Winter 1994

A Survey of Tennessee Supreme Court Death Penalty Cases in the 1990s

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A SURVEY OF TENNESSEE SUPREME COURT DEATH PENALTY CASES IN THE 1990s

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Since September 1990, the Tennessee Supreme Court has ruled on nineteen death penalty cases.[1] Those cases have required the court to interpret seven of the twelve aggravating circumstances set forth in the Tennessee death penalty statute.[2] Additionally, the court has considered the constitutionality of Tennessee's death penalty in light of two federal and three state constitutional provisions.[3] This Article will review those nineteen cases, their interpretation of statutory aggravating circumstances, and their impact on state constitutional jurisprudence.

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1. *See* State v. Hutchison, No. 03S-01-9108-CR-00078, 1994 WL 242632 (Tenn. June 7, 1994); State v. Keen, No. 02S01-9112-CR-0064, 1994 WL 198625 (Tenn. May 23, 1994); State v. Stephenson, 1994 WL 175096 (Tenn. May 9, 1994); State v. Nichols, No. 03-S-01-9105CR00047, 1994 WL 162134 (Tenn. May 2, 1994); State v. Smith, 868 S.W.2d 561 (Tenn. 1993); State v. Howell, 868 S.W.2d 238 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1339 (1994); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), *cert. denied*, 114 S. Ct. 1577 (1994); State v. Smith, 857 S.W.2d 1 (Tenn.), *cert. denied*, 114 S. Ct. 561 (1993); State v. Branam, 855 S.W.2d 563 (Tenn. 1993); State v. Caughron, 855 S.W.2d 526 (Tenn.), *cert. denied*, 114 S. Ct. 475 (1993); State v. Hurley, No. 34, 1994 WL 131554 (Tenn. Apr. 5, 1993); State v. Bane, 853 S.W.2d 483 (Tenn. 1993), *cert. denied*, 114 S. Ct. 682 (1994); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), *cert. granted*, 113 S. Ct. 1840, *and cert. dismissed*, 114 S. Ct. 651 (1993); State v. Hale, 840 S.W.2d 307 (Tenn. 1992); State v. Harris, 839 S.W.2d 54 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1368 (1993); State v. Evans, 838 S.W.2d 185 (Tenn. 1992), *cert. denied*, 114 S. Ct. 740 (1994); State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Black, 815 S.W.2d 166 (Tenn. 1991); State v. Terry, 813 S.W.2d 420 (Tenn. 1991).

2. *See* TENN. CODE ANN. § 39-13-204(i) (Supp. 1993).

3. *See* U.S. CONST. amends. VIII, XIV; TENN. CONST. art. I, §§ 8, 16, 19. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Fourteenth Amendment provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of laws." *See infra* notes 4-6 for the text of the Tennessee provisions.

I. STATE CONSTITUTION

Opponents of the death penalty have frequently relied upon three provisions of the state constitution to urge invalidation of the Tennessee death penalty statute: (1) Article I, Section 8, the law of the land clause;[4] (2) Article I, Section 16, the cruel and unusual punishment clause;[5] and (3) Article I, Section 19, the jury's right to determine the law clause.[6]

A. Cruel and Unusual Punishment Clause

With regard to Article I, Section 16—the Tennessee Constitution's prohibition against cruel and unusual punishment—the majority of the court has repeatedly rejected per se challenges, holding that the death penalty statute survives constitutional scrutiny under the analysis utilized in *Gregg v. Georgia*.[7] Equating the standards of Article I, Section 16 to those of the Eighth Amendment, the Tennessee Supreme Court held in a three-two decision, *State v. Black*,[8] that the death penalty conforms with "'contemporary standards of decency,'" is not "'grossly disproportionate'" to first-degree murder, and does not exceed that punishment "'necessary to accomplish any legitimate penological objective.'"[9] Thus, the majority concluded that the question is "'in the last analysis, a moral question which has been resolved . . . by our Legislature as the representative of the people.'"[10] Since its release, *Black* has replaced *State v. Dicks*[11] as the precedent for quick resolution of claims that the death penalty is a per se violation of the state constitutional prohibition against cruel and unusual punishment.[12]

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4. This clause provides: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." TENN. CONST. art. I, § 8.

5. This clause provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." TENN. CONST. art. I, § 16.

6. This clause provides in pertinent part that "in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases." TENN. CONST. art. I, § 19.

7. 428 U.S. 153 (1976) (plurality opinion).

8. 815 S.W.2d at 166.

9. *Id.* at 189 (quoting State v. Ramseur, 524 A.2d 188, 210 (N.J. 1987) (citing *Gregg*, 428 U.S. at 157), *cert. denied*, 113 S. Ct. 2433 (1993)).

10. *Id.* at 190 (quoting State v. Barber, 753 S.W.2d 659, 670 (Tenn.), *cert. denied*, 488 U.S. 900 (1988)).

11. 615 S.W.2d 126 (Tenn.), *cert. denied*, 454 U.S. 933 (1981).

12. *See Keen*, 1994 WL 198625, at *16; *Nichols*, 1994 WL 162134, at *14; *Smith*, 868 S.W.2d at 582; *Howell*, 868 S.W.2d at 258; *Van Tran*, 864 S.W.2d at 481; *Hurley*, 1994 WL 131554, at *14-*15; *Bane*, 853 S.W.2d at 489; *Harris*, 839 S.W.2d at 76; *Evans*, 838

Justices Reid and Daughtrey, dissenting in *Black*, criticized the majority's reliance on federal precedent on grounds that it had been formulated with little or no experience with death by electrocution.[13] Advocating the need to evaluate the method of execution in accordance with "'evolving standards of decency,'"[14] the dissenters argued that the case should be remanded for the presentation of evidence on whether execution by electrocution is cruel and unusual.[15]

While the majority of the current Tennessee Supreme Court[16] has upheld the death penalty against per se challenges, the court *has* held the statute to be cruel and unusual when imposed for murder in the perpetration of a misdemeanor.[17] In *State v. Hale*,[18] the defendant was convicted under the then existing version of the so-called Scotty Trexler law,[19] which permitted the imposition of capital punishment for murder in perpetration of child abuse.[20] Broadly interpreting the phrase "child abuse" to refer to the misdemeanor statute identically entitled,[21] a three-judge majority[22] found the death penalty to be disproportionate to the offense and hence, unconstitutional when applied to those who killed in the perpetration of a misdemeanor.[23] The dissenting justices, in order to avoid "constitutional defect,"[24] argued that the phrase "child abuse" in the statute actually

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S.W.2d at 196.

13. 815 S.W.2d at 199-201 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined).

14. *Id.* at 201 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined) (quoting Glass v. Louisiana, 471 U.S. 1080, 1094 (1985) (mem.) (Brennan, J., dissenting from denial of certiorari) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))).

15. *Id.* at 199-201 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined).

16. The change in membership of the court due to Justice Daughtrey's appointment to the United States Court of Appeals for the Sixth Circuit does not affect the Anderson-Drowota-O'Brien majority.

17. *See Hale*, 840 S.W.2d at 307.

18. *Id.*

19. TENN. CODE ANN. § 39-2-202(a)(2) (Supp. 1988) (current version at TENN. CODE ANN. § 39-13-202(a)(4) (Supp. 1993)). Scotty Trexler was an infant who died as a result of child abuse inflicted by his mother's boyfriend, who was convicted of second-degree murder. *See* State v. Bowers, C.C.A. No. 115, 1989 WL 86576, at *1 (Tenn. Crim. App. Aug. 2, 1989). As a result of public outcry, the legislature passed a statute making murder in perpetration of child abuse, murder in the first-degree and punishable by life imprisonment or death. 840 S.W.2d at 310 n.3.

20. 840 S.W.2d at 308.

21. *Id.* at 310-12.

22. Justice Anderson authored the majority opinion, *id.* at 308, in which Justice Daughtrey and Chief Justice Reid concurred, *id.* at 315.

23. *Id.*

24. *Id.* at 317 (Drowota, J., dissenting, with whom O'Brien, J., concurred).

referred to the felony "aggravated child abuse" statute.[25] Interpreted this way, the statute authorized the death penalty for murder in the perpetration of a felony, not a misdemeanor, and was therefore not disproportionate.[26]

The *Hale* proportionality analysis set the stage for *State v. Middlebrooks*,[27] the next death penalty case decided by the Tennessee Supreme Court, and arguably the most significant. Middlebrooks was convicted of felony murder and aggravated kidnapping. His death sentence was prompted by the finding of two aggravating factors, one of which was that the murder was committed in the perpetration of a felony enumerated in the Tennessee first-degree murder statute.[28] Middlebrooks challenged his death sentence, arguing that the death penalty was per se unconstitutional.[29] Although not raised by the parties, the court also addressed the issue of whether the application of the death penalty in felony murder cases is per se unconstitutional.[30]

A majority of the court rejected both per se contentions.[31] Adopting the federal standard[32] for determining whether the culpable mental state is sufficient to impose the death penalty,[33] the majority rejected a per se proportionality approach.[34] Instead, the court adopted a case-by-case approach under the required statutory proportionality review[35] and concluded that imposing the death penalty for felony murder was not a per se violation of Article I, Section 16 of the Tennessee Constitution.[36]

In the context of the *Middlebrooks* case, and presumably other felony murder cases in which death is imposed by virtue of the felony murder

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25. *Id.* Justice Drowota, writing for the dissent, argued that such an interpretation was consistent with legislative intent and with the principle of statutory construction that requires interpretation that renders statutes "constitutionally valid . . . even though [a construction that voids the statute] may initially seem more natural." *Id.* at 317 (Drowota, J., dissenting, with whom O'Brien, J., concurred) (citing State v. Bobo, 727 S.W.2d 945, 955 (Tenn.), *cert. denied*, 484 U.S. 872 (1987)).

26. *See id.*

27. 840 S.W.2d at 317. The United States Supreme Court granted certiorari in *Middlebrooks* but dismissed the case after oral argument. *See* 113 S. Ct. at 1840 (granting certiorari), *and* 114 S. Ct. at 651 (dismissing certiorari as improvidently granted).

28. 840 S.W.2d at 322.

29. *Id.* at 335.

30. *Id.*

31. *See id.* at 335, 340-41.

32. The United States Supreme Court has upheld the death penalty in accomplice liability cases in which one kills, attempts to kill, intends a killing, or is substantially involved in an underlying felony and exhibits reckless disregard for life. Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

33. 840 S.W.2d at 337-38.

34. *Id.* at 340.

35. *See* TENN. CODE ANN. § 39-13-206 (Supp. 1993).

36. 840 S.W.2d at 340-41.

aggravating circumstance,[37] three justices concluded that the broad definition of felony murder,[38] together with the duplicative language of the aggravating circumstance, did not sufficiently narrow the class of death-eligible defendants.[39] Consequently, Middlebrooks's death sentence imposed for felony murder, when the aggravating circumstance was murder committed during an aggravated kidnapping, was unconstitutional.[40] However, because the jury concluded that an additional aggravating circumstance existed, the court was unable to determine whether inclusion of the felony murder aggravator was harmless error and remanded the case for resentencing.[41]

This harmless error analysis previewed in *Middlebrooks* has assumed a place of priority in post-*Middlebrooks* death penalty cases. Since *Middlebrooks*, a majority of the court has upheld death sentences under harmless error review more often than not. In conducting that review, the court examines "the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence."[42]

The application of that review to the circumstances of a given case has produced some divergence of opinion. In a meticulous explanation of the analysis, Chief Justice Reid, in his dissent in *State v. Nichols*,[43] found that the record failed to support the conclusion reached by the majority that the

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37. TENN. CODE ANN. § 39-13-204(i)(7) (Supp. 1993) (formerly TENN. CODE ANN. § 39-2-203(i)(7) (1982)).

38. For the current definition, see TENN. CODE ANN. § 39-13-202(2) (1991). In effect at the time of the *Middlebrooks* case was the pre-1989 felony murder statute that allowed the death penalty to be imposed solely because the killing took place during an enumerated felony. *See id.* § 39-2-202(a)(1) (Supp. 1988). In 1989 the statute was amended to require recklessness during the felony before a death sentence could be imposed. *See id.* § 39-13-202(2) (1991).

39. 840 S.W.2d at 346. The Eighth Amendment disallows a mandatory death penalty for even very narrow classes of murderers. A state must narrow the reach of the death penalty not only to certain offenses but also to certain offenders. Zant v. Stephens, 462 U.S. 862, 879 (1983); Woodson v. North Carolina, 428 U.S. 280, 301, 303-04 (1976).

40. 840 S.W.2d at 346.

41. *Id.* at 347. In his dissent, Chief Justice Reid espoused the view that a harmless error analysis was inappropriate when an aggravator was found to be invalid on appeal. *Id.* at 354-55 (Reid, C.J., concurring and dissenting). In two later decisions, in which "there was no evidence before a jury which could influence its decision," he held otherwise. *Howell*, 868 S.W.2d at 270 (Reid, C.J., concurring); *see Smith*, 868 S.W.2d at 583-85 (Reid, C.J., concurring). *But see Nichols*, 1994 WL 162134, at *20-*24 (Reid, C.J., dissenting).

42. *Howell*, 868 S.W.2d at 261.

43. 1994 WL 162134.

State had "shown that beyond a reasonable doubt, the jury was not influenced by the aggravating circumstance."[44]

At least one justice, Chief Justice Reid, addressed in *Middlebrooks* the larger issue of whether imposing death as a sentence for a crime committed with mere reckless intent was cruel and unusual.[45] The Chief Justice concluded that Article I, Section 16 imposed a higher standard than its federal counterpart in that at least a "conscious purpose" to produce death, or knowledge that it was likely to occur, must precede imposition of the death penalty.[46] Opting for a per se proportionality approach, Chief Justice Reid challenged the majority's claim that the required statutory proportionality review assured sufficient narrowing of death-eligible defendants.[47] He found the majority's proportionality review to be conclusory and illogical.[48]

B. Law of the Land Clause

Article I, Section 8, containing Tennessee's law of the land clause, has been deemed synonymous with the Federal Due Process and Equal Protection Clauses and is another Tennessee constitutional provision frequently raised by those challenging the death penalty. Its provisions were used to mount an attack of the child abuse murder statute at issue in the case of *State v. Hale*.[49] There, a majority of the court concluded that due process was violated because conviction under the statute included a determination that the accused was also guilty of prior uncharged incidents

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44. *Id.* at *23. Complicating the issue in the *Nichols* case was the jury's return of the death penalty verdict form citing four nonstatutory aggravating circumstances detailing the nature of the murder, but citing no statutory aggravating circumstance concerning the prior convictions. *Id.* at *6-*7.

45. 840 S.W.2d at 350-55 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., concurred).

46. *Id.* at 353 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., concurred).

47. *Id.* at 354 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., concurred).

48. *Id.* The Chief Justice has continued to criticize the statutory proportionality review employed by the majority as being pro forma and superficial. *See Nichols*, 1994 WL 162134, at *24 (Reid, C.J., dissenting); *Smith*, 868 S.W.2d at 585 (Reid, C.J., concurring); *Howell*, 868 S.W.2d at 271-73 (Reid, C.J., concurring); *Van Tran*, 864 S.W.2d at 484 (Reid, C.J., concurring and dissenting); *Branam*, 855 S.W.2d at 570-71 (Reid, C.J., joining in the majority opinion). Justice O'Brien addressed this argument when raised in *Keen* by referring to *State v. Barber*, 753 S.W.2d 659 (Tenn.), *cert. denied*, 488 U.S. 900 (1988), in which the court compared a number of cases and Supreme Court Rule 12, which requires that a trial judge file a report with the supreme court in all first degree murder cases. *Keen*, 1994 WL 198625, at *18; *see* TENN. SUP. CT. R. 12.

49. 840 S.W.2d at 307.

of misdemeanor child abuse.[50] Utilizing prior uncharged crimes to establish guilt amounted to a violation of the right to a jury trial and the right to be tried upon an indictment returned by a grand jury, consequently violating Article I, Section 8.[51] The two dissenting justices analogized the procedure to that required to prove felony murder and concluded that the constitution required only that every element of an offense, including a prior pattern of conduct, be proven beyond a reasonable doubt.[52]

Article I, Section 8 was also the partial basis for a claim that a jury verdict poll that excluded the words "beyond a reasonable doubt" was unconstitutional. In *State v. Nichols*,[53] the court rejected the claim that the failure to inquire whether each juror found that the aggravating circumstances outweighed the mitigating circumstances *beyond a reasonable doubt* violated the federal and state constitutions.[54]

C. Jury's Right to Determine Law Clause

Another frequently used, yet infertile, provision for death penalty challengers is Article I, Section 19. The last sentence of that section provides that "in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."[55] The word "criminal" was added in 1835 to clarify that the section applied to criminal libel and not civil libel cases.[56]

Death penalty challengers have urged the Tennessee Supreme Court to find that the death penalty statute violates this section of the constitution by *requiring* the imposition of a death sentence after a jury finds that the aggravating circumstances proven beyond a reasonable doubt outweigh any mitigating circumstances.[57] No member of the court has accepted this argument. The court has reasoned that Article I, Section 19 was never intended to apply to the sentencing phase of capital cases.[58]

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50. *Id.* at 313.

51. *Id.* The majority cited *Bobo*, 727 S.W.2d at 945, as support. 840 S.W.2d at 313-14. In *Bobo*, the Tennessee Supreme Court invalidated the introduction of evidence of untried, charged murders in the sentencing phase as aggravating circumstances violative of both state and Federal Constitutions. 727 S.W.2d at 952.

52. 840 S.W.2d at 315-16 (Drowota, J., dissenting, with whom O'Brien, J., concurred).

53. 1994 WL 162134.

54. *Id.* at *14. Nichols challenged the polling procedure under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article I, Sections 8, 9, and 16 of the Tennessee Constitution. *Id.*

55. TENN. CONST. art. I, § 19.

56. LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 53 (1990).

57. *See* TENN. CODE ANN. § 39-13-204(g) (Supp. 1993).

58. *Black*, 815 S.W.2d at 187.

Thus the most successful state constitutional challenge for death penalty opponents has been based upon Article I, Section 16, the Tennessee cruel and unusual punishment provision. While per se challenges have been consistently rejected by a majority, individual disproportionality challenges have captured the court's attention.

II. AGGRAVATING CIRCUMSTANCES

The death penalty cases decided by the Tennessee Supreme Court since September 1990 have contained discussions of seven of the twelve aggravating circumstances enumerated in our death penalty statute.[59] Of the seven aggravators addressed, the felony murder aggravator[60] and the "heinous, atrocious, or cruel" aggravator[61] have received the most attention.

A. Felony Murder Aggravator

In *State v. Middlebrooks*,[62] the court decided that the use of the felony murder aggravator to impose the death penalty on one convicted of felony murder was essentially a "duplication of the elements of the offense" of first degree murder, and consequently insufficiently narrowed the class of death-eligible murderers.[63] In reversing the death sentence in *Middlebrooks*, the majority held that, in light of the finding by the jury of only one other aggravator, the error was not harmless beyond a reasonable doubt.[64] In subsequent cases the harmless error analysis has resulted in remands for

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59. *See* TENN. CODE ANN. § 39-13-204(i) (Supp. 1993).

60. *See id.* § 39-13-204(i)(7). Specifically, this aggravator now applies to murder "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 of the enumerated felonies. *Id.*

61. *See id.* § 39-13-204(i)(5). Specifically, this aggravator, as amended, applies to an "especially heinous, atrocious, or cruel [murder] in that it involved torture or serious physical abuse beyond that necessary to produce death." *Id.* The aggravator read otherwise when applied in many of the cases. *See id.* § 39-2-203(i)(5) (1982) (amended 1989). Formerly, the statute applied if "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Cases applying the 1982 version of the statute include *Smith*, 868 S.W.2d at 579 & n.3; *Van Tran*, 864 S.W.2d at 478-80; *Caughron*, 855 S.W.2d at 542-44; *Bane*, 853 S.W.2d at 484, 489; *Middlebrooks*, 840 S.W.2d at 331; *Harris*, 839 S.W.2d at 76; and *Black*, 815 S.W.2d at 181-82. *See also Hurley*, 1994 WL 131554, at *15 ("The heinous, atrocious and cruel nature of the killing was in evidence, but was not charged to the jury and not formally found."). Instructing the jury as to the wrong version of this aggravator was one reason for the reversal and remand for a new sentencing hearing in *Keen*.

62. 840 S.W.2d at 317.

63. *Id.* at 341.

64. *Id.* at 346-47.

resentencing and affirmances in light of other factors found.[65] While it initially appeared that at least one member of the court would not employ harmless error analysis,[66] two recent opinions by a unanimous court, employing harmless error analysis, upheld the imposition of the death sentence in which the felony murder aggravator was found.[67]

A different issue under the felony murder aggravator arose in a recent death penalty case, *State v. Terry*.[68] In that case, the court found an insufficient nexus to warrant use of the felony murder aggravator when the proof did not establish that the victim was killed in the course of a larceny.[69]

B. Heinous, Atrocious, or Cruel Aggravator

The second most divisive aggravator for the court has been the "heinous, atrocious, or cruel" aggravator.[70] The ambiguity of this aggravator, as previously written, caused at least two justices to criticize its use.[71] Calling the definition of "depravity" utilized by the court a "slight expansion of a circle of synonyms," the dissenting justices carefully scrutinized findings of depravity and torture and urged the adoption of a standard, clear definition.[72] Additionally, the dissenters have suggested that use of this aggravator, which requires a purposeless killing, precludes the use of other

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65. *See Smith*, 857 S.W.2d at 25; *Bane*, 853 S.W.2d at 490; *Evans*, 838 S.W.2d at 196; *see also supra* text accompanying notes 42-44.

66. *See Black*, 815 S.W.2d at 198 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined).

67. *See Smith*, 868 S.W.2d at 561; *Howell*, 868 S.W.2d at 238.

68. 813 S.W.2d at 420.

69. *Id.* at 424. Terry, a pastor, committed several acts of larceny and developed an elaborate plan to disappear with a new identity. *Id.* at 421. He then killed, decapitated, and dismembered a church handyman and set the church on fire in an effort to convince authorities of his own death. *Id.* The last incident of larceny occurred four days before the murder. *Id.* at 422. The murder victim was not a witness to the larceny, nor did he expose it, try to stop it, or interfere with it. *Id.* at 424.

70. *See* TENN. CODE ANN. § 39-13-204(i)(5) (Supp. 1993); *see also supra* note 60.

71. Justices Reid and Daughtrey in three cases have launched attacks on this aggravator. *See Black*, 815 S.W.2d at 195-97 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined); *Harris*, 839 S.W.2d at 83-84 (Reid, C.J., dissenting, with whom Daughtrey, J., joined); *Van Tran*, 864 S.W.2d at 483 (Reid, C.J., concurring and dissenting); *id.* at 485-90 (Daughtrey, J., dissenting). In *Van Tran*, a case involving the aggravator as it was written prior to amendment, Justice Daughtrey applauded the legislative change. *Id.* at 487 (Daughtrey, J., dissenting).

72. *See Harris*, 839 S.W.2d at 83 (Reid, C.J., dissenting, with whom Daughtrey, J., joined).

aggravators—which by definition imply a purpose in the killing—in the same case.[73]

The majority of the court has evaluated this aggravator on the facts of each individual case in multiple-murder situations. In *State v. Van Tran*,[74] the court analyzed the means and method of each of three murders with which the defendant was charged in order to ascertain whether the killings were cruel and depraved, and found sufficient evidence to support the finding in only one of the three instances in which the death sentence was imposed.[75]

More recently, the confusion over the changed statutory wording of this aggravator was among the reasons that led the court to reverse a death sentence and remand for resentencing. In *State v. Keen*,[76] a unanimous court reversed and remanded for resentencing when the trial court incorrectly instructed on the pre-1989 cruel and heinous aggravator and standard of proof for imposition of the death penalty.[77] Again, however, the court rejected the argument that the aggravator was overbroad and vague.[78]

C. *Avoidance of Arrest And Prosecution Aggravator*

Several multiple-homicide cases decided since 1990 have involved the use of the avoidance of arrest and prosecution aggravator.[79] In these cases the jury is asked to find that the second or subsequent killing was for the purpose of eliminating witnesses to the first killing and thereby, for the

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73. For example, the dissenters criticized the apparent inconsistency in a jury finding of the heinous, atrocious, or cruel aggravator, coupled with either the finding of the murder to avoid arrest and prosecution aggravator, *Black*, 815 S.W.2d at 197 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined), or the enumerated felony murder aggravator, *Smith*, 857 S.W.2d at 25 (Reid, C.J., concurring and dissenting); *id.* at 25-26 (Daughtrey, J., concurring and dissenting).

74. 864 S.W.2d at 465.

75. *Id.* at 478-80.

76. 1994 WL 198625.

77. *Id.* at *8-*9. Before 1989, the death penalty could be imposed if the jury found that no mitigating circumstances were sufficiently substantial to balance or outweigh the statutory aggravating circumstances. *See* TENN. CODE ANN. § 39-2-203(g) (1982) (amended 1989) (current version at *id.* § 39-13-204(g)(2)(B) (Supp. 1993)). The 1989 amendment allowed the imposition of a death penalty only after a jury finding "that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance[s] . . . outweigh any mitigating circumstances." *Id.* § 39-13-204(g)(2)(B) (Supp. 1993). A mistaken use of the prior standard also caused the invalidation of the death sentence in *Stephenson*, 1994 WL 175096.

78. *Keen*, 1994 WL 198625, at *16.

79. This aggravator specifically applies when "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." TENN. CODE ANN. § 39-13-204(i)(6) (Supp. 1993).

purpose of avoiding apprehension or arrest.[80] Though not yet raised, this aggravator may also be attacked as duplicative and as providing insufficient narrowing since arguably all murder victims are witnesses to their own attempted murder or aggravated assault before they die.

D. Mass Murder Aggravator

In multiple-homicide cases the court also has been called upon to construe the mass murder aggravator.[81] While a majority of the court has found that the aggravator applies to double or triple homicides committed in a relatively brief time period,[82] dissenting justices have argued that the legislative history demonstrates that the aggravator was intended to apply only to serial murders.[83] In *State v. Van Tran*,[84] dissenting Chief Justice Reid found this aggravator to be inconsistent with the jury's rejection of both the premeditated, deliberated murder count and the "knowingly created a great risk of death" aggravator.[85] As such, the Chief Justice deemed the aggravator to insufficiently narrow the field of death-eligible defendants.[86] In the recent case of *State v. Smith*,[87] Chief Justice Reid continued to reject the mass murder aggravator in the context of triple homicides committed close in time and proximity, but found the error to be harmless since the evidence substantiating the aggravator was otherwise admissible.[88]

E. Other Aggravators

Three other aggravators were discussed generally by the court in five of the death penalty cases to come before it. The first aggravator, victim less than twelve years of age, was present in *State v. Hale*[89] and *State v. Keen*,[90] but because of reversal on other grounds, was not elaborated upon. The second aggravator, previous violent felonies, escaped thorough

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80. *See Smith*, 868 S.W.2d at 580-81; *Branam*, 855 S.W.2d at 570; *Evans*, 838 S.W.2d at 188.

81. *See* TENN. CODE ANN. § 39-13-204(i)(12) (Supp. 1993).

82. *See Smith*, 868 S.W.2d at 581-82; *Van Tran*, 864 S.W.2d at 478; *Black*, 815 S.W.2d at 182-83.

83. *See, e.g.*, *Black*, 815 S.W.2d at 197 (Reid, C.J., concurring and dissenting, with whom Daughtrey, J., joined).

84. 864 S.W.2d at 465.

85. *Id.* at 483 (Reid, C.J., concurring and dissenting) (emphasis omitted); *see* TENN. CODE ANN. § 39-13-204(i)(3) (Supp. 1993).

86. *Id.* at 484 (Reid, C.J., concurring and dissenting).

87. 868 S.W.2d at 561.

88. *Id.* at 583-84 (Reid, C.J., concurring).

89. 840 S.W.2d at 308; *see* TENN. CODE ANN. § 39-13-204 (i)(1) (Supp. 1993).

90. 1994 WL 198625.

discussion in two cases,[91] but formed the basis for a constitutional challenge in a third.[92]

The third aggravator, murder for remuneration, was analyzed in *State v. Stephenson*.[93] Stephenson argued that the aggravator was unconstitutional when employed in a first-degree murder case based on criminal responsibility for soliciting murder[94] because it failed to sufficiently narrow the number of death-eligible defendants.[95] While the majority rejected the argument, the dissent, relying on *Middlebrooks*, agreed that the aggravator did not sufficiently narrow because the same acts constituted the criminal offense and the aggravating circumstance, thus rendering the aggravator invalid.[96] The chief justice concluded that the majority had abandoned *Middlebrooks* in its analysis, which only invalidated aggravators that failed to narrow *and* duplicated essential elements of the offense, but did not invalidate an aggravator that only failed to narrow.[97] In *State v. Hutchison*,[98] the chief justice dissented and found defendant ineligible for the death penalty on the same grounds.[99]

Two related arguments regarding the use of aggravating circumstances have recently been rejected by the court. In *State v. Keen*,[100] the defendant claimed that when viewed in combination, the (1) felony murder, (2) heinous, atrocious, or cruel, (3) avoidance of arrest and prosecution, and (4) previous violent felonies "encompass the majority of homicides committed in this State," and therefore do not sufficiently narrow the class of death-eligible defendants.[101] The court found the unsupported argument unpersuasive.[102] Similarly, in *State v. Nichols*,[103] the defendant challenged the order in which the prosecution tried the cases, alleging that this created the additional aggravator of previous violent felonies.[104] The court rejected the argument and held that "the order [of commission] is irrelevant so long as the convictions have been entered before the sentencing hearing at which

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91. *See Howell*, 868 S.W.2d at 243; *Harris*, 839 S.W.2d at 59 & n.1; *see also* TENN. CODE ANN. § 39-13-204(i)(2) (Supp. 1993).

92. *See Nichols*, 1994 WL 162134, at *13-*14.

93. 1994 WL 175096.

94. Stephenson was criminally responsible for the murder of his wife because he solicited another to kill her. *See* TENN. CODE ANN. § 39-11-402(2) (1991).

95. 1994 WL 175096, at *29.

96. *Id.* at *30 (Reid, C.J., concurring and dissenting).

97. *Id.* at *32 (Reid, C.J., concurring and dissenting).

98. 1994 WL 242632.

99. *Id.* at *14 (Reid, C.J., concurring and dissenting).

100. 1994 WL 198625.

101. *Id.* at *16.

102. *Id.*

103. 1994 WL 162134.

104. *Id.* at *13.

they were introduced."[105] In the face of Nichols's due process and equal protection challenges, the court concluded that this aggravator was subject to a certain degree of "prosecutorial discretion," which did not create any constitutional infirmity.[106] In addition, the court found no merit to Nichols's argument that his prior convictions could not form the basis for the prior violent felonies aggravator simply because no final judgment of conviction had been entered.[107]

CONCLUSION

The Tennessee Supreme Court, though divided, has upheld our state death penalty statute despite several constitutional and statutory challenges. Those decisions bind the court of criminal appeals which now has jurisdiction over the direct appeals of death penalty cases. Notwithstanding these precedents and others in the seventeen-year history of the Tennessee death penalty statute, new challenges undoubtedly will arise as a result of the evolving state and federal constitutional principles.

105. *Id.*
106. *Id.* at *14.
107. *Id.* at *15.