region. Well known as the "Bible Belt", this area also is known by death penalty experts as the "Death Belt", with executions in

Georgia, Louisiana, Texas, and Florida seeming to be weekly events (Sher, 1991; Kunstler, 1992).

Probably because the sociology of crime and punishment is changing, we have come to a time of routine death, wherein the merits of the legal issue are less debated than is the concept of retribution. In fact, the United States Supreme Court in March, 1993, gave states more flexibility in imposing the death penalty as punishment. In the Idaho case of Arave v. Creech (synopses of all published cases mentioned in the text are included in Appendix F), the court held that the concept of utter disregard for human life is not so unlawfully vague as to prohibit its inclusion as a requisite for imposition of the death penalty--even if it is the only requisite proven.

Americans are no longer disturbed by execution. Indeed, at the newly created San Quentin Museum in California, the biggest draw is the death penalty wing, with its replicas of the current gas chamber, the old gallows, and a pharmacist's scale used to weigh lethal sodium cyanide pellets (Kaplan, 1992). Perhaps the shift is explained both by the lack of high profile, public executions and by the use of allegedly more humane lethal injection by the federal government and most states that execute prisoners.

Whether or not one favors the death penalty, its imposition has both social and legal implications: To meet Constitutional muster, all citizens must be guaranteed equal protection and due process of law. To promote the general welfare, a balanced tension between the rights of the individual and the rights of society must be assured. At issue is a rather cavalier legal concept of proportionality that requires all state interventions into the lives of its citizens be even-handed. With criminal prosecutions, it requires that the punishment fit the crime and that like crime receive like punishment, irrespective of extralegal factors.

Death being the ultimate of all governmental interventions, the path to its imposition embodies the spectrum of social justice concerns. However, law is not moral, it is legal; herein lies the crux of the problem. As William Kunstler (1992), writing for the National Law Journal, notes:

> As the only western nation tolerating capital punishment and, at the same time, as one professedly devoted to the highest ideals of fundamental fairness and essential humanity, we [must adhere to] concepts of fair play and due process of law. . . . [To do otherwise would] strike at the very heart of our status as a supposed civilized society and make us all murderers, both in spirit and in deed (p. 16).

The Research Problem

Our conventional wisdom tells us that certain individuals more often come into contact with the criminal justice system and, when convicted, receive the harshest penalties. In Tennessee, for example, in 1993 there were slightly more than 100 inmates on death row. They were convicted from approximately one-third of the state's 95 counties; most were male; fewer than one-third were non-white; and most had state-appointed counsel. At the very least, one can infer from these data that among the probable factors influencing the prosecution of capital crimes in Tennessee, in addition to the type of homicide, are the defendant's economic status, race, gender, and the county where the crime was committed.

Thus the problem: There has been no rigorous, data-based study of the prosecution of capital crimes in Tennessee. It is not known, for example, whether or not the probable factors are correct for Tennessee. The purpose of this study, then, was to investigate whether or not, as a matter of social justice, the Tennessee system of criminal justice ensures non-discriminatory prosecution of death-eligible crimes so as to assure that those people presently incarcerated on death row got there as a result of a legal process that was fundamentally fair. More specifically, the purpose was to analyze the various

outcomes at each stage of the state's prosecution of capital crimes, to determine whether or not the process was discriminatory, arbitrary or capricious, and whether or not the defendants' eventual punishments were excessive or disproportionate to those applied in crimes of like circumstance.

The research question to be investigated was: When considering Tennessee's prosecution of homicide defendants, were there any descriptors that would indicate the defendants disparate, and therefore unjust, treatment?

An Historic Perspective

The death-process had been interrupted in the United States since the early seventies, when the Supreme Court declared it to be violative of the Eighth and Fourteenth Amendments to the Constitution (Furman v. Georgia, 1972), but not unconstitutional per se (Gregg v. Georgia, 1976). Since that time, some 35 states, including Tennessee, have instituted or amended their death-legislation to meet Constitutional muster. In addition to the requirement of a bifurcated trial, guided-discretion statutes have been enacted to aid jury sentencing, and various forms of proportionality review exist to ensure that punishment is neither disproportionate to the severity of the crime nor

to the penalty imposed in similar cases (Acker, 1990; Bedau, 1983; Lockhart, Kamisar, & Choper, 1980).

The concept evolved from a North Carolina employment case, Griggs v. Duke Power (1971), in which an employee-selection process, though held not to be discriminatory per se, was held to have a disparate impact on blacks. Decisions following Griggs (1971) have held impermissible any government policy that either treats differently an identifiable group of people or is applied in an arbitrary and/or capricious manner.

In capital punishment, the threshold case was Furman v. Georgia (1972), in which the death sentences of three black defendants from Texas and Georgia were overturned because the court found their imposition under the then state laws to be arbitrary and capricious and thus violative of due process. Indeed, the imposition of death in general was found to be so infrequent as to violate the Constitutional prohibition against cruel and unusual punishment. As a result of Furman (1972) and its progeny, states (including Tennessee) ostensibly came into Constitutional compliance when they statutorily instituted standards for appellate review of their death penalty cases.

While the stated purpose of such legislation is to regularize and to make reviewable the processes of death-imposition, an alternative view exists. For example,

Nakell and Hardy (1987) pointed to the continued arbitrariness of the death penalty, and Tabak (1986) warned:

> . . . many supreme courts have failed to comply with their states' laws. . . . [They have] failed to develop any coherent method for distinguishing between those defendants who deserve the death penalty and those who do not. [Also there is] an unwillingness to develop any effective appellate review of death sentences (p. 823).

Tennessee Law

Tennessee's current death penalty legislation was enacted in 1977, (Tennessee Code Annotated, 39-13-203, 1989) following years of revision and attempted abolition. The original method of death was execution-by-hanging which was a public affair in the county where the crime was committed. Then in 1883, law required that all executions be conducted behind a wall ". . . higher than gallows, or so constructed as to exclude the view of persons outside thereof . . ." (Tennessee Public Acts, 1888). In 1909, executions were moved to the state prison, where in 1913, in an attempt at humane execution, Tennessee adopted death-by-electrocution (Martin, 1985).

As with the rest of the death-states, crimes exacting the death penalty in Tennessee have varied with the political mood of the legislature. At times, death was required for second offenders of larceny, forgery, perjury, arson, and horse stealing; and for a brief time from

1915-1919, it was abolished for all crimes except rape (Tennessee Public Acts, 1915). Since 1909, when official recordkeeping began, of the 134 people from 38 counties executed in Tennessee, 37 were executed for rape and 97 for murder. All were male, and 90 of the 134 executed were non-white.

No one has been executed in Tennessee since 1960, when William Tynes, a black man from Roane County, was electrocuted for rape--a crime no longer punishable by death (Kopper, 1990; Martin, 1985). (For a complete listing of Tennessee executions, see Appendix A.) In October, 1989, Tennessee's new maximum security prison was opened. Unit Two is death row, complete with a refurbished, computer-controlled, state-of-the-art electric chair. No one knows when, if ever, the new equipment will be used. It should be noted, however, that Tennessee is the only state of those who have reinstated the death penalty not to have exercised it (Carelli, 1992).

The Tennessee Courts

A majority of the Tennessee Supreme Court consistently have held the death penalty to be Constitutional. A review of their decisions found most to be limited to lock-step affirmation language; but several recent cases reflect a change.

In August, 1991, in the case of State v. Black, a man was found guilty of murdering his paramour and her two daughters. Given other aggravating circumstances, the jury imposed the death penalty for the murder of the minor child only. Among the many issues brought on appeal was the method by which capital juries arrived at the life/death decision. The Tennessee Constitution, and subsequent case law, forbid any meddling with jury decision-making including, perhaps, the statutory guidelines by which capital juries currently weigh mitigating versus aggravating circumstances in reaching their verdicts (see Article I, Sections 6, 9, 19, 1870; Neely v. State, 1874). In a 3-2 vote, the Court discounted the jury issue as one not contemplated by Article I and reaffirmed its position that imposition of capital punishment is constitutional in any case of first-degree murder. The close vote signaled a shift in thinking. The U.S. Supreme Court chose not to review the case.

Then in June, 1992, in the case of State v. Mack Brown, the requisite of premeditation became an issue. In this case, the Court reversed a first-degree murder conviction and death sentence imposed on a mentally retarded defendant who beat to death his four-year-old son. While reaffirming their position on capital punishment per se, the Court held that while no specific time period is required for the formation of premeditation, the element

of deliberation cannot be formed in an instant and requires ". . . time to reflect, a lack of impulse, and . . . cool purpose" (State v. Brown, 1992, p. 20).

In the more recent cases of State v. Middlebrooks (1993) and State v. Sparks (1993), the issue of aggravators justifying the death penalty came to the Court's attention: In September, 1992, the court reviewed the case of Donald Ray Middlebrooks who was sentenced to death for the torture-slaying of a man he had kidnaped. The jury had convicted Middlebrooks of felony-murder and then had considered the felony as one of the aggravating circumstances necessary to imposing the death penalty. The Court found that using the other felony to justify both the first-degree murder and the death penalty was an unconstitutional duplication. They overturned the sentence and ordered a new penalty hearing. The state filed for review by the U.S. Supreme Court and the case was argued in October, 1993. On December 13, 1993, the Court declined to interfere with the state court decision that felony murder by itself is not punishable by the death penalty.

Willie Sparks was convicted and sentenced to death in 1983, for the robbery and slaying of a liquor store delivery man. His case was filed for post-conviction relief. Based on the Middlebrooks ruling, the Court possibly will use the case of Willie Sparks to clarify the circumstances

in which the death sentence will have to be set aside. The status of some 44 death row inmates could be affected by the decision.

In the lower courts there also may be a shift. According to the Atlanta-based Southern Center for Human Rights, criminal court judges are reticent to enforce the death penalty, because they have seen the horror in other states (Sher, 1991). Rather the ultimate decisions are being left to the appeals courts, and the process has become cumbersome and costly as these courts attempt to reconcile the blind directives of law with humane discretion.

Prosecution in Tennessee

In Tennessee, as in most states, homicide is the killing of a human being by another human being. It may be criminal or non-criminal, depending on whether or not there is lawful excuse or justification. Premeditated, malicious homicide is murder, while homicide without malice or premeditation is manslaughter. Manslaughter can be voluntary or involuntary, depending on whether or not the act was intentional. Both murder and manslaughter are crimes against the state, but only murder is a death-eligible offense.

In every instance of homicide, both the crime charged and the penalty sought are at the sole discretion of the state attorney general. She/he decides whether to press a case or to drop it. When a charge is reduced, as it often is, the prosecutor is the official who reduces it. As chief administrative officer in the processing of criminal cases, the prosecutor wields almost undisputed sway over the pretrial process. This occurs because many defendants waive their rights to pretrial hearings, and it is common knowledge in the legal profession that more often than not, the grand jury will indict precisely as the prosecutor has requested.

Prosecutorial decision-making remains unquestioned so long as the process is based upon neither unjustifiable standards, such as race or religion, nor other arbitrary classifications that fly in the face of equal protection (Bordenkircher v. Hayes, 1978; Criminal Law Digest, 1983; Tennessee Digest, 1966; Tennessee Jurisprudence, 1985; Wayte v. United States, 1985).

In the 1992 case of Cooper v. State, the Tennessee Court of Criminal Appeals specifically reiterated the prosecution's wide discretion in the charging process, including the decision to seek the death penalty. Commenting on the trial court's decision not to require the district attorney general and one of the assistant prosecutors to defend their decision to pursue the death

penalty for a mentally ill defendant, the appeals court upheld the state's position, as a matter of law.

The Cooper case particularly is interesting, because aside from the legal requisites for criminal homicide, one can find no other standards in Tennessee for prosecutorial decision-making, and for the first time, a Tennessee court has affirmed this position. In essence, the decision states that the absence of such standards, although "perhaps providing fertile ground for abuse, does not show the existence of vindictiveness or improper discriminatory practices in a given case" (Cooper v. State, 1992, p. 538). The court went further to say that the mere claim of unbridled discretion is insufficient to support a finding of unconstitutional activity by the state.

In October, 1991, Tennessee's Attorney General questioned the credibility of the death penalty because of the many delays caused by the appeals process (Sher, 1991). He suggested that the legislature consider the limiting of such appeals in order to maintain the credibility of the state justice system. As yet no action has been taken on the recommendation.

Currently, in an effort to negate the effect of the Mack Brown decision, there is a move by the Tennessee District Attorneys' Conference to lobby for the amendment of the first-degree murder statute, to remove the element of deliberation in premeditation. And on November 8,

1993, the state asked for the Supreme Court to deny a stay of execution for Wayne Lee Bates, scheduled to be electrocuted on December 1. Bates, convicted in the 1987 shooting death of a jogger, requested no further legal representation and that he be allowed to drop all appeals and be put to death. Interestingly, in an unpublished opinion, the Court denied the request, and appointed a former state attorney general to defend Bates in his subsequent appeals.

Proportionality in Tennessee

Rule 12 of the Tennessee Supreme Court is the state's response to Furman (1972). (The protocol in its entirety is found in Appendix B). Rule 12 requires that trial judges complete a form report in ". . . all first-degree murder cases in which death or a sentence of life imprisonment is imposed" (Rules of the Supreme Court, 1987), allegedly to protect against excessive and disparate sentencing. However, there are apparent deficiencies:

1. There is no procedure in place either to ensure compliance or to provide credible proportionality review. A review of the Supreme Court files finds fewer than fifty percent of the forms tendered in the Murder I convictions from among the state's death-counties (i.e.: Those counties in which the death penalty has been imposed). Of the

protocols that are submitted, many are incomplete, and there is no process in place to monitor either the validity or the reliability of the information that is included.

The constitutionality of Tennessee's death penalty depends ultimately on reliable evidence that the state Supreme Court, by some meaningful method, routinely and strictly reviews the state's capital sentences, consistent with concerns for procedural due process and equal protection of law. At the very least, the number of Rule 12 protocols should equal the population of Murder I convictions.

2. The Rule 12 protocol lacks clear intent. The absence of concise operational definitions produces an ambiguity that forecloses any meaningful judicial review. For example: What would an excessive and/or disproportionate case require for relief under Tennessee law? The terms themselves imply quantitative meaning which in turn require quantitative definition.

3. Given quantitative definition: There is no process in place to analyze resultant data.

4. Only those cases in which the prosecution seeks death are reviewed, not all death-eligible homicides. Therefore, the constitutional concerns revolving about prosecutorial decision-making never are addressed. The legal process is not scrutinized; merely its end result is recounted.

Summary

There is no published study of the Tennessee system of capital crime prosecution and no evidence of serious compliance with the requirements of meaningful appellate review. Thus defendants who commit similar crimes may receive strikingly different sentences for other than legal reasons. If disparate impact exists in the state's purposeful deprival of life, and if prosecutorial discretion exists to the extent that equal protection of law is denied, and if appellate review is illusory, then whether or not one agrees with the concept of capital punishment, the process itself is unconstitutional.

The purpose of this study, then, was to examine previous homicide defendants' paths through the criminal justice system, to determine whether or not certain extralegal variables impacted prosecutorial decision-making to the extent of rendering its impact legally and socially unjust.

CHAPTER II

JUSTICE AND LAW

In 1990, Ignatieff wrote:

> The inspiration for a demand for rights may well be a concern for justice; it may be that in some circumstances to struggle for rights is the best way of struggling for justice. But that does not mean that the struggle for justice is the same as the struggle for rights . . . if the distinction is forgotten, there is a danger that a concern for rights will take one farther and farther away from justice; or that the quest for justice will be entirely submerged (p. 40).

There is a delicate balancing act to be performed here. The challenge for social work comes in addressing the tension between individual rights and the public good, with an umbrella commitment to some concept of social justice that eludes precise definition. The problem is that along the continuum, due process considerations often are lost, because providing for the public good may seriously and irreparably harm a few individuals.

Because concepts of social justice demand some understanding of how law weaves individual rights to create a welfare matrix, we begin with a discussion of the challenges in defining the concept of "public good" as it relates to law.

The Public Good

Technically, the public good is defined by the written law, that Brieland and Lemmon (1985) termed the political community's formal means of controlling the people, and Friedman (1984) viewed as multi-dimensional. Included in law are elements of substance, cultural bias and social impact. It was the latter concept of impact that drove this study, impact which could not be divorced from the cultural bias that drives the law.

Several years ago, the Times Mirror Company in conjunction with the Gallop Organization published a study of Americans' values and beliefs that dictate their political action (Ornstein, Kohut, & McCarthy, 1988). The study suggested that the terms "liberal" and "conservative" have lost their traditional meaning. Rather it held that there are surprising groups of coalitions that shift dramatically, without regard to political allegiance, on a variety of fundamental social issues. For purposes of this study, the views of two of those groups were important: the "intolerance" and the "social justice" coalitions.

The intolerance coalitions come from both ends of the spectrum. They include both liberals and conservatives who share a belief in less personal freedom for those who do not share their respective values. Operating from their own moral certainty, both actually want to impose

their views on others. The right-wing intolerance coalition particularly is strong. Their moral biases push them to the top of pro-death penalty advocacy.

The social justice coalitions believe that social justice should be one of the government's primary goals. They view crime as a social problem rather than a moral one. Their morality would have capital punishment itself immoral and thus they are strongly opposed to the death penalty.

No matter what their respective moral stance, the study found that the majority of all those surveyed favored capital punishment, even though there appeared to be substantial ambivalence among even the most diverse groups when it came to concepts of revenge. For example, arch-conservative Charles Colson, spokesperson for the Prison Fellowship, a Christian ministry to prisoners, stated:

> Is it prudent public policy for a nation to deliberately take life? If so, is our criminal-justice system capable of administering the death penalty justly and morally?
>
> Though my fellow political conservatives--and some of my fellow Christians--may consider me a heretic, my experience and conscience compel me to say no. My years in politics deepened long-held conservative convictions about limited government. Excessive government power is too often abused by fallible humans. And to be able to deliberately take a life is the ultimate power.
>
> My experience as a lawyer confirmed these convictions. I've seen firsthand that the judges, prosecutors and juries of our overburdened criminal-justice system are not infallible. The system is not fairly administered; of those sentenced to die, only a fraction are actually executed. A

> disproportionate percentage of that number are minorities. Sometimes innocent people are executed--Judge Learned Hand was right: Better than 100 guilty people go free than one innocent person be sentenced to death (1993, p. A-7).

Near the time of Colson's speech, the Tennessee Association of Criminal Defense Lawyers--allegedly a liberal group--published a form of advanced directive from a murder victim to a state prosecutor, opposing the death penalty for his murderer. It states:

> I, the undersigned, being of sound and disposing mind and memory, do hereby in the presence of witnesses make this Declaration of Life.
>
> 1. I believe that, unless under conditions of extreme and immediate defense of one's self or another person, the killing of one human being by another is morally wrong.
>
> 2. I am opposed to capital punishment on any grounds whatsoever.
>
> 3. I believe it is morally wrong for any state or other governmental entity to take the life of a human being by way of capital punishment for any reason.
>
> 4. I believe that capital punishment is not a deterrent to crime and serves only the purpose of revenge.
>
> THEREFORE, I hereby declare that should I die as a result of a violent crime, I plead, pray and request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered. The death penalty would only increase my suffering.
>
> I believe it is morally wrong for my death to be the reason for the "legal" killing of another human being.
>
> I plead, pray and request that the Prosecutor or District Attorney having jurisdiction of the person

or persons alleged to have committed my homicide not file or prosecute an action for capital punishment as a result of my homicide.

I plead, pray and request that this Declaration be made admissible in any trial of any person charged with my homicide and read and delivered to the jury.

I plead, pray and request the Court to allow this Declaration to be admissible as a statement of the victim at the sentencing of the person or persons charged and convicted of my homicide; and, to pass sentence in accordance with my wishes.

I plead, pray and request that the Governor or other executive officer grant pardon, clemency or take whatever action is necessary to stay and prohibit the carrying out of the execution of any person or persons found guilty of my homicide.

This Declaration is not meant to be, and should not be taken as, my forgiveness of the person or persons who have committed my homicide.

I plead, pray and request that my family and friends take whatever actions are necessary to carry out the intent and purpose of this Declaration; and, I further request them to take no action contrary to this Declaration.

During my life, I want to feel confident that under no circumstances whatsoever will my death result in the capital punishment of another human being.

I request that, should I die under the circumstances as set forth in this Declaration and the death penalty is requested, my family, friends and personal representative deliver copies of this Declaration as follows: to the Prosecutor or District Attorney having jurisdiction over the person or persons charged with my homicide; to the attorney representing the person or persons charged with my homicide; to the Judge presiding over the case involving my homicide; for recording, to the Recorder of the County in which my homicide took place and to the Recorder of the County in which the person or persons charged with my homicide are to be tried; to all newspapers, radio and television stations of general circulation of the County in which my homicide took place and the County in which the person or persons charged with my homicide are to be

tried; and, to any other person, persons or entities my family, friends or personal representative deem appropriate in order to carry out my wishes as set forth herein.

I affirm under the pains and penalties for perjury that the above Declaration of Life is true (Milford, 1993).

Law and the Social Contract

For the general welfare, the United States Constitution forbids wrongful government intervention into personal life and liberty. Thus, state action is to be resultant of due process of law and be applied evenhandedly, according to no other than legal standards. These legal requisites are rooted in the custom of natural law that forms the basis of most governmental policy-making. Its tenets include the beliefs that equality of humankind is an unimpeachable doctrine; that people are rational beings to be treated with dignity and governed by rules of reason; and that the chief goals of a socialized government are keeping the peace and meting out justice. While punishment in general is a morally acceptable consequence of rule by law, state-imposed death presents far different issues which can be attributed generally to two schools of thought: Abolitionist and Retentionist.

Abolitionists state that irrespective of circumstances, all life is sacred, that there is insufficient evidence of capital punishment's deterrent effect, that

there is evidence that the innocent may die, and that death is imposed with a class bias.

Retentionists counter with the deterrent effect of capital punishment in certain heinous crimes, that it balances the scales of justice, and that it makes economic sense, as society does not have to foot enormous incarceration costs for folks who can never be among its contributing members (Ehrlich, 1975; Greenfield & Hinners, 1985; Marquart & Sorensen, 1988; Souryal, 1992).

These views exemplify the inherent duality in concepts of justice that reflect the prevailing, and competing, cultural biases that drive our system of law: The social order is maintained by secular law while the moral order is envisioned by natural law. Thus we have social control tempered by matters of the soul, and law becomes a sort of ordinance by reason, directed toward some common good, defined by time and place. It has meaning only as it accurately reflects the customary ethic. As Sumner (1959) points out, there is no universal or permanent standard of right and wrong. Rather there is some combination of ancestral tradition and current expediency that dictates which behaviors will be tolerated and which will be punished.

The United States was born under this assumption of legitimacy. Both slavery and its eventual abolition, and the civil rights movement, affirmed the concept. If law

reflects society's behavioral requirements of its members; and if it contemplates negative sanctions--or criminal penalties--for members who fail to conform; then especially in the instance of capital punishment, disparate impact--or serious and irreparable harm to an identifiable few--becomes particularly important. Implicit is a sort of social contract--or reciprocity between the state and its subjects--upon whose breach, the state is given the power to kill human beings. Indeed, the death penalty epitomizes Weber's (1962) concept of reciprocal social conduct, in that it is intentionally revengeful for past behavior and defensive against present danger and future attack.

It follows that capital punishment not only affects those who participate in the death process, but also those who contract daily with their society to live, for death becomes an acceptable consequence of social misbehavior. And while the killing of a human being by another human being is a serious moral concern, the legal remedy may be as desensitizing and dehumanizing as the crime itself. On the other hand, if one breaches the implied contract of social cooperation for mutual survival, then state-imposed death may be just consideration for murder.

Summary

It is unclear whether human violence can be applied evenly and ethically, and it is equally unclear how society translates the concept of retribution. What is clear, however, is that most societies have made a sincere attempt to safeguard social justice by implementing strict procedural law. Whether it be the Mosaic requirement that death be imposed only upon the unimpeached testimony of two eyewitnesses to the crime, or 19th century England's strict scrutiny of death-eligible indictments, or today's Furman requirements, it is agreed that the imposition of death warrants special attention.

It may be that the illusion of procedure is necessary to hide our more primitive nature. At any rate, there has been little scholarly investigation of Tennessee's criminal justice procedures relative to issues of moral right. This is a curious omission for a Bible-Belt state, as spiritual law has much to contribute to secular concepts of social justice. Perhaps one explanation came from Charles Colson when he inferred: Though the justice of God may demand that some should die, the justice of man may be too flawed to carry out the mandate.

Perhaps the criminal justice system is an illusion based in the paradox that good is an outcome of

punishment. Or perhaps the dual imperatives of social and moral order can be forced by ex post facto retribution.

The challenge for social work seems to be some reconciliation of its ethic of social justice with either the repugnance for--or the social utility of--state-imposed death. For law that is hide-bound makes no sense, contradicts reason and ethic and loses its ability to make either social or legal justice.

CHAPTER III

LITERATURE REVIEW

Research Justification

Although this study lies outside the more narrowly drawn boundaries of contemporary social work, it is well within the limits of traditional practice which included as a matter of social policy the issues of penal reform and criminal justice. It has long been a tenet of the profession that when law either discriminates against--or fails to protect--an identifiable segment of society, not only do legal requisites fail, but for social work the implications become both moral and ethical. There is an obligation to promote the public welfare with rules for orderly living that do not offend concepts of justice and fair play for the individual.

Social Work Literature

Even though a study of the interplay between the prosecutorial processes of capital punishment and the issues of social justice is valid for social work, a review of the social work literature indicates that there has been no systematic inquiry into the death penalty.

The void is interesting, because legal issues are in fact social justice issues, and social justice issues have always been the concern of social work. Perhaps an explanation lies in social work's status as a public profession that's very survival depends upon its maintenance of legitimacy and political support. In striving for self-determination, independence and access to power, the profession continually has had to reconcile its ethic with the social temperament of its domain. As Leiby (1978), Link and McCormick (1983), and Ehrenreich (1986) point out, in more conservative times individual rights have lost to the right of the institution, while in more liberal times personal freedoms have been championed. Yet at neither end of the spectrum does the social work literature reflect much interest in the issues of state-promulgated death.

Aside from the consideration of capital punishment, the literature does however reflect a rich interdisciplinary tradition between law and social work generally. In fact, many of the leaders of the social work movement were lawyer/advocates. The Abbott sisters used their legal training to advocate for such issues as women's suffrage, women's rights in family planning, labor law, immigrants' rights and world peace (Costin, 1983). Crystal Eastman's legal training gave her the expertise to co-found the American Civil Liberties Union in an effort to ensure

civil rights for women (Cook, 1978). And Florence Kelley used her legal training from the University of Zurich to advocate for women's rights and child labor laws (Blumberg, 1966).

During the 1920's, the literature reflected social work's concern with the ramifications of law on professional practice. Schools began offering courses in social work and law which, according to Schottland (1967-1968), produced books and articles in abundance dealing with an interdisciplinary approach of the two disciplines to social problem-solving. When the profession became more formally organized after World War II, the scholarly literature dealt with social work's responsibility to ensure constitutional protections for welfare clients and for the elderly (Sloane, 1967; Dickson, 1976; Ehrlich & Ehrlich, 1979). The role of legal education was emphasized by such luminaries as Schottland (1967-1968), Covington (1970), Bitensky (1973) and Falck (1977), each of whom advocated the need for social workers to address issues of social justice from a legal knowledge base. Even so, while the general issues of social justice (and even those of penal reform) were discussed, the literature of the seventies reflects little attention either to capital punishment per se or to its processes. Interestingly, it was during this same time period that

capital punishment, amidst great public controversy, was reinstated in the current death-states.

The decade of the eighties saw a dominance by the political right and of conservative tradition. Predictably, the social work literature dealing with social justice was considerably less common. In a survey of research articles published in five major social work journals during the early eighties, fewer than two percent were found dealing with any sort of social reform or political change (Glisson, 1983). A more recent search of the social work literature, limited to the factors of capital punishment and race, gender, age and economic condition, found only five articles during the entire decade of the eighties, none of which dealt with the social impact of prosecutorial discretion.

Other Literature

There are a number of studies outside of the social work literature. They are found in the literature of criminal justice, law and sociology. Most examined defendant demographics, but they are product rather than process oriented. Few have been held to meet the legal requisites of strict scrutiny. For example, in a recent Georgia case, a federal appeals court, in affirming a lower court's imposition of the death penalty, described

the results of the Baldus and Cole (1981) study (an ambitious, 230-variable, study of racial discrimination) as ". . . arbitrarily structured little rinky-dink regressions that . . . are the sort of statistical analysis given short shrift by the courts [and] prove nothing other than the truth of the adage that anything may be proved by statistics" (McKlesky v. Kemp, 1987, p. 12). In this instance, the impact of the court's commentary was significant. After thirteen years of litigation, the concept of racial discrimination virtually was eliminated as the last sweeping challenge to the death penalty. Warren McKlesky was electrocuted on September 26, 1991. McKlesky was black; his alleged victim was a white police officer.

The bulk of the literature, repetitively, either examined the impact of Furman on the original states involved--especially Georgia--or comments on McKlesky. Of note for purposes for this study are the following works.

Race

Pre-Furman, Wolfgang and Riedel (1973, 1975), reporting on 361 Georgia rape cases from 1945-1965 (when rape was punishable by death), found race to be the single most significant factor, compared to age, marital status, employment status and prior knowledge of victim, in discretionary death sentencing. Further, their study

found in all cases that the combination of black defendant and white victim was most likely to result in the death penalty.

Post-Furman studies inferred the same bias: Radelet and Pierce (1985) examined 1976-1977 Florida homicides to determine the effect of defendant's and victim's race on severity of indictment. They found that black killers of whites are more likely to be charged with first-degree murder and face possible execution than are black and white killers of blacks. Nakel (1985), reporting on 1977-1978 homicide cases in North Carolina, found that the defendant's race influenced prosecutorial decision-making, while the victim's race influenced jury decision-making. And DeParle (1985) found that, despite reforms, race played a critical role in the imposition of the death penalty in Louisiana. Of his 310 cases involving white victims, 45 resulted in the death penalty; of 194 cases involving black victims, 8 resulted in the death penalty; of 13 cases involving white defendants and black victims, none resulted in the death penalty.

In 1981, however, Kleck reported a detailed reevaluation of the literature on racial bias in capital and non-capital sentencing from 1930-1978. He found that there were inadequacies in earlier studies, such as failure to control properly for prior criminal acts, income, social class, and occupation. He concluded that

non-capital sentencing reflected mixed support for racial disparity and that blacks, except in the South, faced lower execution risk than whites. He agreed, however, that crimes involving black victims were less severely punished. Soon after, Radelet and Vandiver (1986), in reviewing the Florida cases, found that with the death penalty the problem perhaps was not so much conscious racism as it was some inherent bias in the structure of the criminal justice system itself. Indeed, Murrell's (1987) examination of death sentencing patterns in Maryland from 1978-1987 concluded that an overriding factor in determining who will and who will not be sentenced to death is the decision-making of the state prosecutor.

In 1987, Smith examined 504 Louisiana homicide cases to determine whether or not patterns of discrimination continued to exist. He found that the race of the victim, not the race of the defendant, was the controlling factor in death penalty imposition. And in 1988, Ekland-Olson, examining data from Texas, a state with highly structured capital jury instructions, came to the same conclusion. He found that, as in states with wider jury discretion statutes, there were race-linked disparities in sentencing. Texas cases involving white victims were more likely to precipitate the death penalty than those involving either black or Hispanic victims.

In 1984, Gross and Mauro reinforced the racial bias of the justice system by examining sentencing under post-Furman death penalty laws in eight states: Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma and Virginia. Their dismal conclusion, based on the McKlesky (1987) decision: "de facto racial discrimination in capital sentencing is [held by the courts to be] legal in the United States. . . . [It seems to] pose no constitutional issue, merits no hearing, and requires no response" (p. 212).

Finally, in 1991, Spohn and Cederbloom, confirming Kalvan and Zeisel's "liberation hypothesis" (1966), found that juries do indeed consider extralegal factors in less serious, weaker or inconsistent cases. They found the defendant's race to be an important predictor of the decision on whether to incarcerate (blacks being significantly more likely than whites to be incarcerated), and especially with capital offenses, they found significant interaction between race, heinousness and harshness of sentence.

In January, 1992, the American Civil Liberties Union called for public support of proposed federal legislation that would support racial justice and fairness in capital sentencing. Based on a 1990 General Accounting Office report which alleged racial disparity in the charging, sentencing and imposition of the death penalty, the

proposed legislation was not to abolish capital punishment or to establish racial or death quotas. Rather it was to eliminate race from the decision of whether to seek the death penalty by encouraging states to develop non-racial standards for seeking the death penalty and to apply those standards uniformly and consistently. The legislation, which remains unpassed, is curious in that it implies the existence of some sort of articulated, racist, state standards for prosecution of capital crimes--statutes that would be prima facie unconstitutional.

There is no reported study of the impact of race on criminal justice outcomes in Tennessee.

Gender

Generally, there has been little scholarly concern for gender differences in crime and punishment. However, the limited literature clearly reflects a gender difference in the sentencing of male and female capital offenders.

The difference seems rooted in the historical perspective that expects different behavior from men and women. Women probably are no more or less moral than men, nor are they more or less inclined to engage in criminal acts. However, conventional wisdom believes men to be more violent. Even though statutes in most states today

are gender-blind, the criminal justice system treats male and female offenders differently--either because women are expected to be more compliant or because they are seen in need of paternalistic care.

Nagel and Weitzman (1971) found that women were less likely to remain in jail pretrial and more likely to be convicted of a lesser included offense (thus receiving a lighter sentence). Streib (1986, 1989) found that when the aggravating and mitigating circumstances were the same, female offenders generally received lighter sentences, and very few received the death penalty. Indeed, Streib (1986) reported that from the turn of the century until the mid-eighties, fewer than 1% of those executed in the United States have been women, and that today only about 1% of death row inmates are women. These findings were confirmed by Simon and Landis (1991), who found that even in the face of a trend toward equity in punishment, any differences generally were on the side of greater leniency for women.

Even so, despite greater apparent leniency, women's due process rights are at risk. Nagel and Weitzman (1971) also found that women were more likely not to be represented by counsel and more likely to plea bargain, thus waiving the right both to a preliminary hearing and to a jury trial. Such practices have been encouraged by state statutes that represented the prevailing view of the

treatment of women who broke the law. Of note was the Pennsylvania case of Commonwealth v. Daniel (1967), in which a lower court found that indeterminate sentencing was a reasonable approach to the rehabilitation of women as a class because of their physiological and psychological makeup, their type of crime committed relative to the criminal world (which assumedly was male), their role in society, their unique vocational skills and their reaction to imprisonment. The case also commented on the types of women who are incarcerated rather than given a suspended sentence. The Pennsylvania Supreme Court overturned the lower court decision but held that legislative classification on the basis of gender did not violate the equal protection clause. In response, the Pennsylvania legislature enacted an indeterminate sentence statute by which only male sentences were determined in open court, while women's sentences would be decided by the parole board in closed session. Eventually, this statute also was found to be unconstitutional, but not before numerous women fell prey to its dictates.

Mann (1984) suggested that there is a practical reason for the differential treatment of women in the criminal justice system. She cited concepts of critical criminology based on Marxist theory that patriarchal capitalism always protects the status quo by means of the legal system. To expand on Mann, if the fact of crime and

punishment is directly related to opportunity and access to self-determination, then for women the process could be good or bad. Even though their punishments may be lighter, their access to due process of law may be limited by design. Such gender differences are, on their face, indicative of the lack of equal protection of the law.

There is no reported study of the impact of gender differences on criminal justice outcomes in Tennessee.

Economics

Finally, concepts of social justice must include some ideas of fairness, equality and impartiality, none of which are available to the poor. Although poverty is not synonymous with inequality, it is closely related to it. As Harrington (1984) pointed out, the poor not only lack simple cash income, they lack public amenities, legal services and basic human respect--the requisites of substantial life quality.

When set against a system of choices for life or death, poverty may be the most significant factor influencing the outcomes at each stage of the prosecutorial process. Capital offenses usually are unbailable or the high bail is accessible only to the affluent. And the expenses of an effective capital defense are immense. Black (1974) accurately reflected:

> It is all completely out of the reach of the poor. The poor man--unless some public interest organization happens to see an important issue in his case--can no more afford a really adequate defense than he can afford a year's cruise around the world on a luxury liner. He may luck out, one way or another. But he will be heavily handicapped from the beginning (p. 86).

Although the 1963 Supreme Court case of Gideon v. Wainwright held that poor people must be provided counsel at state expense, it is not merely counsel that the accused needs, but advocacy and investigation of a high and costly order.

Perhaps Gideon had the unfortunate effect of lulling us into a sense of fairness that is illusory. At the very least, the state should assure an even-handedness in its criminal prosecutions that protects the least strong of its citizens against disparate treatment. To do otherwise flies in the face of the constitutional requirement of equal protection of law. And the system would be unjust and unethical per se.

There is no published study of the effect of economic status on the outcomes of Tennessee's criminal justice system.

Geography

There is little specific information about the impact of geography on prosecutorial outcomes; however there is

general information regarding crime and punishment in the south.

There has long been an awareness of the impact of geography on types of crime--mainly the impact of regional cultural influences. For example, in 1974, Harries reported that southern crime data reflect an abnormally high homicide rate when compared to the rest of the nation and that these deaths have a distinct association with firearms and with personal disputes unrelated to other crimes. In other words, capital crimes in the South occur mostly between acquaintances rather than as felony-murders.

While there is no simple explanation for the high levels of violence in the South, the literature suggests a relationship with the Civil War legacy and the agrarian economy that engendered a rigid caste system of white landed-gentry, poor whites and blacks. Each of these groups settled their grievances in combative ways. Indeed, human life ranked so low on the scale of social values that homicide was an inevitable outcome of personal difficulty. Perhaps the most telling factor was the prevailing attitude about violence, stemming from social and economic conditions as well as the effect of rather prolonged frontier conditions that still exist in some rural areas.

All of the behavior revolved about a strong concept of honor that was to be defended at all costs. Indeed,

views of family and property rights were so strongly held that, according to Brearly (1932), southern folkways and mores almost required a man to kill another who disrupted his home in any way--especially by adultery. Thus we find a rich tradition of long-standing family feuds that defy even the most rational explanation. As Ayers reports:

> Self-respect, as the Southerners understand it, has always demanded much fighting. . . . It permeates all society; it has infected all individualities. The meekest men by nature, the man who at the North would no more fight than he would jump out of a second story window, may at the South resent an insult by a blow, or perhaps a stab or a pistol shot (1984, p. 10).

With the advent of the twentieth century, establishment southerners who sought to defend tradition, increasingly turned to differing conservative values to replace fighting for honor. According to Ayers (1984), local republicanism and evangelical moralism tended to protect against nationalism, societal secularization and the demise of the class system. But the militaristic bent remained: As late as 1965, four of the sixteen southern states (Alabama, Georgia, Tennessee and Virginia) had 22% of the nation's military schools while having only 8% of the population (Harries, 1974).

Overt militarism has been removed from the schools, but the fights for honor remain--mostly with gangs. Ironically, the acute sensitivity to insult and the propensity for violence have become more identified with poor white rural and poor black urban societies. Today a white

southerner, whatever the class, would understand far better than most one of the outcomes of Wolfgang's (1975) study of homicide in the urban north: "A male is virtually expected to defend the name and honor of his mother . . . and to accept no derogation about his race, his age, or his masculinity" (pp. 88-89).

There is no published study of the impact of geography on prosecutorial decision-making in Tennessee. However, the Tennessee Judicial Council reported that for all crimes prosecuted in the state's tenth judicial district during the 1989 period (i.e., the East Tennessee counties of Bradley, McMinn, Monroe and Polk), defendants were acquitted more than they are convicted, with Bradley having the highest conviction rate of the four and Polk having the lowest (Kopper, 1993).

Several factors that may have influenced the process, the most important being the prosecutorial discretion to plea bargain based on what a case is worth. Worth seems to be a shorthand term descriptive of the prosecutor's caseload, the comprehensiveness of the investigation and the politics of the matter, i.e., the odds of the jury convicting that defendant for that crime in that county.

It is fairly concluded, then, that given historical perspective, the Judicial Council data, and the earlier-cited fact that since 1977, only 28 of the state's 95 counties have imposed the death penalty, geography may

have significantly impacted homicide defendants' paths through the Tennessee criminal justice system.

Summary

Despite reforms, the death penalty still may be handed out with the randomness and bias denounced by the Furman Court in their 1972 decision. Whether the variable is the defendant's race, gender, economic status or some other extralegal factor, prior studies have suggested that there may be significant inequities in the government's prosecution of capital defendants, to the extent of constitutional impermissability.

Because most of these studies have been based on end-products of the system rather than on the process that created them, there is a knowledge gap. For social work, there also is an obvious lack of attention to a pressing and controversial social issue. Given the profession's developmental history, it would now seem an appropriate activity to examine the legal processes of capital punishment, in an effort to determine whether the tenets of social justice are being breached--particularly in the prosecution of death penalty cases.

CHAPTER IV

METHODOLOGY, DATA COLLECTION, AND ANALYSIS OF DATA

Conceptual Framework

The problem of proportionality in the criminal justice system revolves about issues of whether or not crime and punishment are balanced, both in retribution for the state and in level of punishment for the defendant. Of particular interest have been the outcomes associated with capital crimes. Prior research has suggested that the death penalty has been imposed discriminatorily, to the detriment of minorities and the poor. Also in question has been the alleged arbitrariness of the system in which like homicides engender strikingly different outcomes for their perpetrators.

The results of these studies have been ignored by the courts, because they have been adjudged to be complicated and at times biased. If there is any bias, it is that the results are product--rather than process--oriented. They deal de facto only with capital defendants and omit any study of death-eligible defendants in the previous intervening stages of decision-making in prosecutorial process. Thus a very important aspect of the criminal justice system has been omitted from review because, as a matter

of law, prosecutorial discretion remains unchallenged unless there is hard evidence of vindictiveness or constitutionally impermissible behavior by the individual prosecutor. By the time a defendant finally gets to death row, crucial tests of fundamental due process and equal protection of law have become moot.

This study tracked both the process and the impact of specific variables on the decision-making within it. Its goal was to determine, with simplicity and legal relevancy, whether there was discrimination or arbitrariness or cruelty and inhumaneness in the imposition of the death penalty in Tennessee.

The central question addressed was whether or not the assumption of a fair, rational relationship between crime and punishment in Tennessee is correct. Specifically, Tennessee's prosecution of capital crimes was examined to determine its constitutionality. If prosecutorial outcomes, when analyzed, suggested significant discrimination or caprice, then further investigation would be necessary. In other words, certain quantitative associations would require qualitative analysis for the Tennessee Supreme Court's claim of proportionality be validated.

The Research Model

The idea for the research model evolved from a 1987 list of death row inmates, garnered from Tennessee's Capital Case Resource Center, and a question: How did these people get there? Or better yet: What happened to the defendants in death-eligible cases who didn't get there? Other researchers had examined the demographics of death row populations, but few had addressed the process that got them there. Since the prosecutorial process is so powerfully determinative, it seemed appropriate that the research model be a decision-tree that tracked the state's prosecution in death-eligible crimes. The tree was representative of the continuum of traditional legal procedure that flows from investigatory through accusatory to retributory stages. On it were superimposed the independent demographic variables of race, gender, age, economic status and prior bad acts as possible explanatory factors of the outcomes at each juncture. The questions were:

1. What are the critical stages of the prosecutorial process?

2. Given the stages, what are the possible outcomes at each juncture?

3. Given the possible outcomes at each juncture, what is the probability that a member of the

death-eligible population will exit from the process at a given outcome?

4. Given the probability of exit at a given outcome, were there external factors that significantly influenced that probability?

Thus the decision-tree represented an investigative approach to determine in Tennessee (a) the stages of the prosecutorial process, (b) the legal options available at each stage, and, (c) the probabilities of certain criminal defendants terminating at particular options.

Critical Stages and Possible Outcomes of the Prosecutorial Process

The model is represented in Figure 1. It represents what should happen in law, irrespective of extralegal factors, in the state's prosecution of homicide defendants.

I. Police Charge refers to police disposition of the case. Either first-degree murder is charged, or no charge is filed because of some sort of extraordinary clearance. An extraordinary clearance occurs when there is no one to prosecute, as in a murder-suicide. If a charge issues, the defendant continues to the preliminary hearing.

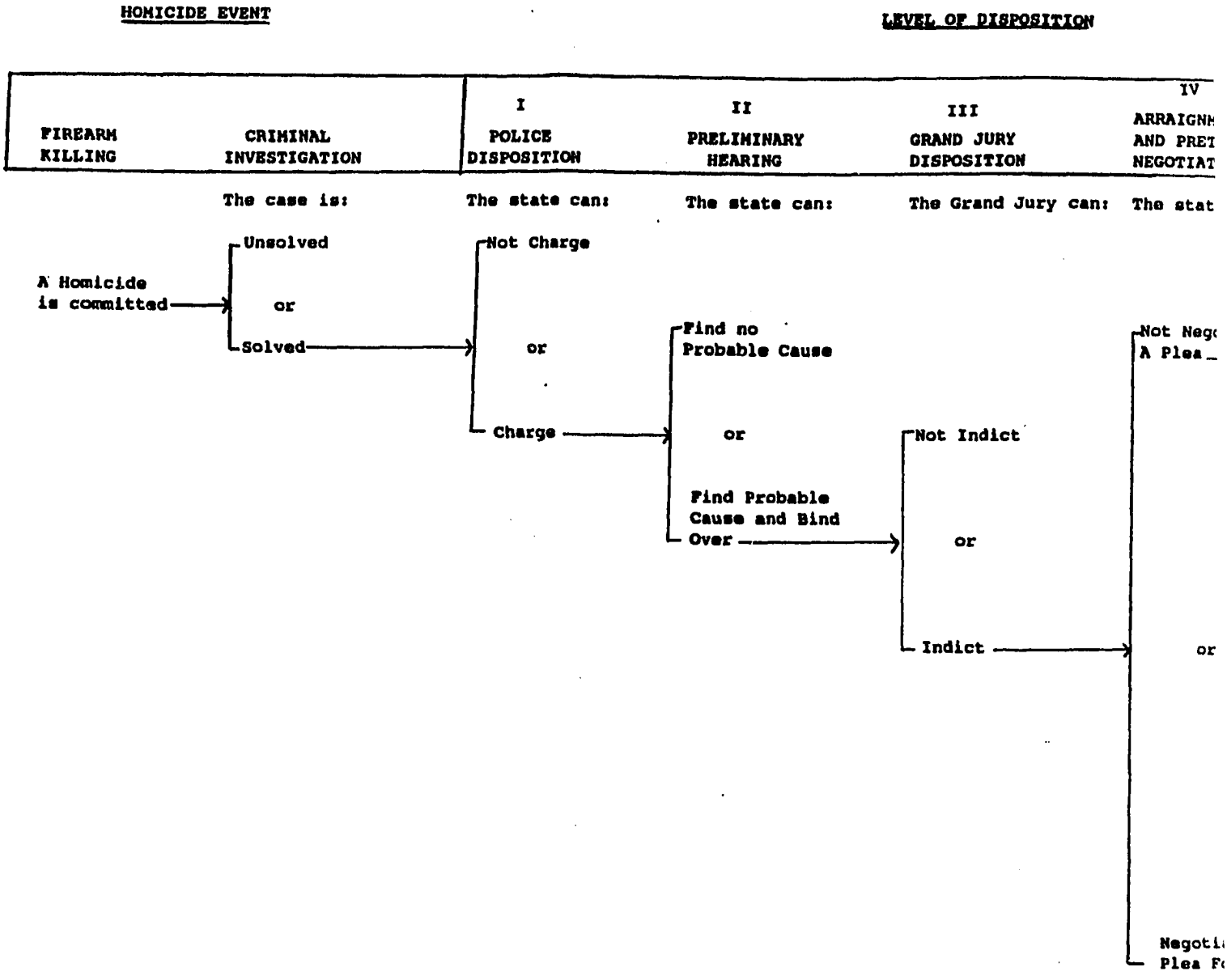
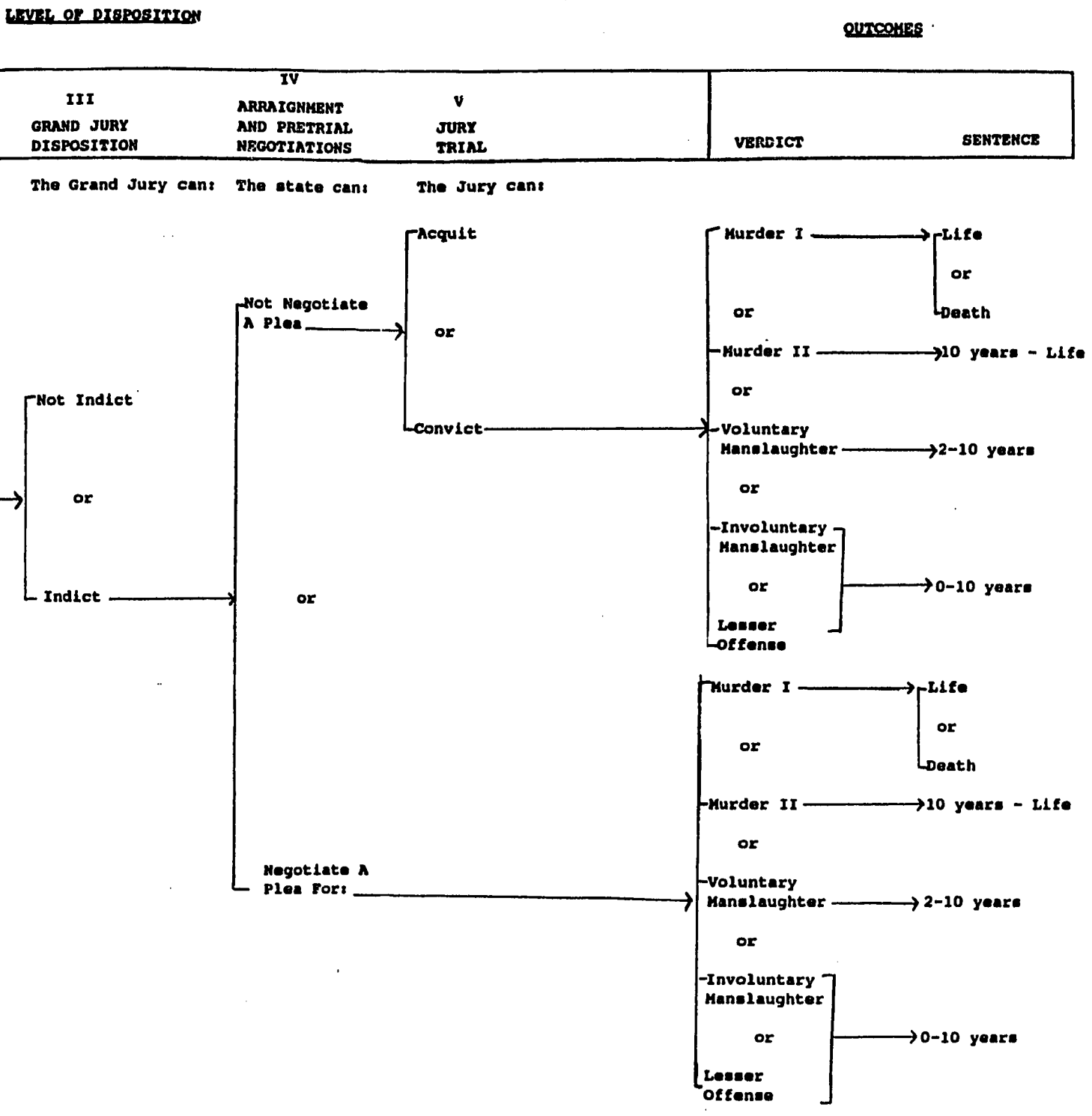


Figure 1. Decisions in the Prosecution of Case



the Prosecution of Cases in Tennessee

II. Preliminary Hearing is the stage where probable cause is determined for the first time, i.e., is it probable that a criminal homicide was committed and this is the person who committed it? At this stage, either the judge or the prosecutor may dismiss all or part of the police charges. If the case goes forward and if probable cause is found, with the recommendation of the prosecutor, the judge may find misdemeanor manslaughter and sentence the defendant to something less than one year in confinement. Otherwise the case will be bound over to the Grand Jury for a second probable cause determination, relative to the law of felony.

III. Grand Jury Findings are the result of a second set of probable cause hearings. These hearings are held at the sole discretion of the prosecutor. Neither the defendant nor the defense attorney is present, and the hearings are secret. The jury either finds probable cause by issuing a True Bill, or does not find probable cause by issuing a No Bill. At this juncture the prosecutor also can bring an original action that, if sustained, becomes a Presentment. With the occurrence of either a True Bill or a Presentment, the case moves forward in the prosecutorial process.

IV. Arraignment and Pretrial are, respectively, the formal charging of the defendant and the time of informal negotiations between the prosecution and defense.

Arguably, these negotiations are the most important events of the entire process. They are not a matter of record and they are guided by no standards other than the practicalities of the matter. One knows the outcome of the process only by whether or not the defendant's case exits the system or continues to the criminal court for judge-approval of a negotiated plea agreement or a jury trial.

V. Trial refers to the determination of the merits of the case, by a judge and/or jury. The finding can be first-degree murder or any lesser-included offense; the defendant can be acquitted, or charges can be dismissed.

In the event of a plea bargain, the agreement is entered for the approval of the trial judge. Its effect is that the defendant receives some sentence less than death, in consideration for the state receiving an assured conviction.

In the event of first-degree murder the trial must be bifurcated. Upon a finding of guilt, there is a separate sentencing hearing.

Sometimes cases remain untried because either the defendant dies pretrial or there is some other reason not anticipated in law but agreed to by the prosecution.

VI. Verdict refers to the decision of the finder-of-fact (the judge or jury) regarding the extent of the defendant's culpability in the homicide. The findings can be as follows:

a. First-degree Murder in which premeditation, intent and malice are found.

b. Second-degree Murder in which intent and malice, but not premeditation, are found.

c. Voluntary Manslaughter in which only intent is found.

d. Involuntary Manslaughter in which unintentional homicide is found.

e. Other Finding refers to some lesser included offense.

f. Acquittal is a finding of no legal guilt.

VII. Sentence refers to the extent to which the state exacts retribution by incarceration for the homicide and is determined by a judge or jury.

In 1989, the Tennessee legislature passed a sentencing reform act (TCA 40-35-101, et. seq.) for the purpose of balancing and regularizing sentencing throughout the state. Also, Tennessee now has judge-sentencing for all but first-degree murder convictions. As a practical matter, fewer than 50% of the cases ever get to that level, and most judges still adhere to prosecutors' sentencing recommendations along the way, so it is unlikely that either judge-sentencing or the sentencing act would have had--or will have--any significant impact on homicide outcomes.

During the period of this study, sentences were grouped as follows:

a. Murder I: life or death;

b. Murder II: 10 years to life;

c. Voluntary Manslaughter: 2-10 years;

d. Involuntary Manslaughter-Lesser Offense: 0-10 years.

In findings of first-degree murder, a unanimous jury must make the life or death determination.

VIII. Appellate Review. Not included on the decision-tree, but definitely a part of the process is the right of appeal, i.e., the right of the defendant to question the judicial process as applied to his case. In instances of life sentences or less, the appeals court may deny the appeal. In the instance of death, direct appeal to the Supreme Court is a matter of right. All Tennessee death row inmates are at some level of the appeals process--some at the final stage.

A collateral issue to be addressed was: Were the Tennessee Supreme Court's findings of due process and equal protection for the individual death penalty appellant justified in fact?

Subjects

The eleven-year period of 1977-1987 was selected for investigation because this period began just after Tennessee had legislated its response to Furman and was most likely to allow prosecutorial closure of each homicide incident. According to Tennessee Bureau of Health and Environment data, during this period there were 5,444 homicides in Tennessee, exclusive of deaths by legal intervention (police-initiated deaths) and deaths by act of war (see Appendix C). According to Tennessee Department of Corrections data, the population of homicides had culminated in only 555 first-degree murder convictions (10%), 85 of the 555 received the death penalty (15%). And according to Capital Case Resource Center data, most of those on death row are white and male. They came from 28 (29%) of the state's 95 counties. These counties were referred to as "death-counties".

The vast majority, 3,898 (71.6%) of the homicides during the period were by firearm, so that particular category seemed to be a logical control variable. Also, according to the National Center for Health Statistics, next to traffic accidents, firearm-homicide is the most common cause of death for American youth (especially black youth) and is rising every year (AP/Times, 1991, p. 51).

Taking into account that an event might be unsolved, or there might be missing information, or there could be multiple defendants for a single event, it was highly probable that the number of events and the number of defendants would be unequal. In other words, there would be more defendants than homicide incidents. Therefore each defendant was treated as a separate event moving through the system, even though some might have been involved in the same homicide. These defendants became the research subjects, and what happened to them in the Tennessee criminal justice system provided the data for this study.

Independent Variables

The independent variables were defined operationally as follows:

I. County: the location of the homicide event which, presumably, is the same county where the prosecutorial process occurred.

II. Race: white or non-white, as only recent data differentiate Hispanic, Asian and other ethnicity.

III. Gender: male or female.

IV. Age: age of defendant or victim on the date of the homicide event.

V. Economic Status: based upon a court determination of whether or not the defendant met the statutory requisites for indigency sufficient to warrant appointed legal council (Tennessee Code Annotated, 1965).

VI. Prior Bad Acts: prior felony convictions or extraordinary misdemeanor convictions such as misdemeanor-murder or misdemeanor-sexual battery.

Criteria for Interpretation

Because the results of the study would have legal as well as social implications, they were reported for legal reliability as well as for academic value. According to Baldus and Cole (1981), the courts generally regard proof as reliable when it (a) is legally relevant, (b) meets scientific muster, and, (c) has conceptual simplicity. In criminal law, the notion of proportionality has been held to be legally relevant, and yet the social science research inferring discrimination has been held not to meet the muster sufficient to be legally persuasive. Thus the goal of this study was, by conceptual simplicity, to offer a framework by which the courts could evaluate the extent to which Tennessee ensures Furman protections to all its homicide defendants.

Once the decision tree was completed, the probabilities determined and the impact of the independent

variables analyzed, the legal criteria for interpreting results were those of the Furman court, as follows:

1. Arbitrariness was defined as the extent to which legally relevant factors did not distinguish in some systematic fashion between those who became death-eligible and those who did not. Arbitrariness was used synonymously with whim or caprice (Furman, 1972). In the treatment of homicide defendants, every prosecutorial outcome should have been based in law. If not, then arbitrariness was assumed, and the process found unconstitutional for the defendants' lack of equal protection of law.

2. Discrimination was defined as the extent to which legally irrelevant issues appeared systematically and consistently to influence the outcomes of criminal prosecution in death-eligible cases (Furman, 1972). In other words, if there were statistically significant differences in defendants' outcomes when compared by race, gender, age, economic status or county, then discrimination was inferred. If equal protection of law was not guaranteed all firearm-homicide defendants, the process was unconstitutional.

3. Frequency was defined as the extent to which the death penalty was imposed. The concern was whether or not the imposition was so infrequent, even for the most heinous crimes, that it had ". . . no meaningful basis for distinguishing the few cases in which it is imposed from

the many cases in which it is not" (Furman, 1972, p. 313). Simply put, unusual here referred to not of predictable or regular incidence.

Data Collection

[Note: Normally, the data collection section of a dissertation is a rather perfunctory exercise. However, in this study, the collection itself was a valuable learning experience that should be shared. Although some of this section is anecdotal, the content remains valuable because it points up the inadequacy of Tennessee's data retrieval system.]

Originally, a simple random sample of 1,000 was to be drawn from the population of defendants who had gone through the prosecutorial system. This number was based on Hauskin's table for determining sample size with a known population based on chi-square distribution, 95% CI, 5% bound on error (1963, p. 3). However, as the research progressed, it became apparent that a basic assumption about the data set was incorrect: Neither the state nor the federal government had a uniform process for the collection of crime data that was reliable. Consequently, there was no way to validate the data from the Federal Bureau of Investigation's Uniform Crime Report because, as one governor's aide rather cavalierly stated, the data are

"cooked". As a matter of fact, local data are interpreted and recorded differently from jurisdiction to jurisdiction, and even within jurisdictions.

What happens is this: Local police agencies file Supplemental Homicide Reports (SHRs) with the Federal Bureau of Investigation (FBI). These expansive reports include case-by-case data on each reported homicide in local jurisdictions. The data may be the best available, but they are misleading. First, not all homicides are reported to the police. Second, of those reported, the information forwarded to the FBI is on suspected defendants, with no way to determine whether the homicide ultimately was found by the justice system to have been criminal in nature or, for that matter, if this suspect in reality was the perpetrator. Moreover, according to the FBI, for a variety of reasons (such as a jurisdiction having an abnormally high unsolved murder rate) some known homicides are not included in the SHRs. Finally, for specific events, there is no systematic way to connect victim with defendant to track the prosecutorial process. Indeed, informants--i.e., those people who agreed to share information so long as they not be identified--stated that many local records have been deliberately destroyed or have been lost or rendered inaccessible for political or other reasons. Some records have been expunged according to Tennessee law (Tennessee Code Annotated, 40-32-101,

1990). Since most scholarly research is based on the FBI data, which are easily obtainable and reasonably organized, the issue became one of credibility.

After considerable review of the literature and subsequent contact with the State Attorney General's Office, the Tennessee Bureau of Investigation, the Federal Bureau of Investigation, the Tennessee Judicial Conference, and the Tennessee Association of Criminal Defense Lawyers, it was apparent that this research would have to include a revised system of data collection to meaningfully challenge so important an assertion as the Supreme Court's on equal protection of Tennessee's criminal defendants in capital cases.

It was the same governor's aide who suggested that perhaps the only state department with complete data, or to use his phrase: "as complete as it gets in Tennessee", is the Tennessee Department of Health and Environment, because in Tennessee one can do little with a dead body unless there is a certificate of death signed by the county coroner. Since time is of the essence with dead bodies, death certificates regularly are signed and filed with the state. It was with this department that the data collection began in January, 1991.

From January to June, 1991, the formal request for data remained on the desk of the Commissioner of Health and Environment. Near the end of June, the Commissioner

forwarded the request to the Director of the Division of Information Resources. The request was received just as the Governor's budget cuts took away most of the Director's staff. It was the end of August before he was able to draw the requested population. He offered to draw the random sample as well.

For each event identified by Health and Environment, local authorities were contacted in an effort to connect homicide victim with defendant. The experience was challenging, because the police jealously guarded their records, even matters of public record, and court clerks were gatekeepers extraordinaire. Although it was made clear to local officials that the details of their respective investigations and actions were not under scrutiny, they remained reluctant to share information. In the largest urban counties the requested data were unretrievable because of disorganization and lack of coordination among local government enforcement agencies. In one county, a reliable source alleged that because the county's rate of unsolved crimes was the highest in the state, the city and county police agencies were reluctant to share information with outsiders. Also, until the mid-1980's, that particular county's homicide records were considered to be the personal property of the investigating officers and therefore were unavailable even to their own departments.

By January, 1992, for practical reasons, the decision was made to limit the geographic area of study to one realistically more manageable. The challenge then became to decide on a region whose selection logically could be defended.

For state administrative reasons, Tennessee is divided into three grand divisions. The citizen populations of the divisions essentially are the same, as are the populations of their respective homicide events. The simple random sample originally drawn for a state study also breaks down along grand division lines. Thus the decision was made to limit the study to the East Tennessee Grand Division (see Appendix D).

Of the state's 3,898 firearm-homicides between January 1, 1977 and December 31, 1987, 1,092 occurred in East Tennessee. Again, based on Hauskin (1963), a simple random sample of 300 events was drawn from the East Tennessee population. These events yielded 334 defendants.

The defendant data were collected following the University of Tennessee's rules and regulations regarding the protection of the rights of human subjects. The collection process continued until March, 1993. All avenues short of court-ordered intervention were pursued. Police chiefs, sheriffs (and in several instances, sheriff's wives and one sheriff's girlfriend), secretaries, district attorneys general, criminal defense

lawyers, court clerks, Tennessee Bureau of Investigation agents, data processing clerks, and just plain folks with good memories contributed information.

Some incidents were discarded because it became apparent they had become state statistics only because the victim died in a Tennessee regional hospital. The defendants' prosecutions were not within the state's jurisdiction. Other incidents were only partially traceable, and some simply were untraceable for the reasons mentioned earlier.

Even where data were available, as noted earlier, the format for their reporting varied among the jurisdictions, as did local interpretations of like events. Concerns about comparability were addressed by assuming that only the legal requisites for criminal behavior dictated the state charges.

For every firearm-homicide incident in the sample, the victim's name first was cross-referenced with police victim/defendant files. Where no file was available, local authorities were asked their recollection of the case. As bits and pieces of defendant data came to light, their court files were located. Where there was no available court file, local police officials were questioned, and where there were no knowledgeable police, other locals were interviewed.

In addition to the victim data, the data selected for each incident included its status as solved or unsolved and whether it was a Tennessee crime or merely a death reported from a Tennessee hospital. For each identified Tennessee case, defendant data included race, gender, age, economic status and any prior bad acts of record. Process data included level of disposition, verdict, sentence, appeal status and whether or not each outcome of first degree murder had an accompanying Rule 12 protocol, as required by law. (Note: The Rule 12 Protocol, as mentioned in Chapter I and shown in Appendix B, is the form that the Supreme Court requires be completed by the trial judge in every life or death sentenced capital case.)

The raw data were detailed on forms presented in Appendix E. Each incident was assigned a code representing the county of occurrence, the chronology of the event in the sample and the year of its occurrence. The data then were reduced to numerical form and entered into a data file. There were 257 cases that unequivocally could be followed through the entire prosecutorial process.

Data Analysis

As mentioned earlier, the McKlesky (1987) court gave short shrift to the extremely sophisticated Baldus study. The goal of this current study was to take a different

approach in suggesting to the Tennessee Supreme Court that equal protection may not be afforded the state's homicide defendants. It is evident that the need for subsequent research would be suggested.

Data that were collected for defendant's age and victim's economic status and criminal history but were incomplete and unreliable and were not analyzed.

Jury Data

One could present cogent arguments for or against the inclusion of the jury outcome data. Those opposed to its inclusion in the analysis could say that this study is about prosecutorial discretion, and therefore jury decision-making has no place in the discussion.

On the other hand, as a practical matter, criminal cases are under the control of the state at every level of decision-making--even when the outcome is attributed to the jury.

It is the state who chooses to go forward with a case, and the state who chooses whether or not to ask for the death penalty. It is the state who presents the prima facie case upon which the jury makes its ultimate decisions, and the state who discretionarily offers a mere pro forma exercise or brings all its resources to bear in exacting death.

Thus it is the state who, as Kalvan and Zeisel (1966) and Spohn and Cederbloom (1991) suggest, by its own commission or omission, allows the jury the freedom to fashion its verdict and sentence. For these compelling reasons, jury outcomes were included in the analysis.

The remaining data were analyzed as follows:

Outcomes of the system, were considered to be measured at the ordinal level, from the lowest level of case disposition or verdict or sentence (1), to the most state intrusive level (6). Therefore, the Mann-Whitney test of significance was used. The level of probability of Type I error was set at p=.05. Where statistical significance was found, the individual stages of decision-making were analyzed, at the nominal level, to determine where those differences lay. For this latter analysis, the population was divided into two groups. Group I was the group being examined, and Group II consisted of the remaining subjects. Then a cross-tabulation and Chi-square test of significance were performed, using the Yates correction where necessary. Each of the four variables (race, gender, economic status, prior bad acts) were examined. Again, the level of probability for Type I error was set at p=.05.

Where the data did not lend itself to testing--i.e., where the numbers were too small or expected cell frequencies of zero, and it was impractical to collapse them--the

results simply were discussed. This approach seemed reasonable, especially where the meaning of the numbers would be intuitively obviously, even to the most casual observer.

Summary

A criminal justice system is composed of complicated interactions among competing social values. Thus it is important, particularly in capital cases, that there be some sort of reasonable way of measuring the outcomes of the process in order to assure its Constitutional compliance. As there has been no published investigation of the Tennessee system, the purpose of this study was to examine the state's prosecutorial outcomes as they may relate to the defendant race, gender, age, economic status and prior bad acts, the victim's race and gender, and the county of case disposition.

The data came from a simple random sample of firearm-homicide incidents in East Tennessee for the years 1977-1987. An interesting aspect of the study was the process of the data collection itself. Tennessee's information retrieval system relative to crime and punishment often was colloquial rather than formalized and traceable in writing. Of particular interest was the fact that prior

research had been based on FBI data which was found to be unreliable and invalid.

CHAPTER V

FINDINGS AND DISCUSSION

The East Tennessee data were analyzed in sequential steps. First the frequencies of actual outcomes were determined and noted on the decision-tree, and their probabilities of occurrence determined. Real-world outcomes for capital defendants were found to be different from those contemplated in law, so the model was altered to reflect the sample data (see Figure 2). Also, sentence outcomes for verdicts less than Murder I fell in no discernible pattern, so they were omitted from the figure and discussed in the text. In all, 257 solved and traceable incidents were followed through the prosecutorial process to disposition.

At each dispositional level, the probabilities of defendants' exit were determined. Since most defendants exited the system prior to jury trial, their outcomes were per se discretionary with the state and not a matter of record. Given the fact of unbridled prosecutorial discretion, the issue became whether or not the state misused that right, as measured by Furman standards. First the issue of arbitrariness was addressed.

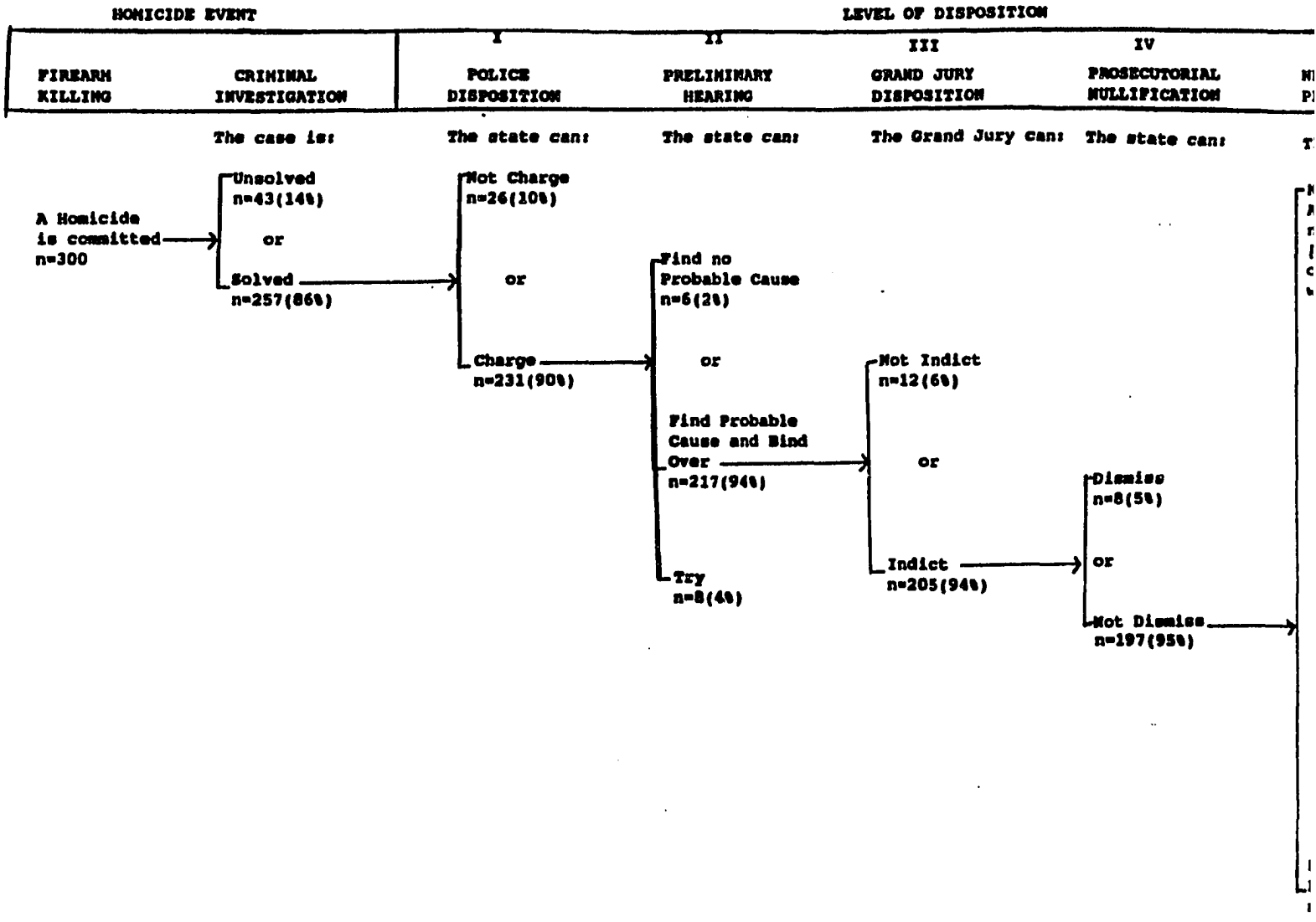
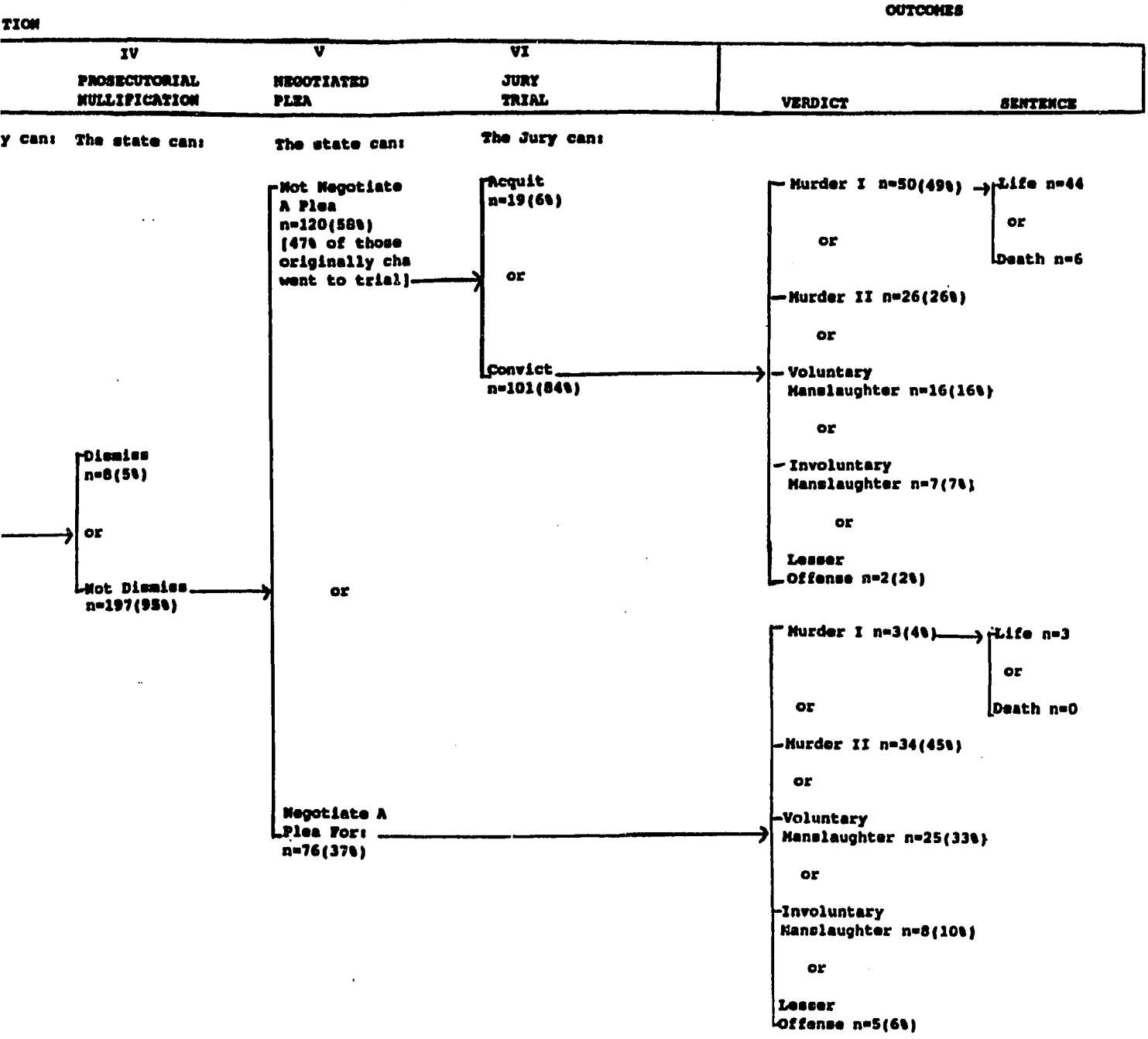


Figure 2. Actual Outcomes in the Prosecution of Firearm-Ho



ution of Firearm-Homicide Cases in Tennessee 1977-1987

The Issue of Arbitrariness

Arbitrariness is defined as the lack of routine and consistent legal standards which the state applies in its prosecution and disposition of criminal matters. In other words, level of disposition, resulting verdict (whether by jury or merely "for the record") and sentence must be based in law.

Tennessee law prescribes not only the level of disposition of a criminal incident but also, given the facts of the case, the subsequent verdict and sentence to be given. Depending on the seriousness of the matter, firearm-homicide is a felony that commands a verdict ranging from involuntary manslaughter to first-degree murder, with concomitant sentences ranging from one year's incarceration to death.

In the sample, 43 (14%) of the cases officially were termed "unsolved". In reality, a number of the victims were described by local authorities as "deserving to die". It is not known whether the killers actually were known to those authorities, but the records reflect little attention paid to the crime. The neglect appeared to be examples of "local justice". At any rate, there were no prosecutions and therefore no further data. Results of the remaining 257 cases were scattered across the tree as follows:

Arbitrariness Relative to Levels of Disposition

I. Police Charge: Twenty-six (10%) of the known killers were not charged by the police. Local law enforcement officials either found the homicides to be justified or chose not to charge for some other reason. In law, the issue of justifiable homicide--i.e., self-defense--is one to be decided in a court of law, either by a judge or jury. There is no reason other than murder-suicide for a charge not to issue. There were two murder-suicides in the sample. Therefore 24 known defendants exited the system as a result of arbitrary police discretion. The remaining 231 cases continued to preliminary hearing.

II. Preliminary Hearing: Fourteen cases were disposed of at preliminary hearings. Six (2%) were dismissed by the judge for lack of probable cause, and eight (4%) actually were tried. This was an unexpected outcome. The law contemplates that the only issue to be tried at a preliminary hearing for first-degree murder is probable cause.

Upon further legal research it was determined that if a court finds probable cause that a crime was committed but no more than involuntary manslaughter (a crime punishable by a sentence of 1-5 years), a quirk in the law allows for trial at the preliminary hearing stage: TCA 40-20-103

(1859) states that if a jury could find from the facts of the case, a crime that is punishable by some sentence that has a minimum of one year, the lower court judge may try and impose a sentence of less than one year. In effect, a "misdemeanor-manslaughter" is created. This law often is employed by the prosecution as a bargaining tool to gain homicide convictions. Evidently it was used in our sample.

III. Grand Jury: Two hundred seventeen (217) cases were bound over to the Grand Jury. The Grand Jury found 12 cases (6%) lacking in probable cause evidence; therefore they were "no-billed". Two hundred five (94%) were "true-billed".

IV. Prosecutorial Nullification: Eight indictments simply were nullified by the prosecution, with no reason given. (Note that Figure 2 is amended to include this unexpected result.)

V. Plea Negotiations: The remaining 197 defendants continued to arraignment. Following formal arraignment, the prosecution negotiated justice with 76 (37%) of them, while the remaining 120 (47% of those originally charged with Murder I) went to jury trial. One case remains open and untried.

VI. Jury Trial: At jury trial 101 (84%) of the defendants were convicted of some crime, while 19 (16%) were acquitted.

In sum, 257 traceable firearm-homicide cases resulted in 176 convictions at some level of disposition. As Table 1 indicates, their verdicts ranged from first-degree murder to some lesser-included offense, and their sentences ran the gamut from none to death. To alleviate confusion, only the life and death outcomes are noted on the figure. The other sentence outcomes are limited to discussion in the text.

Arbitrariness Relative to Verdict, and Sentence, Outcomes

Whether by plea or by jury finding:

Murder I. There were 53 capital convictions. Six (11%) of the defendants received death penalties from their juries.

Murder II. During the time of study, Murder II contemplated a sentence of 10 years to life (now 15-60 years). There were 60 Murder II convictions, 34 by plea and 26 by jury. Forty-four (73%) were sentenced to 10 years to life. The remaining defendants received sentences not contemplated by law. Indeed, 8 (13%) received sentences of less than 2 years.

Voluntary Manslaughter. Forty-one (24%) of the defendants were convicted of voluntary manslaughter (25 by plea and 16 by jury). This crime was punishable in law by

TABLE 1

SENTENCE BY VERDICT (n = 176)

Sentence	Verdict: Lesser Offense (n=7)	Involuntary Manslaughter (n=15)	Voluntary Manslaughter (n=41)	Murder II (n=60)	Murder I (n=53)
<-1 year					
Count	3	6	5	2	
Percentage*	43	40	12	3	
1-2 years					
Count	4	7	24	6	
Percentage*	57	47	59	10	
2-10 years					
Count		2	12	8	
Percentage*		13	29	14	
10-Life					
Count				41	
Percentage*				68	
Life					
Count				3	47
Percentage*				5	89
Death					
Count				0	6
Percentage*				0	11

*Percentage reported is for column.

a sentence of 2-10 years (now 3-15 years). Nearly 71% of all those convicted of Voluntary Manslaughter received sentences of less than 5 years.

Involuntary Manslaughter and Lesser Offenses. The penalty for involuntary manslaughter was 1-10 years. At various levels of disposition 22 defendants were convicted of involuntary manslaughter or some lesser offense. They received sentences from 0-10 years, depending on the county of conviction. Six of the involuntary manslaughter convictions received sentences of less than 1 year, even though that offense was a felony punishable by greater than 1 year's incarceration.

Rule 12

The data reflected that 89.5% of the Murder I cases in this study did not have Rule 12 protocols filed with the Court.

Appeals

Fifty-eight of the homicide-firearm verdicts were appealed. Ninety-eight and two-tenths percent of them were affirmed. Usually appeals courts' decisions address only the issues that defendants present for review. If a defendant fails to present a question, normally the court

will not act of its own accord. In this study, the Tennessee Supreme Court--allegedly based on data garnered from its Rule 12 reports--routinely found lack of arbitrariness in both law and procedure, as applied to the cases.

A Finding of Arbitrariness

There appeared to be little detectable pattern of prosecutorial decision-making in which legal factors systematically determined the outcomes of criminal prosecution in death-eligible cases: Twenty-six known killers were not charged by the police, only two of whom were participants in a murder/suicide event. Eight Murder I defendants were tried at preliminary hearing. Eight Murder I indictments simply were nullified by the state, and seventy-six cases were plea bargained for lesser verdicts and sentences.

Indeed, prosecutorial discretion seemed couched in local pragmatism rather than based in law. With the majority of homicide cases decided before they even got to open trial, it is unlikely that either the new law of sentencing or judge-sentencing would have corrected the problem. Neither were the appeals courts a safeguard, as most verdicts and their sentences were not appealed. Of

those that were appealed, their affirmations were based in faulty reasoning.

In summary, the data suggested that the Furman test for lack of arbitrariness was not met for firearm-homicide cases in East Tennessee during 1977-87. The task then turned to the question of discrimination by the state.

The Issue of Discrimination

Discrimination is an issue different from arbitrariness. Rather than focusing on standardized application of law, it contemplates some regularized influence of extralegal factors.

As indicated by Tables 2 and 3, firearm-homicide in East Tennessee during 1977-87 was pretty much a white male event, even though the percentage of nonwhite defendants (17.5%) was greater than their occurrence in the general population (6%). Two hundred three (79%) of the crimes were white-on-white crimes, and one hundred ninety (74%) were all male.

Generally, the defendants were slightly younger than their victims. Their mean age was 34 years; the median age was 30. Victims' mean age was 39 years, with a median of 35.

Victims' financial status and prior bad act data either were unavailable or were unreliable. Defendants'

TABLE 2

FIREARM-HOMICIDES BY RACE (n = 257)

Defendant	Victim White (n=211)	Victim Nonwhite (n=46)
White (n=212)		
Count	203	9
Percentage*	79	4
Nonwhite (n=45)		
Count	8	37
Percentage*	3	14

*Percentage reported is for total number of cases in sample.

TABLE 3

FIREARM-HOMICIDES BY GENDER (n = 257)

Defendant	Victim Male (n=218)	Victim Female (n=39)
Male (n=223)		
Count	190	33
Percentage*	74	13
Female (n=34)		
Count	28	6
Percentage*	11	2

*Percentage reported is for total number of cases in sample.

financial status was equally divided between indigent and non-indigent for both white and nonwhite. Clearly, the majority (66%) had no history of bad acts, irrespective of race, gender or financial status.

Race

Mixed Race Incidents

Tables 4, 5, and 6 reflect that only eight incidents involved white victims of nonwhite killers, and nine involved white killers of nonwhite victims. Their numbers were insufficient to analyze for statistical purposes, but the numbers in Table 4 suggested nonwhite killers of white victims tended more often to negotiate pleas, while white killers of nonwhite victims tended to take their chances with juries. The numbers in Tables 5 and 6 predictably reflect lesser verdicts and sentences for the plea-bargained cases.

Dispositional Levels and Race

There were 212 white and 45 nonwhite defendants in the sample. Table 7 represents, overall, their levels of dispositions by race ($p=.3389$). The Mann-Whitney indicated no significant difference when overall disposition

TABLE 4

DISPOSITION BY MIXED RACE INCIDENT (n=17)

	Prosecutorial Discretion				Non-Prosecutorial Discretion
	I	II	III	IV	V	VI
	Police (n=1)	Preliminary (n=0)	Grand Jury (n=2)	Prosecutorial Nullification (n=0)	Negotiated Plea (n=6)	Jury (n=8)
White Killers of Nonwhite Victims (n=9)						
Count	1		1		1	6
Percentage*	11		11		11	67
Nonwhite Killers of White Victims (n=8)						
Count			1		5	2
Percentage*			12		63	25

*Percent reported is for row.

TABLE 5

VERDICT BY MIXED RACE INCIDENT (n=14)

	Acquittal	Lesser Offense	Involuntary Manslaughter	Voluntary Manslaughter	Murder II	Murder I
White Killers of Nonwhite Victims (n=7)						
Count	2				2	3
Percentage*	28				28	44
Nonwhite Killers of White Victims (n=7)						
Count	1			2	3	1
Percentage*	14			28	44	14

*Percent reported is for row.

TABLE 6

SENTENCE BY MIXED RACE INCIDENT (n=11)

	1 year	1-2 years	2-10 years	10-Life	Life	Death
White Killers of Nonwhite Victims (n=5)						
Count			1	1	2	1
Percentage*			20	20	40	20
Nonwhite Killers of White Victims (n=6)						
Count			2	2	2	
Percentage*			33	33	33	

*Percent reported is for row.

TABLE 7

LEVELS OF DISPOSITION BY RACE (n = 257)

	I Police (n=26)	II Preliminary (n=14)	III Grand Jury (n=12)	IV Prosecutorial Nullification (n=8)	V Negotiated Plea (n=77)	VI Jury (n=120)
White (n=212)						
Count	26	10	11	8	58	99
Percentage*	12	5	5	4	27	47
Nonwhite (n=45)						
Count	0	4	1	0	19	21
Percentage*	0	9	2	0	42	47

*Percentage reported is for row. (alpha = .05)

Result of Mann-Whitney comparing overall Disposition Level with Race was .3389.

level was compared with race. However, the individual levels present a different picture; as shown in Tables 8-13:

I. Police Charge. Twenty-six people who shot and killed others were not criminally charged by the police. All of them (100%) were white. Thus, the state discretionally chose not to charge 12% of the whites who committed firearm-homicide, while all of the nonwhites continued to preliminary hearing. When the subjects disposed of at this level were compared to those disposed of at all other levels of decision-making by race, the resulting Chi-square was significant at the p=.0274 level.

II. Preliminary Hearing. Fourteen defendants had their cases disposed of at preliminary hearing. Six were acquitted, or their charges were dropped by the state. Eight were tried. Five percent (5%) of all white defendants had their cases disposed of at this level; nine percent (9%) of all nonwhite defendants had their cases disposed of. A crosstabulation of the subjects disposed of at this level, with all subjects not disposed of showed no statistical significance by race (p=.4482)

III. Grand Jury. The Grand Jury found insufficient probable cause to indict 12 of the defendants for any reason. Eleven of these were white, and one was nonwhite. Thus 5% of all white defendants exited the system at this stage, while 2% of the nonwhites exited. The

TABLE 8

LEVEL I (n=257): POLICE DISPOSITION BY RACE

	White (212)	Nonwhite (n=45)
Disposition (n=26)		
Count	26	0
Percentage*	12	0
Non-Disposition (n=231)		
Count	186	45
Percentage*	88	100

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = 4.86 (p=.0274)

TABLE 9

LEVEL II (n=231): DISPOSITION AT PRELIMINARY HEARING BY RACE

	White (n=186)	Nonwhite (n=45)
Disposition (n=14)		
Count	10	4
Percentage*	5	8
Non-Disposition (n=217)		
Count	176	41
Percentage*	95	92

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .57 (p=.4482)

TABLE 10

LEVEL III (n=217): GRAND JURY DISPOSITION BY RACE

	White (n=176)	Nonwhite (n=41)
Disposition (n=12)		
Count	11	1
Percentage*	6	2
Non-Disposition (n=205)		
Count	165	40
Percentage*	94	88

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .22 (p=.6400)

TABLE 11

LEVEL IV (n=205): PROSECUTORIAL NULLIFICATION OF CHARGES BY RACE

	White (n=165)	Nonwhite (n=40)
Disposition (n=8)		
Count	8	0
Percentage*	5	0
Non-Disposition (n=197)		
Count	157	40
Percentage*	95	100

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .72 (p=.3946)

TABLE 12

LEVEL V (n=197): DISPOSITION BY

PLEA NEGOTIATION BY RACE

	White (n=157)	Nonwhite (n=40)
Disposition (n=76)		
Count	58	19
Percentage*	37	48
Non-Disposition (n=120)		
Count	99	21
Percentage*	63	52

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = 3.90 (p=.0481)

TABLE 13

LEVEL VI (n=257): JURY DISPOSITION BY RACE

	White (n=212)	Nonwhite (n=45)
Disposition (n=12)		
Count	99	21
Percentage*	53	53
Non-Disposition (n=137)		
Count	113	24
Percentage*	47	47

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .00 (p=.9969)

crosstabulation and comparison by race showed no significance (p=.6400).

IV. Prosecutorial Nullification. The cases of eight defendants simply were dismissed by the state. All of the defendants were white males with no prior bad acts. Seven were indigent. The Chi-square analysis suggested no significance (p=.3946).

V. Negotiated Plea. The state negotiated pleas with 77 of the remaining defendants. Twenty-seven percent (27%) of all white defendants plea bargained their cases, while forty-two percent (42%) of all nonwhite defendants plea-bargained theirs. When the subjects disposed of at this level were compared with those in all other levels of decision-making by race, the resulting Chi-square suggested significant differences(p=.0481).

VI. Jury Trial. The 120 remaining cases went to jury trial--47% of the total of white cases and 47% of the nonwhite cases--obviously not a significant difference.

Overall, the results of the tests of significance when comparing level of disposition by race reflected mixed support for racial disparity. The Mann-Whitney suggested no overall significance (p=.3389). However, at the systemic extremes of the process--i.e.: At the entry level of police charge and at the level of plea negotiations immediately prior to trial there were significant differences between whites and nonwhites. There were no

significant differences between the groups at any other level of disposition. This finding agreed with the 1985 findings of Nakel who found in North Carolina, that the defendant's race significantly impacted prosecutorial decision-making at key intervals and again supported Murrell's (1987) findings on the importance of prosecutorial discretion.

Race and Verdict Outcomes

Table 14 represents verdict outcomes by defendants' race. One defendant remains untried. Relative to the 204 verdicts rendered, generally there were no significant differences between whites and nonwhites. Whites and nonwhites equally were acquitted. Twenty-six percent (26%) of the white and forty-two percent (42%) of the nonwhite defendants were convicted of some crime less than murder. Fifty-nine percent (59%) of the white defendants were convicted of murder, evenly distributed between first and second degree, and forty-two percent (42%) of the nonwhite defendants were convicted of murder, with the majority being second degree. However, as Table 15 indicates at the level of involuntary manslaughter, where 18% of the nonwhite, as compared to 4% of the white defendants exited the system, the difference between the two groups was significant (p=.0054). This was the only level of

TABLE 14

VERDICT OUTCOMES BY RACE (n = 205)

	VII Never Tried (n=1)	VI Acquittal (n=28)	V Lesser Offense (n=7)	IV Involuntary Manslaughter (n=15)	III Voluntary Manslaughter (n=41)	II Murder II (n=60)	I Murder I (n=53)
White (n=162)							
Count	1	22	7	7	30	50	45
Percentage*	1	14	4	4	18	31	28
Nonwhite (n=43)							
Count	0	6	0	8	11	10	8
Percentage*	0	14	0	18	26	24	18

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Verdict with Race was p=.1187.
Result of Mann-Whitney comparing Criminal Findings Levels I-V with Race was p=.1115.

TABLE 15

INVOLUNTARY MANSLAUGHTER BY RACE

	White (n=161)	Nonwhite (n=43)
Yes (n=15)		
Count	7	8
Percentage*	4	18
No (n=163)		
Count	154	35
Percentage*	95	81

*Percentage is for column (alpha=.05)
Chi-square, with Yates correction = 10.42 (p=.0054)

verdict outcome that seemed important--at least relative to race. Its overall importance remained to be seen.

Race and Sentence Outcomes

Table 16 represents the 174 sentences by race. Here, the data suggested a significant difference between whites and nonwhites in overall outcome ($p = .0375$). It became important to know where.

Tables 17 through 22 represent the individual levels of sentence outcome relative to race. The results of the Chi-square analyses indicated that only with sentences of 2-10 years was the difference between white and nonwhite significant ($p=.0161$). Indeed, most nonwhite sentences overall fell within the 1-10 year range (again, the involunary manslaughter range), and none received death. Perhaps that outcome was because their cases were disposed of by plea bargaining earlier in the process.

This is not to say that nonwhites received better justice. It may very well be that they received inferior justice at lower levels where the important racial disparity occurred. We cannot know for sure, because the majority of their records never reached any level of public scrutiny. At any rate, they received the lesser sentences for the bargain, while at the jury level of decision-making they received no sentence advantage at all

TABLE 16

LEVELS OF SENTENCE BY RACE (n = 174)

	I >-1 year (n=14)	II 1-2 years (n=41)	III 2-10 years (n=22)	IV 10 years-Life (n=41)	V Life (n=50)	VI Death (n=6)
White (n=137)						
Count	9	32	13	35	42	6
Percentage*	7	23	9	26	31	4
Nonwhite (n=37)						
Count	5	9	9	6	8	0
Percentage*	14	24	24	16	22	0

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Sentence with Race was p=.0375.

TABLE 17

LESS THAN 1 YEAR BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=14)		
Count	9	5
Percentage*	7	14
No (n=160)		
Count	128	32
Percentage*	93	86

*Percentage refers to column. (alpha=.05)
Chi-square, with Yates correction = 1.07 (p=.1682)

TABLE 18

1-2 YEARS BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=41)		
Count	32	9
Percentage*	23	24
No (n=133)		
Count	105	28
Percentage*	77	76

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .01 (p=.9022)

TABLE 19

2-10 YEARS BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=22)		
Count	13	9
Percentage*	10	24
No (n=152)		
Count	124	28
Percentage*	90	76

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = 4.53 (p=.0161)

TABLE 20

10 YEARS--LIFE BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=41)		
Count	35	6
Percentage*	26	16
No (n=133)		
Count	102	31
Percentage*	74	84

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .93 (p=.2353)

TABLE 21

LIFE BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=50)		
Count	42	8
Percentage*	31	22
No (n=124)		
Count	95	25
Percentage*	69	78

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .76 (p=.2812)

TABLE 22

DEATH BY RACE

	White (n=137)	Nonwhite (n=37)
Yes (n=6)		
Count	6	0
Percentage*	4	0
No (n=168)		
Count	131	37
Percentage*	96	100

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .76 (p=.4308)

These results compared favorably with the 1981 findings of Kleck who determined that non-capital sentencing reflected mixed support for the much-touted concepts of racial disparity. In fact, he found that capital sentencing was less risky for blacks than for whites--except in the South. The data from this study indicated no exception.

Gender

Disposition Levels and Gender

There were 223 male and 34 female defendants in the sample. Table 23 is an overall representation of their levels of disposition. The Mann-Whitney indicated no overall significant difference relative to gender ($p=.6536$), nor were there any significant differences at the individual levels of outcome. It then became important to move on to the more practical matters of verdict and sentence outcomes.

Gender and Verdict Outcomes

Tables 24-30 represent verdicts by gender. While there was no significant difference between males and females overall ($p=.0939$), there was a significant

TABLE 23

LEVELS OF DISPOSITION BY GENDER (n = 257)

	I Police (n=26)	II Preliminary (n=14)	III Grand Jury (n=12)	IV Prosecutorial Nullification (n=8)	V Negotiated Plea (n=77)	VI Jury (n=120)
Male (n=223)						
Count	24	10	11	8	67	103
Percentage*	11	4	5	4	30	46
Female (n=34)						
Count	2	4	1	0	10	17
Percentage*	6	12	3	0	29	50

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing Disposition Level with Gender was p=.6536.
Result of Mann-Whitney comparing Prosecutorial Discretion Levels I-V with Gender was p=.8593.

TABLE 24

VERDICT OUTCOMES BY GENDER (n = 205)

	I Murder I (n=53)	II Murder II (n=60)	III Voluntary Manslaughter (n=41)	IV Involuntary Manslaughter (n=15)	V Lesser Offense (n=7)	VI Acquittal (n=28)	VII Never Tried (n=1)
Male (n=176)							
Count	48	53	36	9	5	24	1
Percentage*	27	30	20	5	3	14	1
Female (n=29)							
Count	5	7	5	6	2	4	0
Percentage*	17	24	17	21	7	14	0

*Percentage reported is for row. (alpha=.05)

Result of Mann-Whitney comparing overall Level of Verdict with Gender was p=.0939.

Result of Mann-Whitney comparing Criminal Findings Levels I-V with Gender was p=.0020.

TABLE 25

MURDER I AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=53)		
Count	48	5
Percentage*	27	17
No (n=157)		
Count	127	24
Percentage*	73	43

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = 1.51 (p=.4692)

TABLE 26

MURDER II AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=60)		
Count	53	7
Percentage*	30	24
No (n=144)		
Count	122	22
Percentage*	70	76

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .62 (p=.7333)

TABLE 27

VOLUNTARY MANSLAUGHTER AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=41)		
Count	36	5
Percentage*	21	17
No (n=163)		
Count	139	24
Percentage*	79	83

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .33 (p=.8445)

TABLE 28

INVOLUNTARY MANSLAUGHTER AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=15)		
Count	9	6
Percentage*	5	21
No (n=189)		
Count	166	23
Percentage*	95	79

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = 9.02 (p=.0110)

TABLE 29

LESSER OFFENSE AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=7)		
Count	5	2
Percentage*	3	7
No (n=197)		
Count	170	27
Percentage*	97	93

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = 1.39 (p=.4977)

TABLE 30

ACQUITTAL AND GENDER

	Male (n=175)	Female (n-29)
Yes (n=28)		
Count	24	4
Percentage*	14	14
No (n=176)		
Count	151	25
Percentage*	86	86

*Percentage refers to column (alpha=.05)
Chi-square, with Yates correction = .16 (p=.9205)

difference among levels I-IV where some criminality was found (p=.0020), and again it was at the involuntary manslaughter level (p=.0110).

Twenty-eight percent (28%) of the males and thirty-five percent (35%) of the females were convicted of some crime less than murder. Fifty-seven percent (57%) of the males were convicted of murder, equally divided between first and second degree, and forty-one percent (41%) of the females were convicted of murder, with a clear majority receiving a verdict of second degree. Females received the less harsh verdicts--possibly because, like nonwhites, they plea bargained more often.

Sentence and Gender

Table 31 indicates that also there were significant differences overall between males and females in levels of sentence (p=.0155), and it occurred at the level of misdemeanor sentencing (Table 32). Because the data suggested that the state was more likely to negotiate pleas with females, it followed that males were more likely to receive the harsher penalties. All of the sample's death-row inmates were male. In fact, today there is only one woman in the death row population.

These results agreed with the findings of Nagel and Weitzman (1971), Mann (1984), and Streib (1986, 1989) that

TABLE 31

SENTENCE OUTCOMES BY GENDER (n = 174)

	I >-1 years (n=14)	II 1-2 years (n=41)	III 2-10 years (n=22)	IV 10 years-Life (n=41)	V Life (n=50)	VI Death (n=6)
Male (n=150)						
Count	9	32	22	36	45	6
Percentage*	6	21	15	24	30	4
Female (n=24)						
Count	5	9	0	5	5	0
Percentage*	21	38	0	21	21	0

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Sentence with Gender was p=.0155.

TABLE 32

LESS THAN 1 YEAR AND GENDER

	Male (n=150)	Female (n=24)
Yes (n=14)		
Count	9	5
Percentage*	6	21
No (n=160)		
Count	141	19
Percentage*	94	79

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 6.15 (p=.0131)

women are treated less harshly by the system. But the issue of justice again is more illusive. Women were more likely to plea bargain, so the criteria of due process as applied to them could not be measured. There was no record to review. Indeed, as Mann (1984) suggested, the female outcomes could have been indicative of a paternalistic process that begged the issue of fundamental fairness.

Economic Status

Dispositional Level and Economic Status

There were reliable financial data for 229 defendants. Table 33 represents their levels of disposition by economic status.

As Table 33 indicates, indigent and nonindigent defendants were spread equally across the board. Overall, there was no significant difference among their levels of disposition ($p=.7981$). The Chi-square analyses of the individual levels also indicated no significant differences.

TABLE 33

LEVELS OF DISPOSITION BY ECONOMIC STATUS (n = 229)

	I Police (n=11)	II Preliminary (n=9)	III Grand Jury (n=7)	IV Prosecutorial Nullification (n=8)	V Negotiated Plea (n=76)	VI Jury (n=118)
Indigent (n=118)						
Count	4	4	3	7	41	59
Percentage*	3	3	2	6	35	50
Nonindigent (n=111)						
Count	7	5	4	1	35	59
Percentage*	6	4	4	1	32	50

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing Disposition Level with Economic Status was p=.7981.

Verdict and Economic Status

Table 34 represents verdict outcomes by economic status. Here the differences between indigent and nonindigent defendants for all levels, and for criminal findings levels only, were significant (p=.0001 and p=.0116, respectively). Sixty-eight percent (68%) of the indigents and forty-two percent (42%) of the non-indigents were convicted of murder, with indigents receiving Murder I verdicts twice as often as non-indigents (p=.0273). Non-indigents were three times more likely to be convicted of the lesser offenses, including involuntary manslaughter (p=.0070), and 19% of them were acquitted of any crime whatsoever, as compared to only 6% of the indigents (p=.0111). Tables 35 through 40 represent Chi-square analyses of the individual levels, in which Murder I, Involuntary Manslaughter and Acquittal reflected significant differences in verdict by economic status.

Sentence and Economic Status

Table 41 represents sentence outcomes by economic status. Here again the data indicated a significant difference between indigent and non-indigent defendants, overall (p=.0030). Although no one level was more important than the others at the .05 level.

TABLE 34

VERDICT OUTCOMES BY ECONOMIC STATUS (n = 201)

	I Murder I (n=52)	II Murder II (n=60)	III Voluntary Manslaughter (n=41)	IV Involuntary Manslaughter (n=15)	V Lesser Offense (n=7)	VI Acquittal (n=25)	VII Never Tried (n=1)
Indigent (n=102)							
Count	34	36	19	2	4	6	0
Percentage*	33	35	19	2	4	6	0
Nonindigent (n=99)							
Count	18	24	22	13	3	19	1
Percentage*	18	24	22	13	3	19	1

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Verdict with Economic Status was p=.0001.
Result of Mann-Whitney comparing Criminal Finding Levels I-V with Economic Status was p=.0116.

TABLE 35

MURDER I BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=52)		
Count	34	18
Percentage*	33	18
No (n=148)		
Count	67	81
Percentage*	97	82

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 7.20 (p=.0273)

TABLE 36

MURDER II BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=60)		
Count	36	24
Percentage*	35	24
No (n=140)		
Count	65	75
Percentage*	65	76

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 4.07 (p=.1307)

TABLE 37

VOLUNTARY MANSLAUGHTER BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=41)		
Count	19	22
Percentage*	19	22
No (n=159)		
Count	82	77
Percentage*	81	78

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 1.33 (p=.5137)

TABLE 38

INVOLUNTARY MANSLAUGHTER BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=15)		
Count	2	13
Percentage*	3	13
No (n=185)		
Count	99	86
Percentage*	97	87

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 9.93 (p=.0070)

TABLE 39

LESSER OFFENSE BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=7)		
Count	4	3
Percentage*	4	3
No (n=193)		
Count	97	96
Percentage*	96	97

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 1.10 (p=.5759)

TABLE 40

ACQUITTAL BY ECONOMIC STATUS

	Indigent (n=101)	NonIndigent (n=99)
Yes (n=25)		
Count	6	19
Percentage*	6	19
No (n=175)		
Count	95	80
Percentage*	94	81

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 9.00 (p=.0111)

TABLE 41

SENTENCE OUTCOMES BY ECONOMIC STATUS (n = 173)

	I <-1 years (n=14)	II 1-2 years (n=41)	III 2-10 years (n=22)	IV 10 years-Life (n=41)	V Life (n=49)	VI Death (n=6)
Indigent (n=94)						
Count	4	19	9	26	31	5
Percentage*	4	20	10	28	33	5
Nonindigent (n=79)						
Count	10	22	13	15	18	1
Percentage*	13	28	16	19	23	1

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Sentence with Economic Status was p=.0030.

Criminal History

Dispositional Level and Prior Bad Acts

The existence of prior bad acts in a defendant's life may be considered a legal or nonlegal factor, depending on process perspective. "Priors" often are used as a tool by the prosecution to force a plea settlement, even though they may not qualify as evidence that could come forward at trial. Under the rules of evidence a jury may or may not be allowed to hear about prior acts, given the facts of a particular case. A judge may or may not consider prior bad acts when sentencing a defendant. However, a jury probably considers them when deliberating the question of life or death in a capital case.

Prior Bad Acts and Levels of Disposition

Tables 42-48 represent the significance of prior bad acts relative to outcomes for the firearm-homicide defendants in East Tennessee. Predictably, there were significant differences between the two groups overall ($p=.0044$), and at the individual levels of police ($p=.0505$) and jury ($p=.0092$) disposition. Those with prior bad acts were more likely to be charged and to be treated differently at trial.

TABLE 42

LEVELS OF DISPOSITION BY PRIOR BAD ACTS (n = 239)

	I Police (n=19)	II Preliminary (n=10)	III Grand Jury (n=9)	IV Pretrial (n=8)	V Plea (n=75)	VI Jury (n=118)
Prior Bad Acts (n=80)						
Count	2	3	4	0	22	49
Percentage*	2	4	5	0	28	61
No Prior Acts (n=159						
Count	17	7	5	8	53	69
Percentage*	11	4	3	5	33	44

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Disposition Level with Prior Bad Acts was p=.0044.

TABLE 43

LEVEL I (n=239): POLICE DISPOSITION BY PRIOR BAD ACTS

	Acts (n=80)	No Acts (n=159)
Disposition (n=19)		
Count	2	17
Percentage*	2	10
Non-Disposition (n=220)		
Count	78	142
Percentage*	88	90

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = 3.82 (p=.0505)

TABLE 44

LEVEL II (n=220): DISPOSITION AT PRELIMINARY HEARING

BY PRIOR BAD ACTS

	Acts (n=78)	No Acts (n=142)
Disposition (n=10)		
Count	3	7
Percentage*	4	5
Non-Disposition (n=210)		
Count	75	135
Percentage*	96	95

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .000 (p=1.000)

TABLE 45

LEVEL III (n=210): GRAND JURY DISPOSITION

BY PRIOR BAD ACTS

	Acts (n=75)	No Acts (n=135)
Disposition (n=9)		
Count	4	5
Percentage*	5	4
Non-Disposition (n=201)		
Count	71	130
Percentage*	95	96

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .12 (p=.7256)

TABLE 46

LEVEL IV (n=201): PROSECUTORIAL NULLIFICATION OF CHARGES BY PRIOR BAD ACTS

	Acts (n=71)	No Acts (n=130)
Disposition (n=8)		
Count	0	8
Percentage*	0	6
Non-Disposition (n=193)		
Count	71	122
Percentage*	100	94

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = 2.75 (p=.0970)

TABLE 47

LEVEL V (n=193): PROSECUTORIAL DISPOSITION BY PLEA NEGOTIATIONS BY PRIOR BAD ACTS

	Acts (n=71)	No Acts (n=122)
Disposition (n=75)		
Count	22	53
Percentage*	31	43
Non-Disposition (n=118)		
Count	49	69
Percentage*	69	57

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = .84 (p=.3591)

TABLE 48

LEVEL VI (n=239): JURY DISPOSITION BY PRIOR BAD ACTS

	Acts (n=80)	No Acts (n=159)
Disposition (n=118)		
Count	49	69
Percentage*	61	43
Non-Disposition (n=121)		
Count	31	90
Percentage*	39	57

*Percentage reported is for column. (alpha=.05)
Chi-square, with Yates correction = 6.78 (p=.0092)

As a practical matter, defendants with criminal records are the most likely of all defendants to get harsher jury verdicts and, given the test of aggravating versus mitigating circumstances, the death penalty. Indeed, the data indicated that the outcomes for defendants with prior bad acts, as opposed to those with no prior bad acts, were significantly different, as follows:

Verdict and Prior Bad Acts

Overall, there was a significant difference in verdict outcomes between defendants with prior bad acts and defendants with no criminal history ($p = .0000$), as represented by Table 49. Tables 50 through 55 represent Chi-square analysis of the individual verdict outcomes. Those levels at the extremes of Murder I ($p=.0006$) and acquittal ($p=.0455$) indicated statistical significance between the two groups, while the other levels did not.

Sentence and Prior Bad Acts

Here again, overall there was a significant difference in sentence outcomes between those with priors and those without them ($p=.0025$), as indicated by Table 56. At the individual sentence levels, the Chi-square analyses indicated statistical significance at the 1-2

TABLE 49

VERDICT OUTCOMES BY PRIOR BAD ACTS (n = 200)

	I Murder I (n=52)	II Murder II (n=59)	III Voluntary Manslaughter (n=40)	IV Involuntary Manslaughter (n=15)	V Lesser Offense (n=7)	VI Acquittal (n=26)	VII Never Tried (n=1)
Prior Bad Acts (n=72)							
Count	30	21	11	4	2	4	0
Percentage*	42	29	15	6	3	65	0
No Prior Acts (n=128)							
Count	22	38	29	11	5	22	1
Percentage*	17	30	23	8	4	17	1

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Verdict with Prior Bad Acts was p=.0000.
Result of Mann-Whitney comparing Criminal Finding Level I-V with Prior Bad Acts was 0=.0285.

TABLE 50

MURDER I BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=52)		
Count	30	22
Percentage*	42	17
No (n=147)		
Count	42	105
Percentage*	58	83

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 14.70 (p=.0006)

TABLE 51

MURDER II BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=59)		
Count	21	38
Percentage*	29	30
No (n=140)		
Count	51	89
Percentage*	71	70

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = .57 (p=.7491)

TABLE 52

VOLUNTARY MANSLAUGHTER BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=40)		
Count	11	29
Percentage*	15	23
No (n=159)		
Count	61	98
Percentage*	85	77

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 2.20 (p=.3324)

TABLE 53

INVOLUNTARY MANSLAUGHTER BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=15)		
Count	4	11
Percentage*	6	9
No (n=184)		
Count	68	16
Percentage*	94	91

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 1.20 (p=.5481)

TABLE 54

LESSER OFFENSE BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=7)		
Count	2	5
Percentage*	3	4
No (n=192)		
Count	70	122
Percentage*	97	96

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = .74 (p=.6881)

TABLE 55

ACQUITTAL BY PRIOR BAD ACTS

	Acts (n=72)	No Acts (n=127)
Yes (n=26)		
Count	4	22
Percentage*	7	17
No (n=173)		
Count	68	105
Percentage*	93	83

*Percentage reported is for column (alpha=.05)
Chi-square, with Yates correction = 6.17 (p=.0455)

TABLE 56

SENTENCE OUTCOMES BY PRIOR BAD ACTS (n =)

	I >-1 years (n=13)	II 1-2 years (n=41)	III 2-10 years (n=21)	IV 10 years-Life (n=41)	V Life (n=49)	VI Death (n=6)
Prior Bad Acts (n=68)						
Count	5	9	9	14	26	5
Percentage*	7	13	13	21	38	7
No Prior Bad Acts (n=103)						
Count	8	32	12	27	23	1
Percentage*	8	31	12	26	22	1

*Percentage reported is for row. (alpha=.05)
Result of Mann-Whitney comparing overall Level of Sentence with Prior Bad Acts was p=.0025.

years level (p=.0075) and at the mid-level of 10 years to life (p=.0244).

A Finding of Discrimination

It was concluded that there is good reason to believe that the Furman test of discrimination was not met in East Tennessee during 1977-87. The data suggested that defendants of differing race, gender, and economic status were not equally protected by processes of law. Indeed, white, nonindigent females seemed to fair the best when compared with severity of retribution by the state. However this outcome does not suggest the better justice. As a practical matter, the opposite situation may be true.

Summary

If the criminal justice system is based on an assumption of rationality in the relationship between crime and its punishment, and if this assumption is grounded in the belief that government intervention into the lives of the public should be fair and equitable and neither cruel nor inhumane, it follows that there must be objective and uniform standards by which all those who breach the social contract are tried. Especially with death-eligible defendants, there can be no factors other than legal that

distinguish the criminal cases that are pushed forward by the state from those that are not, and those legal standards cannot be applied by whim.

Such was not the case in East Tennessee during 1977-87. Predictably, criminal history played a part in outcome, but there were other influences that shattered the illusion of constitutional justice. In reviewing the criminal prosecution process during that time, the data clearly indicate that defendants of differing race, gender and economic status were not treated equally by the system and that the system itself was whimsical. Prosecutorial discretion was unguided, and extralegal influences compromised and displaced the socially prescribed functions of punishment.

Especially with the issue of proportionality, the Tennessee Supreme Court had little substantial basis for its findings that the death penalty was imposed by the state without arbitrariness or disparate impact or inhumanity. The safeguards of Rule 12 were all but absent. As a result, the court's claim of strict, routine review of all the cases, by some meaningful method, could not be considered valid. Indeed, the death penalty was imposed so infrequently, even for the most heinous crimes, as to be cruel and inhumane per se, according to Furman standards.

These findings challenge the Court's findings in Cooper (1992), in that they give straightforward evidence that in the absence of both prosecutorial standards and meaningful appellate review, there is indeed fertile ground for improper discriminatory practice in a given case.

CHAPTER VI

SUMMARY, CONCLUSIONS AND IMPLICATIONS FOR FURTHER RESEARCH

In 1972, the United States Supreme Court issued a highly controversial decision that held the death penalty to be arbitrary, capricious, discriminatory and inhumane. The Furman case set the benchmarks by which the constitutionality of future capital cases would be evaluated. As a result, the death penalty was abolished across the nation until the states could promulgate standards by which their imposition of capital punishment could meet constitutional muster. Thirty-three states have reinstituted the death penalty, and all but one--Tennessee--have implemented it.

A number of scholarly works have investigated the disparate impact of various factors on capital punishment. Particular attention has been paid to the issue of race. But most studies have been product rather than process oriented. They have analyzed the demographics of those who have received death rather than the demographics of those who have not. Also, they have focused on the states of the Furman decision (Georgia and Texas), with little attention paid to contiguous states, such as Tennessee.

The purpose of this study was to determine whether Tennessee's prosecution of capital defendants is constitutional and socially just. Its intent was to add to the social work literature, because there is a lack of knowledge about the state-imposed death. Also, it seemed important that a profession which claims to be intimately involved with the tensions between individual and social justice have information about the very process in which those two values could most violently clash.

The conceptual framework for the research had three aspects: First, a decision-tree was constructed to represent the flow of legal decision-making in the state's prosecution of defendants in death-eligible offenses. Then the actual outcomes of a sample of 300 defendants in firearm-homicide cases from 1977-1987 were followed from the initial homicide to the punishment of the defendant. The results were overlaid on the decision points of the tree and the probabilities of the defendants exiting the system at a given decision point were determined. The data were then analyzed according to Furman standards to determine whether there were significant differences in outcome for those of differing race, gender, economic status, criminal history and county of case disposition.

If legal standards were not routinely and equally applied to all cases, irrespective of extralegal factors, and if the differences among groups were statistically

significant, the process was assumed to have been discriminatory and capricious. Further, it was assumed that if the outcome of capital punishment was extraordinary, even for the most heinous crimes, then its imposition per se was cruel and inhumane.

Gathering the data was tedious, because Tennessee has no uniform system of crime/outcome data collection, and available data were incomplete and unreliable. Each case had to be followed through all levels of local prosecution to the appeal stage--a process that took several years--to ensure the integrity of the sample. A major constraint was the dogged gatekeeping of police agencies.

No one factor proved to be more significant than any other among the personal variables being tested. A stepwise regression indicated that prior bad acts was the most influential of the factors, but even it was accounted for only 3% of the total effort. Race was not the overriding factor, as studies in other states had held. Something else, or a combination of factors, was more important in explaining the outcomes.

The Impact of Local Justice

There appeared to be a combination of legal and extralegal factors that combined to form a systematic bias

that is best termed "local justice", wherein the county of prosecution was important.

The county data (as shown in Appendix C) suggested a scatter of outcomes across East Tennessee, not subject to formal statistical analysis, wherein unbridled prosecutorial discretion seemed to be an important factor.

Also, there seemed to be a tactic acceptance of violence, in both rural and urban counties reflecting a concept of justice, that reinforced the findings of Brearly (1932), Wolfgang (1975), and Ayers (1984), holding that the value of human life does not outrank the value of defending one's honor. Indeed, an informal qualitative analysis of the cases was fascinating, not so much for the myriad of reasons folks killed one another, but because killing per se was the routine way of proving the point.

Then there was the political perspective: Local justice reflected local politics. Judges and district attorneys generally are elected to their positions, and their staffs are employed by them for only so long as they hold office. The smaller counties are grouped into jurisdictions that are served by "circuit-riding" prosecutors and judges, while the larger counties are singly-served. It was not surprising, therefore, to find that discretionary outcomes varied with locale--not only from prosecutor to prosecutor but also among the several counties in a single prosecutorial district.

And there was the influence of pragmatism. Limited resources influenced decision-making at all levels. Police and prosecutors agreed that as a practical matter, a case is worth not so much what the law prescribes as what the odds are of getting a conviction. Their informal cost-benefit analysis must have included some combination of all the factors of this study, plus those of current caseload, intensity of investigation and the odds of getting a conviction of this defendant for this homicide in this locale.

Jury justice also was affected by geography. One can only guess at the motivations. But as Spohn and Cederbloom pointed out in 1991, and Zeisel before them in 1966, juries sometimes consider extralegal factors when deliberating weaker or inconsistent cases. They, in effect, "liberate" themselves from the law to get the results they consider just, given the facts of the case.

The data also indicated that, irrespective of the defendants' personal demographics or the heinousness of their crimes, East Tennessee juries were reluctant to impose death. Indeed, in the population of 5,444 homicides in all of Tennessee during 1977-1987, only 28 of the 94 counties where homicides occurred, imposed death. Nine of them were in the East Tennessee Grand Division.

The finding agrees with those of Murrell in his 1987 study of Maryland death sentencing patterns. He found

that the single most important factor in determining who receives the death penalty was prosecutorial discretion, a result which assumedly is based on some combination of factors, from local politics to population demographics.

The findings also compare favorably with those of Radelet and Vandiver (1986) who reviewed their earlier study of Florida capital cases and reversed themselves by deciding that perhaps the problem with the death penalty was not so much conscious racism as it was some inherent bias in the structure of the criminal justice system itself. The findings disagree somewhat with those earlier reported by Wolfgang and Riedel (1973, 1975) that found race to be the single most important factor in discretionary death sentencing.

Finally, there was the issue of economics. In this study the criterion for indigency was whether the defendant was qualified by state statute to receive appointed counsel. That being the case, it followed that the outcomes for differences in economic status were closely related to those resulting from the effect of retained or appointed counsel. Thus a possible collateral finding was that significant difference in verdict and sentence outcomes between indigent and non-indigent defendants were also true for those who had retained counsel and those who had appointed counsel. Defendants with retained counsel possibly benefited from better plea negotiations.

None of these factors were addressed, much less corrected, by the Supreme Court's Rule 12 protocol. Indeed, that alleged safeguard was all but nonexistent. There was good evidence, albeit by omission, that the justices based their decisions on pragmatism rather than on fact.

Clearly, more research is needed to gain a true understanding of the outcomes. To do less would overestimate the bias of racial or other demographic variables and underestimate the impact of local concepts of justice.

As a practical matter, the subtleties of racism, sexism and economic discrimination always will influence human decision-making; and, given local mores and folkways, it is unlikely that county differences will be regularized. Southern political posturing probably always will demand the statutory retribution of death, even though capital punishment, in fact, has not happened in Tennessee.

There is much more research needed, but immediate solutions must come from within the system that ensures the integrity of the process. The responsibility lies with the state Supreme Court, which is responsible for assuring that law is applied to all citizens through processes that are socially just and fundamentally fair.

Therefore, it is the Court who must promulgate the standards by which the outputs of the system are measured.

The tenets of social justice should not be impaired by law; rather law should potentiate them. Nowhere is the issue more important than with state-imposed death, for it has the greatest potential for irreparable harm. If the Court already has established its Rule 12 as a means by which the criminal justice system's constitutional compliance allegedly is ensured, it seems reasonable to amend that method to accomplish the task.

Once a uniform system of data maintenance is established throughout the state, a redesigned Rule 12 protocol would engender meaningful review. The protocol should be accompanied by rules of procedure that assure continuing data collection by the lower courts and meaningful review by the higher court. Accordingly, the following suggestions, based on appropriate research are offered:

1. The protocol should be simplified to ensure that data will be complete and easily collected and analyzed for the purposes contemplated by the Court. A cursory review of the present form suggests that the new length could be no more than 2 pages, and that the requested data could be retrieved more easily from already overburdened judges if it were in checklist form. The simplified form would provide for standardized data that relate directly to the issues and are amenable to quantitative analysis.

Random qualitative review of cases throughout the state would ensure that substance is not sacrificed to form.

2. All cases that are death-eligible should be reviewed, not just those that receive a verdict of Murder I. Impermissible discrimination and arbitrariness happen long before defendants get to the criminal trial level. By the time a defendant gets to death row, the concept of any meaningful review is moot.

3. The rule should be amended to include a procedure for enforcement of the data collection. Without exception, for every Murder I conviction, there should be a Rule 12 protocol filed with the court.

4. Analysis of the protocol data should be based on clear intent. Operational definitions should be included to specify the standards by which results are measured. Inherent in this concept are quantitative benchmarks.

5. Statistical techniques used to analyze the data should be selected both for their ease in understanding and for the straightforward answers they provide. A pattern of quantitative inequities would necessitate further qualitative investigation, using the case study method.

To the extent that the law guides and monitors human decision-making, the information gathered from the suggested changes would help the court correct present disparities in the state's prosecution of homicide

defendants. Also, the court's claim of reliable proportionality review pertaining to the death penalty would be validated and the tenets of social justice--at least in one area of law--would no longer be insulted.

In sum, the justices must back their holdings with fact. It is not enough merely to state that a process is just; there must be reliable proof. Indeed, a basic tenet of criminal law is that a conviction must be supported by proof beyond a reasonable doubt. Surely, the court can base its affirmation of capital punishment on no lower a standard.

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APPENDICES

APPENDIX A

TENNESSEE EXECUTIONS FROM 1909, WHEN OFFICIAL RECORD-KEEPING BEGAN, TO 1960, WHEN STATE EXECUTION LAST OCCURRED

NAME	RACE	AGE	DATE OF EXECUTION	OFFENSE	COUNTY
Mitchell, William	W	42	10/01/1909	M	Rutherford
Palmer, Cecil	B	--	10/01/1909	Ra	Wilson
Byrom, C. F.	W	53	03/15/1911	M	Wilson
Kinnon, Tom	B	--	01/13/1912	Ra	Haywood
Bailey, John	W	--	07/26/1912	M	Decatur
Shelton, George	W	--	07/26/1912	M	Decatur
Rose, George	W	70	08/26/1912	M	McMinn
Dunlap, Sidney	B	--	09/04/1912	Ra	Fayette
Temples, Leo	B	17	12/19/1912	Ra	Shelby
Morgan, Julius	B	--	07/16/1916	Ra	Dyer
Williams, J. D.	B	--	07/08/1918	Ra	Giles
Alsup, Eddie	B	--	07/08/1918	Ra	Giles
Ewing, Frank	B	--	05/21/1919	Ra	Davidson
Walker, Winifred	B	--	01/08/1920	Ra	Jefferson
Young, Lorenzo	B	--	09/03/1920	M	Shelby
Jackson, Cyrenus	B	18	08/03/1921	M	Hamilton
Neal, Taylor	B	19	08/03/1921	M	Hamilton
Graham, Chesley	B	--	08/17/1921	M	Hardin
Allen, Will	B	--	08/17/1921	M	Hardin
Goshton, Hamp	B	--	08/17/1921	M	Shelby
Green, John	W	--	02/17/1922	M	Washington
Fields, Asbury	W	47	02/18/1922	M	Bradley
Stephens, Otto	W	--	03/01/1922	M	Anderson
Petree, Charles	W	23	03/01/1922	M	Anderson
McClure, John B.	W	26	03/01/1922	M	Anderson
Christmas, Tom	W	26	03/01/1922	M	Anderson
Mays, Maurice	B	--	03/15/1922	M	Knox
Bunch, Granville	W	--	04/11/1922	M	Anderson
Dwight, William	B	18	07/25/1922	M	Hamilton
McElroy, Jim	W	--	08/15/1922	M	Roane
Harris, Austin	B	--	01/14/1922	M	Madison
Burchfield, Ben	W	44	01/14/1925	M	Sullivan
Tate, Robert	W	26	11/05/1925	M	Marion
Barr, Charley	B	26	11/05/1926	M	Marion
Webb, John Franklin	B	--	05/20/1927	Ra	Shelby
Wallace, John Henry	B	37	05/25/1927	M	Rutherford
Coggins, Herman	W	29	11/10/1927	Ra	Davidson
Fowler, Ben	B	--	01/25/1928	M	Scott
Terrell, Will	B	22	06/19/1928	Ra	Davidson
Brown, Henry	B	--	08/22/1928	Ra	Davidson
Jones, John	B	--	02/14/1930	M	Roane
Gunn, Carey	B	21	02/14/1930	Ra	Hardeman
Harris, Theodore J.	B	22	01/27/1931	M	Knox

NAME	RACE	AGE	DATE OF EXECUTION	OFFENSE	COUNTY
Shaw, John T.	B	--	07/03/1933	M	Davidson
Bevins, Oscar	B	25	09/07/1933	Ra	Hamilton
Wilcoxen, Andrew	B	26	09/07/1933	Ra	Hamilton
Jones, Willie	B	24	10/30/1933	M	Shelby
Emory, Joe	B	39	02/05/1934	M	Knox
Swann, James	B	20	02/05/1934	M	Knox
Allen, Jim	B	21	01/05/1934	M	Knox
Fain, Lewis	B	--	02/26/1934	M	Knox
Smith, Percy	B	--	04/04/1934	Ra	Shelby
Graham, Jasper	B	--	04/04/1934	Ra	Shelby
Mays, Frank	B	--	04/04/1934	Ra	Shelby
Deal, John	B	31	09/15/1934	M	Shelby
Pillow, James	B	--	09/15/1934	M	Shelby
Lee, Bill	W	24	01/21/1936	M	Monroe
Kennedy, Walter	W	18	01/21/1936	M	Anderson
Willis, Louis	B	27	01/28/1936	M	Davidson
Womack, Ernest	B	18	04/10/1936	M	Warren
Smith, James	B	27	08/14/1936	M	Lincoln
Ballard, Curley	B	56	08/14/1936	M	Sullivan
Clark, James	B	23	08/14/1936	M	Shelby
Harris, Ernest K.	B	23	05/22/1936	Ra	Bedford
Barrett, Elmer	B	22	11/18/1936	M	Knox
Taylor, James	B	25	03/15/1937	Ra	Davidson
Berry, Anderson	B	--	03/17/1937	M	Lincoln
Franklin, Tom	B	20	03/18/1937	M	Davidson
McCoig, Gus	W	25	04/08/1937	M	Union
Eatmon, Ray W.	W	24	04/16/1937	M	Shelby
Dunn, Howard	W	22	04/30/1937	M	Davidson
Farmer, William	W	19	04/30/1937	M	Davidson
Turner, James	B	25	08/05/1937	M	Shelby
Parrish, Jimmie Lee	B	35	08/09/1937	Awira	Davidson
Ritchie, Fred	W	32	09/10/1937	Awira	Davidson
McKinney, Gus	B	19	04/15/1938	M	Shelby
Mosby, Arthur	B	--	07/25/1938	M	Shelby
Stanley, Ernest	B	--	01/10/1939	M	Morgan
Tollett, White Miller	W	28	01/11/1939	M	Carter
Johnson, Herman	B	22	03/28/1939	M	Davidson
Murray, Frank	B	19	03/28/1939	M	Davidson
Evans, Harley	W	--	03/28/1939	M	Fentress
Harris, Hubert	B	22	04/04/1939	M	Davidson
Martin, J. O.	W	43	04/10/1939	M	Shelby
McKay, Joe	B	--	04/10/1939	M	Shelby
Smith, Willie James	B	--	04/10/1939	M	Shelby
Williams, Willie	B	33	04/15/1939	M	Davidson

NAME	RACE	AGE	DATE OF EXECUTION	OFFENSE	COUNTY
Wills, Clyde	W	29	01/10/1940	Ra	Knox
Mobley, C. C.	B	35	03/15/1940	Ra	Shelby
Nelson, William Henry	W	44	09/04/1940	M	Dyer
Goodin, James	B	--	09/04/1940	M	Shelby
Gilmore, Van	B	31	04/18/1941	Ra	Shelby
Reed, Walter	B	55	07/18/1941	M	Hamilton
Cole, Carl	B	19	07/24/1941	M	Madison
Porter, Lee Willie	B	21	07/24/1941	M	Madison
West, Lawrence	B	--	07/30/1941	M	Montgomery
Walden, Roy	W	36	02/13/1942	Ra	Knox
Dixon, Ernest	W	23	02/14/1942	Ra	Knox
Dockary, John	W	20	02/14/1942	Ra	Knox
Goode, John Henry	B	--	03/20/1942	M	Shelby
May, Clarence	W	33	03/20/1942	M	Polk
Hedden, William	W	44	03/30/1943	M	Polk
Cannon, Robert	B	27	03/30/1943	M	Shelby
Spigner, Marshall	W	40	07/15/1943	M	Shelby
Tucker, James F.	W	29	07/15/1943	M	Davidson
Arwood, Clyde	W	24	08/14/1943	M	Fed
Hall, Robert	B	50	12/15/1943	M	Hamilton
Hambrick, George	B	--	04/24/1945	M	Davidson
Dixon, Billy	B	--	07/18/1945	Ra	Montgomery
Walker, Thomas	B	33	03/01/1946	M	Shelby
Outlaw, Johnnie	B	27	03/01/1946	M	Shelby
Douglas, George	B	20	07/05/1946	Ra	Shelby
Luffman, John II.	W	--	08/30/1946	M	Stewart
Hicks, Alvin	W	21	08/30/1946	M	Stewart
Duboise, Albert	W	--	04/11/1947	M	Rutherford
Hodge, John Jr.	B	28	06/19/1947	Ra	Davidson
Jackson, Fred	B	18	08/11/1947	M	Shelby
Sandusky, James	W	20	04/22/1948	M	Hickman
Kelley, John	W	21	04/22/1948	M	Hickman
Turner, W. J. C.	B	21	08/31/1948	Ra	Davidson
Scribner, James	B	25	08/31/1948	Ra	Davidson
Taylor, Tommy Howard	B	--	08/31/1948	Ra	Davidson
Thompson, Barney	B	29	02/17/1949	M	Bradley
Watson, Bruce E.	B	25	06/10/1049	Ra	Shelby
Lacy, Paul	B	28	11/15/1949	M	Maury
Steele, Clyde	B	21	01/24/1950	Ra	Knox
Voss, Samuel T.	B	29	04/15/1955	M	Davidson
Kirkendall, Harry	B	--	08/01/1955	M	Wilson
Sullins, Charlie	W	34	08/01/1955	M	Wilson
Crenshaw, Robert	B	41	09/15/1955	Ra	Davidson
Gibs, Billy Thomas	W	--	05/06/1957	M	Coffee

NAME	RACE	AGE	DATE OF EXECUTION	OFFENSE	COUNTY
Allen, Jimmy	B	36	03/15/1957	M	Davidson
Rutledge, Tom	W	--	06/15/1959	M	Warren
Tines, William	B	--	11/07/1960	Ra	Knox

M: Murder
Ra: Rape
Awira: Assault with intent to rape

Source: Tennessee Association of Criminal Defense Lawyers, Nashville, 1984.

APPENDIX B

SAMPLE OF RULE 12 PROTOCOL PRESENTLY USED BY TENNESSEE SUPREME COURT

IN THE _____ COURT OF _____ COUNTY, TENNESSEE

STATE OF TENNESSEE

vs.

_____
(Defendant)

Case No. _____

Sentence of Death ( )
or
Life Imprisonment ( )

A. DATA CONCERNING THE TRIAL OF THE OFFENSE

1. Brief summary of the facts of the homicide, including the means used to cause death:

_____

_____

_____

_____

_____

2. How did the defendant plead? Guilty ( ) Not guilty ( )
3. Was guilt determined with or without a jury? With ( ) Without ( )
4. Separate Offenses:
   a. Were other offenses tried in the same trial? Yes ( ) No ( )
   b. If yes, list those offenses, disposition and punishment:

_____

_____

_____

5. Co-Defendants:
   a. Were there any co-defendants in the trial Yes ( ) No ( )
   b. If yes, what conviction and sentence were imposed on the co-defendants?

_____

_____

_____

   c. Nature of the co-defendants' role in offense:

_____

_____

   d. Any further comments concerning co-defendants:

_____

_____

_____

6. Other Accomplices:
   a. Were there any persons not tried as co-defendants who the evidence showed participated in the commission of the offense with the defendant? Yes ( ) No ( )
   b. If yes, state the nature of their participation, whether any criminal charges have been filed against such persons as a result of their participation and the disposition of such charges, if known:

_____

_____

c. Did the accomplice(s) testify at the defendants trial? Yes ( ) No ( )

7. a. Do you agree with the verdict of the jury as to guilt ? Yes ( ) No ( )
b. If no, explain

---

8. Did the defendant waive jury determination of punishment? Yes ( ) No ( )

9. a. What sentence was impose? Death ( ) Life Imprisonment ( )
b. If life imprisonment, was it imposed as a result of a hung jury? Yes ( ) No ( )

10. Aggravating Circumstances, T.C.A. § 39-2-203(i):
a. Were statutory aggravating circumstances found? Yes ( ) No ( )
b. Which of the following statutory circumstances were instructed and which were found?

	Instructed	Found
1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	( )	( )
2. The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person	( )	( )
3. The defendant knowingly created a great risk of death to two or more persons, other than victim murdered, during his act of murder.		
4. The defendant committed the murder for remuneration or the promise of remuneration , or employed another to commit the murder for remuneration or the promise of remuneration.	( )	( )
5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	( )	( )
6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	( )	( )
7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.	( )	( )
8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from a lawful custody or from a place of lawful confinement.	( )	( )
9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonable should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engage in the performance of his duties.	( )	( )
10. The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.	( )	( )
11. The murder was committed against a national, state, or local popularly elected official, due to tor because of the official's lawful duties or status, and the defendant knew that the victim was such an official.	( )	( )
12. The defendant committed "mass murder" which is defined as the murder of three or more persons within the State of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion as a common scheme or plan.	( )	( )

Relate any significant aspects of the aggravating circumstances that influence the punishment.

---

c. Were the aggravating circumstances found supported by the evidence? Yes ( ) No ( )

11. Mitigating Circumstances, T.C.A. § 39-2-203(j):

a. Were mitigating circumstances in evidence? Yes ( ) No ( )

b. If so, what mitigating circumstances were in evidence?

	Yes	No
(1) The defendant has no signification history of prior criminal activity;	( )	( )
(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	( )	( )
(3) The victim was a participant in the defendant's conduct or consent to the act;	( )	( )
(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;	( )	( )
(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;	( )	( )
(6) The defendant acted under extreme duress or under the substantial domination of another person;	( )	( )
(7) The youth or advanced age or the defendant at the time of the crime;	( )	( )
(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct o the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.	( )	( )
(9) Other (explain):_____	( )	( )

_____

_____

c. Relate any significant facts about the mitigating circumstances that influence the punishment.

_____

_____

d. If tried with a jury, was the jury instructed to consider the circumstances indicated in 11(b) as mitigating circumstances? Yes ( ) No ( )

12. If the sentence was death, doe the evidence show that the defendant killed, attempted to kill or intended that a killing take place or that lethal force be employed? Yes ( ) No ( )

13. Was there evidence that at the time of the offense the defendant was under the influence of narcotics, dangerous drugs or alcohol which actually contributed to the offense? Yes ( ) No ( )

If yes, explain: _____

_____

_____

14. General comments of the trial judge concerning the appropriateness of the sentence imposed in this case (may include consideration of sentences imposed in any similar cases the judge has tried):

_____

_____

_____

_____

B. DATA CONCERNING DEFENDANT

1. Name: _____
   Last First Middle
2. Birth Date: _____
   mo/day/year
3. Sex: _____
4. Marital Status: Never Married ____ Married ____ Divorced ____ Spouse Deceased ____
5. Race: _____

6. Children: Number _____

Ages _____

Other Dependants _____

7. Parents: Father — living? Yes ( ) No ( )
Mother — living? Yes ( ) No ( )

8. Education: Highest Grade or Level Completed: _____

9. Intelligence Level
Low (IQ below 70) _____
Medium (IQ 70 to 100) _____
High (IQ above 100) _____
Not Known _____

10 a. Was a psychiatric or psychological information and/or diagnoses revealed by such evaluation.

_____

_____

_____

_____

11. Brief impression of trial judge as to conduct of defendant at trial and sentencing: _____

_____

_____

12. Prior Work Record of Defendant:

Type of Job	Pay	Dates Held	Reason for termination
a.			
b.			
c.			
d.			

13. Defendant's Military History:

_____

_____

_____

14. a. Does the defendant have a record of prior convictions? Yes ( ) No ( )
b. If yes, list the offenses, the dates of the offense and the sentences imposed:

Offense	Date	Sentence
1.		
2.		
3.		
4.		
5.		
6.		

15. Was the defendant a resident of the community where the homicide occurred? Yes ( ) No ( )
16. Noteworthy physical or mental characteristics or disabilities of defendant:

_____

_____

_____

17. Other significant data about the defendant:

_____

_____

_____

_____

C. DATA CONCERNING VICTIM

1. Describe the relationship between the defendant and the victim (e.g., family member, employer, friend, ect.):

_____

_____

2. Was the victim a resident of the community where the homicide occurred? Yes ( ) No ( )

3. What was the victim's age? _____

4. a. What was the victim's race? _____
   b. Was the victim the same race as defendant? Yes ( ) No ( )

5. a. What was the victim's sex? _____

   b. Was the victim the same sex as defendant? Yes ( ) No ( )

6. Was the victim held hostage during the crime
   Yes – Less than one hour ( )
   Yes – More than one hour ( )
   No ( )

   If yes, give details: _____

   _____

   _____

7. a. Describe the physical harm and/or injuries inflicted on victim:

   _____

   _____

   _____

   b. Was the victim tortured? Yes ( ) No ( )

   c. If yes, state the nature of the torture: _____

   _____

   _____

8. What was the victim's reputation in the community where he or she lived? Good ( ) Bad ( ) Unknown ( )

D. REPRESENTATION OF THE DEFENDANT

1. How many attorneys represented the defendant? _____
   (If more than one counsel served, answer the following questions as to each counsel and attach a copy for each to this report.)

2. Name of counsel: _____

3. Date counsel secured: _____

4. How was counsel secured:
   A. Retained by defendant ( )
   B. Appointed by court ( )
   C. Public Defender ( )

5. If counsel was appointed by court, was it because:
   A. Defendant unable to afford counsel ( )
   B. Defendant refused to secure counsel ( )
   C. Other ( )
   (explain): _____
6. How many years has counsel practiced law?
   A. 0 to 5 ( )
   B. 5 to 10 ( )
   C. over 10 ( )
7. What is the nature of counsel's practice?
   A. Mostly civil ( )
   B. General ( )
   C. Mostly criminal ( )
8. Did counsel serve throughout the trial? Yes ( ) No ( )
9. If not, explain in detail. _____
10. Other significant data about defense representation. _____

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial? Yes ( ) No ( )
2. Did race otherwise appear as an issue in the trial? Yes ( ) No ( )
3. What percentage of the population of your county is the same race as the defendant?
   a. Under 10% ( )
   b. 10% to 25% ( )
   c. 25% to 50% ( )
   d. 50% to 75% ( )
   e. 75% to 90% ( )
   f. over 90% ( )
4. Were members of defendants race presented on the jury? Yes ( ) No ( )
5. a. If not, was there any evidence they were systematically excluded from the jury? Yes ( ) No ( )
   b. If yes, what was the evidence? _____
6. Was there extensive publicity in the community concerning this case Yes ( ) No ( )
7. Was the jury instructed to disregard such publicity? Yes ( ) No ( )
8. Was the jury instructed to avoid any influences of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No ( )
9. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ( ) No ( )
10. If answer is yes, what was the evidence? _____
11. a. Was a change of venue requested? Yes ( ) No ( )
    b. If yes, was it granted? Yes ( ) No ( )

    Reason for change if granted: _____

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense	
2.	Date of arrest	
3.	Date trail began	
4.	Date sentence imposed	
5.	Date post-trial motions ruled on	
6.	Date trial judge's report completed	
*7.	Date received by Supreme Court	
*8.	Date sentence review completed	
*9.	Total elapsed days	
10.	Other	

*To be completed by Supreme Court.

This report was submitted to the defendant's counsel and to the attorney for the state for such comments as either desired to make concerning its factual accuracy.

		D.A.	Defense Counsel
1.	His comments are attached	( )	( )
2.	He stated he had no comments	( )	( )
3.	He has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

Date

Judge, _____
Court of _____ County

APPENDIX C

HOMICIDE CONVICTION DATA BY TENNESSEE COUNTY

1/1/77 - 12/31/87

(East Tennessee Counties in Bold Print)

or Counties of Study

COUNTY	POPULATION**		HOMICIDES		CONVICTIONS+	DEATH++
	White	Non-White	Total*	Firearm		
1. **Anderson**	66,295	3,890	41	29	4	0
2. Bedford	25,862	3,330	25	20	0	0
3. Benton	15,235	339	6	5	2	0
4. **Bledsoe**	9,864	310	12	12	1	0
5. **Blount**	79,527	3,160	49	37	4	0
6. **Bradley**	71,048	3,484	49	33	9	0
7. **Campbell**	38,235	304	40	30	4	0
8. Cannon	10,495	214	12	11	1	0
9. Carroll	25,690	3,507	15	10	6	0
10. **Carter**	51,836	597	26	14	6	1
11. Cheatham	24,850	632	14	11	5	1
12. Chester	12,177	1,483	7	5	1	0
13. **Claiborne**	26,106	402	18	17	1	0
14. Clay	7,754	126	8	7	0	0
15. **Cocke**	29,141	716	43	34	7	1
16. Coffee	38,925	1,799	15	8	3	2
17. Crockett	12,128	3,072	5	4	1	0
18. **Cumberland**	31,394	0	28	21	1	0
19. Davidson	372,500	125,110	1,025	732	95	4
20. Decatur	10,771	517	6	6	2	0
21. Dekalb	14,096	322	8	6	2	0
22. Dickson	31,339	1,896	11	8	0	0
23. Dyer	31,936	4,531	28	17	6	0
24. Fayette	13,974	13,454	24	21	4	0
25. **Fentress**	15,640	0	9	6	1	0
26. Franklin	31,177	2,580	12	10	3	0
27. Gibson	39,853	10,318	26	19	4	0
28. Giles	22,265	3,682	26	20	2	0
29. **Grainger**	17,566	138	14	9	2	0

COUNTY	POPULATION**		HOMICIDES		CONVICTIONS+	DEATH++
	White	Non-White	Total*	Firearm		
30. **Greene**	54,959	1,822	30	22	7	3
31. Grundy	15,905	0	13	13	1	0
32. **Hamblen**	50,355	2,787	37	25	10	0
33. **Hamilton**	239,237	65,655	398	275	70	12
34. **Hancock**	6,985	25	5	5	1	0
35. Hardeman	15,440	9,821	23	16	2	0
36. Hardin	22,634	1,052	25	19	1	0
37. **Hawkins**	46,322	971	14	12	1	0
38. Haywood	10,261	11,335	20	13	1	0
39. Henderson	20,903	2,044	20	14	2	0
40. Henry	26,800	3,401	23	17	0	0
41. Hickman	15,219	898	14	9	4	0
42. Houston	6,873	334	7	6	0	0
43. Humphreys	16,130	744	14	12	6	0
44. Jackson	9,687	0	9	7	1	1
45. **Jefferson**	32,100	1,076	10	7	2	1
46. **Johnson**	14,351	120	6	5	1	0
47. **Knox**	299,538	34,993	351	220	31	6
48. Lake	5,938	1,508	5	3	3	1
49. Lauderdale	18,080	8,899	19	5	1	1
50. Lawrence	35,404	631	13	5	0	0
51. Lewis	11,011	217	4	4	0	0
52. Lincoln	24,380	2,886	19	15	1	0
53. **Loudon**	29,328	502	23	17	2	0
54. **McMinn**	41,741	2,504	32	23	3	0
55. McNairy	22,510	1,740	11	9	0	0
56. Macon	16,958	65	11	11	0	0
57. Madison	54,513	24,993	113	64	11	2
58. Marion	24,627	1,131	24	19	5	1
59. Marshall	18,412	2,166	10	7	1	0

COUNTY	POPULATION**		HOMICIDES		CONVICTIONS+	DEATH++
	White	Non-White	Total*	Firearm		
60. Maury	45,153	9,417	52	48	6	3
61. **Meigs**	8,162	118	14	12	0	0
62. **Monroe**	29,755	970	22	18	4	0
63. Montgomery	75,391	19,833	63	42	17	1
64. Moore	4,789	163	0	0	0	0
65. **Morgan**	17,712	114	31	15	2	1
66. Obion	30,287	3,708	26	16	2	0
67. Overton	18,251	82	8	7	0	0
68. Perry	6,200	166	3	2	1	0
69. **Pickett**	4,643	0	1	1	0	0
70. **Polk**	14,328	0	13	11	1	0
71. Putnam	50,085	1,385	17	10	2	0
72. **Rhea**	23,674	804	17	13	0	0
73. **Roane**	50,038	1,773	36	28	7	0
74. Robertson	35,295	5,580	34	25	7	1
75. Rutherford	84,499	10,143	70	58	13	0
76. **Scott**	21,186	0	16	13	4	0
77. Sequatchie	9,223	46	18	17	2	1
78. **Sevier**	46,924	344	33	21	4	0
79. Shelby	449,839	383,520	1,676	1,220	73	24
80. Smith	15,238	597	10	7	1	1
81. Stewart	8,858	155	4	4	0	0
82. **Sullivan**	145,091	3,371	76	53	24	3
83. Sumner	93,726	6,217	42	29	8	2
84. Tipton	25,985	9,666	26	16	1	0
85. Trousdale	5,689	913	7	6	1	0
86. **Unicoi**	16,533	0	7	5	2	0
87. **Union**	12,779	0	11	6	8	2
88. Van Buren	5,170	0	6	5	1	0
89. Warren	33,728	1,324	30	23	0	0

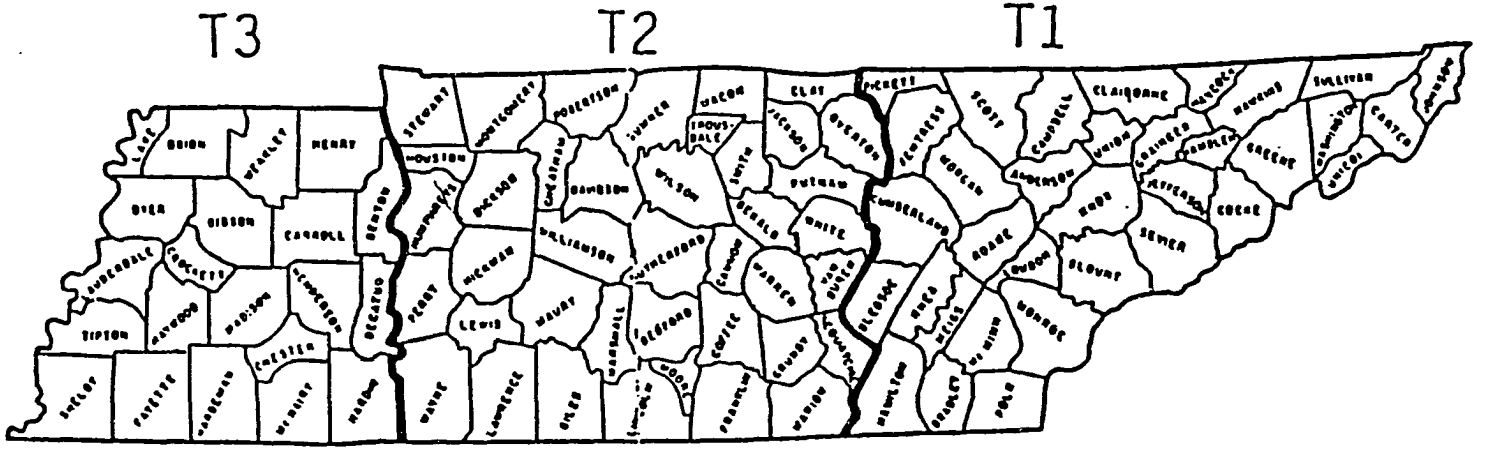
COUNTY	POPULATION**		HOMICIDES		CONVICTIONS+	DEATH++
	White	Non-White	Total*	Firearm		
90. **Washington**	89,573	3,773	56	43	11	5
91. Wayne	14,311	167	11	9	1	0
92. Weakley	31,384	2,277	19	13	3	0
93. White	19,914	510	20	13	3	0
94. Williamson	63,486	5,857	27	22	6	2
95. Wilson	59,005	5,772	37	26	6	0
TOTALS	4,051,439	853,040	5,444	3,898	555	85

Total Homicides: N=5,444 (exclusive of legal intervention and operation of war)
Homicides by Firearm: N=3,898 (71.6%)
Murder I Convictions: N=555 (10%)
Death Penalties: N=85 (15%)
* Source: Tennessee Department of Health and Environment (Est. 7/1/87)
** Source: Tennessee Department of Health and Environment
+ Source: Tennessee Department of Corrections
++ Source: Capital Case Resource Center of Tennessee
East Tennessee Counties in Bold Print

APPENDIX D

TENNESSEE REGIONAL GROUP CODES

TENNESSEE REGIONAL GROUP CODES



HOMICIDE DATA BY GRAND (GEOGRAPHIC) DIVISION

Tennessee (95 counties) 4,051,439	East Tennessee (34 counties) 1,841,689	Middle Tennessee (40 counties) 1,639,000	West Tennessee (21 counties) 1,397,523
Homicides population=5444	1,562 (29%)	1,753 (32%)	2,123 (39%)
Firearm Homicide (39%) population=3898	1,092 (28%)	1,294 (33%)	1,512 (39%)
Percent State Homicides=71.6%	69.6%	73.8%	71.2%

APPENDIX E

DATA COLLECTION FORM AND DEFENDANT CODES

Defendant Information Sheet

County:_____ Police Case #:_____ District:_____

Name:_____ R/A:_____ Age/DOB:_____ M/S:___
Address:_____ Occupation:_____
Other:_____
Prior Bad Acts:_____

_____

Additional Victim Information (Name:)

Address:_____
Occupation:_____ M/S:_____
Other:_____

_____

Critical Stage Path

1. Preliminary Hearing: Judge:_____
D/A(s):_____
Defense:_____ R A
Verdict:_____

2. Indictment:_____

3. Arraignment:_____

4. Criminal Court: Judge:_____
D/A(s):_____
Defense:_____ R A
Trial: Plea___ Verdict:_____
Jury___ Sentence:_____
Rule 12: _____ _____

5. Appeal(s)/Other Notes:_____
_____

Data Codes

I. Incident Status:

Not Research Event = 0
Unsolved = 1
Solved = 2

II. Defendant Demographics:

Race	Gender	Age
White = 1	Male = 1	Age in years
Non-White = 2	Female = 2	

Economic Status	Prior Bad Acts
Indigent = 1	Yes = 1
Non-indigent = 2	No = 2

III. Case Status:

Level of Disposition		Verdict	
Police	= 1	Murder 1	= 1
Preliminary Hearing	= 2	Murder 2	= 2
Grand Jury	= 3	Voluntary Manslaughter	= 3
Pretrial	= 4	Involuntary Manslaughter	= 4
Plea Bargain	= 5	Lesser Offense	= 5
Jury Trial	= 6	Acquittal	= 6
		Untried	= 7

Sentence		Appeal	
0 - 1	= 1	None	= 1
1 - 5	= 2	Affirmed	= 2
5 - 10	= 3	Remanded	= 3
10 - Life	= 4	Reversed	= 4
Life	= 5		
Death	= 6		

IV. Rule 12 Compliance

Yes = 1
No = 2

APPENDIX F

SYNOPSES OF PUBLISHED CASES

Arave v. Creech
___ US ___, 113 S Ct 1534, 123 L Ed 2 188 (1993)

Creech beat and kicked a fellow inmate to death. The sentence of death was based in part on the Idaho statutory aggravating circumstance that by "the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life". Creech was serving life sentences at the time of the killing for other murders. The issue was whether or not the qualifier "utter disregard" met constitutional muster in not being vague and/or overbroad. The Supreme Court held that the Idaho Supreme Court had adopted a limiting construction of "cold and pitiless slayer" that meets constitutional requirements.

Bordenkircher v. Hayes
434 US 357, 98 S Ct 663 (1978)

Hayes was charged with uttering a forged instrument in the amount of $88.30. The prosecutor met with retained counsel to discuss a possible plea agreement. He offered a 5-year sentence if Hayes would agree to plead guilty as charged, and threatened to reindict on a more serious charge is Hayes refused the offer. Hayes refused and was convicted and sentenced to life in prison. The Court held that the course of conduct engaged in by the prosecution was no more than a presentation of the unpleasant alternatives relative to Hayes foregoing trial or facing charges on which he plainly was subject to prosecution. As such, his Due Process rights under the Fourteenth Amendment were not violated.

Commonwealth v. Daniel
210 Pa. Super. 156 (1967)

This case is important because it points up the existence for many years in Pennsylvania law, of gender-based statutes that flew in the face of Equal Protection guaranteed by the Fourteenth Amendment. Women were given indeterminate sentences, as a reasonable approach to rehabilitation, because of their special physiological and psychological make-up. The law also referenced the type women that must be imprisoned and those who could receive a suspended sentence. Further, only male sentences were determined in open court. The law was upheld in the Daniel case; it was many years before justice for women was held to public scrutiny.

Cooper v. State
847 SW2 521 (1992)

Cooper, a former mental patient, was convicted of the murder of his estranged wife. A hearing for post-conviction relief was brought on the basis of ineffective assistance of counsel and abuse of prosecutorial discretion. At issue was the trail court's decision not to require the state to defend its position of requesting the death penalty for a mentally ill defendant. The appeals court upheld the lower court, stating that first a prima facie case for discrimination must be made, before the prosecution can be called to justify their decision. As defense counsel did not present the issue, there was no error. The court went further to say that the mere claim of unbridled discretion is insufficient to support a finding of unconstitutional action by the state.

Furman v. Georgia
408 US 238, 98 S Ct 2726, 33 L Ed 2 346 (1972)

This was a composite case in which the supreme court reviewed three cases involving death sentences: Furman v. Georgia (murder), Jackson v. Georgia (rape) and Branch v. Texas (rape). The five concurring opinions that abolished capital punishment were completely individual in that not one of the Justices joined in the opinion of the other. To aid in the understanding of subsequent decisions in capital cases, all nine opinions are quoted liberally, as follows:

Concurring Opinions

Mr. Justice Douglas Concurring Opinion:

"I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments." [408 U.S. 240]

"The generality of a law influencing capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do or may lead to quite different conclusions."

It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." [408 U.S. 242]

"The words 'cruel and unusual' certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selection and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty--or any

other penalty--selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." [408 U.S. 244-45]

"There is increasing recognition of the fact that the basis theme of equal protection is implicit in 'cruel and unusual' punishments." [408 U.S. 249]

"We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were Black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." [408 U.S. 254]

"In a nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position . . . .

". . . .

"A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that Blacks, those who never went beyond the fifth grade in school, or those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which is the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same."

"Thus these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."

"Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth amendment. . . . Such consequence might be the adding of a mandatory death penalty where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would

otherwise be constitutional is a question I do not reach." [408 U.S. 255-57]

Mr. Justice Brennan Concurring Opinion

Mr. Justice Brennan begins with the premise: "The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible to precise definition." [408 U.S. 258]

In the first part of his opinion he traces historically the Eighth Amendment's evolvement. "Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislators have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the legal principles to be applied by the courts' when a legislatively prescribed punishment is challenged as 'cruel and unusual.' In formulating those constitutional principles, we must avoid the insertion of 'judicial conception[s] of . . . wisdom or propriety,' *Weems v. United States*, 217 U.S., at 379, yet we must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, . . . the Cruel and Unusual Punishments Clause would become, in short, 'little more than good advice.'" [408 U.S. 268-69]

In Part II, Mr. Justice Brennan employs four principles, which he defines, to compile a "test" of what is cruel and unusual punishment: "If a punishment is unusually severe, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes." [408 U.S. 282]

In Part III, Mr. Justice Brennan arrives at the answer that "under these principles and this test, death is today a 'cruel and unusual' punishment." And "in sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether punishment comports with human dignity. Death, quite simply, does not." [408 U.S. 305]

Mr. Justice Stewart Concurring Opinion

Noting the reason why other Justices (at least Justices Brennan and Marshall) have concluded the death

penalty is unconstitutional, Mr. Justice Stewart finds it unnecessary to reach the ultimate question they decided. And, since other Justices have traced the historical aspects of the Eighth Amendment, he states: "[W]hat I have to say can, therefore, be briefly stated.

"Legislatures--state and federal--have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a spy for the enemy in time of war shall be put to death. The Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder. Massachusetts has passed a law imposing the death penalty upon anyone convicted of murder in the commission of forcible rape. An Ohio law imposes the mandatory penalty of death upon the assassin of the President of the United States or the Governor of a State."

"If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature--state or federal--could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence."

"On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. . . ."

"The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. In a word, neither State has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As Mr. Justice White so tellingly puts it, the 'legislative will is not frustrated if the penalty is never imposed.' . . .

"Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson v. California*. . . . In the first place, it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in

kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States*. . . . In the second place, it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone."

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. See *McLaughlin v. Florida*. . . . But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

"For these reasons I concur in the judgments of the Court." [408 U.S. 307-10]

Mr. Justice White Concurring Opinion

"The facial constitutionality of statutes requiring the imposition of the death penalty for first degree murder, for more narrowly defined categories of murder or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgment, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided."

"The narrower question to which I address myself concerns the constitutionality of capital punishment statues under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed) but delegates to judge or juries the decision as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context

that we must consider whether the execution of these petitioners violates the Eighth Amendment."

". . . . [C]ommon sense and experience tells us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."

"The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

"It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statues involved in these cases. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."

". . . . I can do no more than state a conclusion . . . that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful bias for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries--a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence--has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."

". . . ."

". . . [P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime.

Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment." [408 U.S. 310-14]

Mr. Justice Marshall Concurring Opinion

"The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our self-respect' and, therefore, violative of the Eighth Amendment." [408 U.S. 358]

Mr. Justice Marshall turns first to a historical analysis, concluding: "Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments." He then turns to the case law for meaning of the term "cruel." In the third part of his opinion he finds the meaning of "cruel' and "unusual" changed. "Thus, a penalty which was permissible at one time in our Nation's history is not necessarily permissible today."

In the fourth part of his opinion he concludes the death penalty is excessive and unnecessary punishment (cruelty) and has no rational basis, discussing six conceivable purposes and finding them not to justify the death penalty, i.e., "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy." In the fifth part of his opinion he notes: "In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history." [408 U.S. 360]

Dissenting Opinions

Mr. Chief Justice Burger Dissenting Opinion

The Chief Justice (joined by the other dissenting Justices) first interprets the opinions of the majority: "At the outset it is important to note that only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. Mr. Justice Douglas has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty. . . ."

"Mr. Justice Stewart and Mr. Justice White have concluded that petitioners' death sentences must be set aside because prevailing sentencing practices do not comply with the Eighth Amendment." {408 U.S. 375] He then, in four parts, concludes, in answer to Justices Brennan, Marshall and Douglas, that the constitutional

prohibition against "cruel and unusual punishments" cannot be construed to bar the death penalty.

In Part V the Chief Justice explains why he feels the opinions of Justices Stewart and White are fundamental misconceptions of the nature of the Eighth Amendment guarantee. His interpretation of these opinions (which he then answers) is as follows: "Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. The actual scope of the Court's rulings, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past. . . ."

". . . ."

"The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is not as evidence of society's abhorrence of capital punishment--the inference that petitioners would have the Court draw--but as the earmark of a deteriorated system of sentencing. It is not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion."

". . . ."

". . . . The decisive grievance of the opinions--not translated into Eighth Amendment terms--is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die; but that the selection process has followed no rational pattern. . . . The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument." [408 U.S. 396-99]

"While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling

by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised of the crimes more meticulously defined, the result cannot be detrimental." [408 U.S. 400-01]

He concludes in the sixth part of his opinion that "since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo." Judicial limits should be recognized and "some room" should be left for "legislative judgment."

Mr. Justice Blackmun Dissenting Opinion

Mr. Justice Blackmun joins the respective opinions of the other dissenting Justices and adds "somewhat personal, comments." He points out his abhorrence for the death penalty, emphasizing that as a legislator he would vote against the death penalty. In an interpretation of one majority opinion, he states: "If the reservations expressed by my Brother Stewart (which, as I read his opinion, my Brother White shares) were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes stricken down today will be reenacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be." [408 U.S. 413] He finds this approach regressive. He concludes: "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, or law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end." [408 U.S. 414]

Mr. Justice Powell Dissenting Opinion

Mr. Justice Powell, joined by the other dissenting Justices, interprets the majority as follows: "Mr. Justice Douglas concludes that capital punishment is incompatible with notions of 'equal protection' that he finds to be 'implicit' in the Eighth Amendment. . . . Mr. Justice Brennan bases his judgment primarily on the thesis that the penalty 'does not comport with human dignity.' . . . Mr. Justice Stewart concludes that the penalty is applied in a 'wanton' and 'freakish' manner. . . . For Mr. Justice White it is the 'infrequency' with which the penalty is imposed that renders it unconstitutional. . . . Mr. Justice Marshall finds that capital punishment is an impermissible form of punishment because it is 'morally unacceptable' and 'excessive.' . . .

"Although the central theme of petitioners' presentations in these cases is that the imposition of the death penalty is *per se* unconstitutional, only two of today's opinions explicitly conclude that so sweeping a determination is mandated by the Constitution. Both Mr. Justice Brennan and Mr. Justice Marshall call for the abolition of all existing state and federal capital punishment statutes." [408 U.S. 415]

He points to the importance of the decision and that its visible consequences include removing the death sentences of some 600 persons and barring the seeking of the death penalty "at least for the present." "Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint and--most importantly--separation of powers." [408 U.S. 417] He details opinions in previous decisions of the Court, dwelling basically on the rejection of *stare decisis* and separation of powers.

Mr. Justice Rehnquist Dissenting Opinion

Mr. Justice Rehnquist is joined in his dissent by the other dissenting Justices. He points to Justices Douglas, Brennan and Marshall as invalidating the laws enacted by Congress and 40 of the 50 state legislatures with Justices Stewart and White joining in the judgment in these cases. "For the reasons well stated in the opinions of The Chief Justice, Mr. Justice Powell, and Mr. Justice Blackmun, I conclude that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will." [408 U.S. 468]

Gideon v. Wainwright
372 US 335, 9 L Ed 2 799, 83 S Ct 792 (1963)

Gideon was charged with a felony but was denied appointed counsel, because under Florida law only indigents charged with capital offenses were allowed counsel at state expense. The Court held that the guarantees in the Bill of Rights are fundamental safeguards of liberty that are immune from federal abridgement, are equally protected from state abridgement by the Due Process clause of the Fourteenth Amendment. Thus appointment of counsel is fundamental and essential to a fair trial.

Gregg v. Georgia
428 US 152, 96 S Ct 2621, 49 L Ed 2 859 (1976)

Gregg was convicted of armed robbery and murder. The Georgia Supreme Court affirmed the death penalties for the two murder convictions and reversed the two death penalties for the two armed robberies, because it found death

seldom imposed for robbery and therefore cruel and inhuman by Furman standards. The US Supreme Court affirmed the state court, reiterating its stand that capital punishment is not cruel and inhuman per se, and is permissible so long as imposed according to clear and unambiguous state guidelines.

Griggs v. Duke Power
401 US 424, 91 S Ct 849 (1971)

Black employees of Duke Power Company brought a class action alleging their employer violated the Civil Rights Act of 1964, by requiring a high school diploma and a satisfactory intelligence test score for certain jobs previously limited to white employees, so as to preserve the effects of past racial discrimination. The Supreme Court's decision in this case set the standard for disparate impact--a concept that is the basis of most discrimination in employment lawsuits today--as follows: An employer is prohibited from requiring as a condition of employment, transfer or promotion, any test that is (1) shown to be significantly related to successful job performance, (2) operates to disqualify one class at a substantially higher rate than those not in the class, and (3) the jobs in question formerly had been filled by only one class as part of a long practice of giving preference to them.

McKleskey v. Kemp
481 US 279, 95 L Ed 2 262, 107 S Ct 1756 (1987)

Because the McKleskey case is so important to this study, it is liberally quoted, as follows:

Justice Powell delivered the opinion of the Court.

"This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioners McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." [481 U.S. 282-83]

McCleskey was convicted of murder and the death penalty was imposed by the jury on the basis of two statutory aggravating circumstances, i.e., the murder was (1) committed in the course of an armed robbery, and (2) the victim was a peace officer engaged in the performance of his duties. No mitigating circumstances were offered.

Racial Discrimination

McCleskey's claim is that, based upon statistics, rape has infected the administration of Georgia's statute and thus violates the Equal Protection Clause of the

Fourteenth Amendment, i.e., that persons who murder whites and black murderers are more likely to be sentenced to death than persons who murder blacks and white murderers.

"Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful determination'." [481 U.S. 292]

". . .[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. . . ."

"Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. . . . Moreover, absent for stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."

"Finally, McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system. . . . Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsel against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." [481 U.S. 394-97]

Discriminatory Purpose?

The Court also rejects the contention that the Baldus study proves the State as a whole acted with a discriminatory purpose. "For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of*

an anticipated racially discriminatory effect." [481 U.S. 298]

". . . . [W]e will not infer a discriminatory purpose on the part of the State of Georgia." [481 U.S. 299]

"In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, State cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant."

"In light of our precedents under the Eighth Amendment, McCleskey cannot argue successfully that his sentence is 'disproportionate to the crime in the traditional sense.' . . .

"On the other hand, he cannot base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty. . . ."

"On the other hand, absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. . . .

"Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,'. . . , we lawfully may presume that McCleskey's death sentence was not "wantonly and freakishly' imposed, . . . , and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment." [481 U.S. 305-08]

"At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.' . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias

in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process." [481 U.S. 312-13]

Conclusion

". . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could--at least in theory--be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.' . . .

"Second, McCleksey's arguments are best presented to the legislative bodies. It is not the responsibility--or indeed even the right--of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'" [481 U.S. 315-19]

Dissenting Opinions

Justice Brennan, joined by Justice Marshall, and also by Justices Blackmun and Stevens except as to the continuing opinion of Justices Brennan and Marshall that the death penalty is cruel and unusual punishment, dissented.

Justice Blackmun, joined by Justices Marshall and Stevens and all but in Part IV-B by Justice Brennan, dissented. "I am disappointed with the Court's action not only because of its denial of constitutional guarantees to petitioner McCleskey individually, but also because of its departure from what seems to me to be well-developed constitutional jurisprudence.

Justice Brennan has thoroughly demonstrated, . . . , that, if one assumes that the statistical evidence presented by petitioner McCleksey is valid, as we must in light of the Court of Appeals' assumption, there exists in the Georgia capital-sentencing scheme a risk of racially based discrimination that is so acute that it violates the Eighth Amendment."

Justice Stevens, joined by Justice Blackmun, dissented. "One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia wee to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." He believes the Court of Appeals must decide whether the Baldus study is valid, although he is persuaded that it is.

Neeley v. State
63 Tenn 174 (1874)

Neeley was denied a jury trial of his issue because of a state statute requiring that the losing party in all civil suits be taxed with jury fees which he could not afford. The Tennessee Supreme Court held that the Bill of Rights guarantees the right of trial by jury, and that any statute which operates as an attack upon the integrity of jury trials is, therefore, null and void.

State v. Black
815 SW2 166 (1991)

Black murdered his girlfriend and her two children. After weighing all the aggravating and mitigating circumstances, the jury decided to impose the death penalty for the murder of the minor child only. Among the issues brought on appeal was jury meddling forbidden by the Tennessee Constitution. Black argued that the state statute regularizing jury decision-making in capital sentencing does just that. The Court discounted the issue as one not contemplated by the constitution and let the sentence stand.

State v. Mack Brown
836 SW2 530 (1992)

Brown, a mentally retarded defendant, was convicted of the first degree murder of his four-year-old son. Evidence was presented that the child died as a result of his father's physically abusive behavior when the child would not behave. The conviction was reversed on the issue of premeditation. The Court held that while no specific time is required for the requisite of premeditation to be met, it cannot be formed in an instant, as it requires ". . . time to reflect, a lack of impulse, and . . . cool purpose."

State v. Middlebrooks
840 SW2 317 (1993), cert. denied.

Middlebrooks was convicted of felony-murder in the torture-slaying of a man he had kidnaped. The jury convicted him of murder and then used the kidnaping as justification for the death penalty. The court held that using the kidnaping to justify both first-degree murder and death was an unconstitutional duplication--i.e.: that felony-murder by itself is not punishable by the death penalty.

State v. Willie Sparks
S Ct of TN at Knoxville, 03810-9212-CR-00105
(filed 5/10/93), cert. denied

Sparks was convicted of murder and sentenced to death for the robbery and slaying of a liquor store delivery man. His case was filed for post-conviction relief, based on the Middlebrooks ruling. As yet, there has been no ruling.

Wayte v. United States
410 US 598, 105 S. Ct 1524 (1985)

Wayte was prosecuted for failure to register for the draft. The petitioner was prosecuted for failure to register for the draft. He had written several letters stating he had registered and did not intend to do so. When the Government decided it must prosecute some of those who did not register for the draft, the petitioner was one of a select group screened to be prosecuted--all being identified under the Government's passive enforcement system. Over a period of what was called the "beg" policy, the petitioner and the others were warned of their obligation to register and no one that registered was prosecuted for having failed to register on time. Petitioner contends both that there was discriminatory

enforcement and that his First Amendment rights were violated by his being prosecuted--after he failed to register at the end of the "beg" period.

The Court held that a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, does not violate the First and Fifth Amendments.

VITA

Carol Barnett Berz was born in Chicago, Illinois and attended elementary and high school in Atlanta, Georgia, where she graduated from North Fulton High School. The ensuing fall she entered the University of Georgia, at Athens, where she completed two quarters before transferring to Emory University in Atlanta. Her Bachelor of Science degree was completed in 1975, and she also received an M.S. in Social Work in 1976.

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Dr. Berz has served both as Visiting Professor and Adjunct Faculty in the Schools of Social Work, Sociology, Human Services and Education at the University of Tennessee at Chattanooga. She combines her teaching with private practice in mediation and consulting in the areas of human rights, death penalty mitigation, and social policy.

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