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Studying the Death Penalty in Tennessee

Dwight Aarons

The National Debate

Studying the Death Penalty in Tennessee

By Dwight L. Aarons

Protocols for lethal injection is one of the issues under debate.

After three years of study, the Tennessee Death Penalty Moratorium Project Team recently concluded its work and issued its report. This article describes the background of the project, assemblage of the team, collecting the research, and a brief overview of the report, and ruminates on what may lie ahead in the study of the death penalty in Tennessee. The team's work comes when several features of the death penalty as practiced in Tennessee — including the method of execution — are under scrutiny. Read the team's specific recommendations, beginning on page 20.

Background

In the autumn of 2001, the American Bar Association's Section of Individual Rights and Responsibilities created the Death Penalty Moratorium Implementation Project. The project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; and encourages state government leaders to establish moratoriums, undertake detailed

examinations of capital punishment laws and processes, and implement reforms.

In February 2003, the project decided to examine how the death penalty was being implemented in the United States. Towards that end, the project relied on the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States.* These protocols, which cover seven aspects of the death penalty, are not intended to be exhaustive. The protocols, however, are comprehensive in the areas they do cover: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, judicial independence, racial and ethnic minorities, and mental retardation and mental illness. The project added five areas for review: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process. The American Bar Association selected Tennessee as one of a handful of states in which to establish its project. Each jurisdiction was to use the protocols as the benchmark in their assessment. The goal was not to conduct an exhaustive examination of the death penalty, but to take a detailed snapshot of how the death penalty operates in each area under review. From the information collected, an assessment and possible recommendations were to be made.

Assembling the Team

An essential component of the project was to have a team composed of persons within the state. The project sought a law professor as a team leader because of both their familiarity in conducting legal research and their access to law students, who might be interested and available to assist in performing the research. Ideally, the team would be composed of persons who have or had different roles within the capital litigation system. This would likely produce a team that had different perspectives on capital punishment and different insights into the death penalty process. I agreed in summer 2004 to serve as the chair of the Tennessee team. Achieving geographic balance was important. The following agreed to serve on the team:

- **W .J. Michael Cody,** Attorney General of Tennessee from 1984 to 1988, United States Attorney for the Western District of Tennessee from 1977 to 1981 and whose current private practice in Memphis includes white collar crime;
- **Kathryn Reed Edge,** who, among her many activities, is a member of the Tennessee Post-Conviction Defenders Commission and past-president of the Tennessee Bar Association, and who is engaged in private practice in Nashville;
- **Jeffrey Henry,** who is now the Executive Director of the Tennessee District Public Defenders Conference in Nashville; Bradley MacLean, who is now Assistant Director of the Tennessee Justice Project and is of counsel to a Nashville law firm, and who has represented capital defendants in post-conviction proceedings;
- **Gilbert Merritt,** a senior judge on the United States Court of Appeals for the Sixth Circuit and United States Attorney for the Middle District of Tennessee from 1966 to 1969;
- **William Ramsey,** a Nashville attorney who engages in complex civil and criminal matters, including the representation of capital cases at trial and in post-conviction;
- and myself, a law professor at the University of Tennessee College of Law, where I teach and write about, among other things, criminal law and capital punishment. It was a pleasure to serve with all of them.

continued on page 20

Studying the Death Penalty

continued from page 19

They each served with distinction. Perhaps it's unnecessary, but lest there be any confusion: The affiliations of each member are listed for identification purposes only. Each team member acted in his or her personal capacity. The contents and views expressed in the report do not necessarily reflect those of any listed affiliation.

Though the team did have statewide geographic representation, it was less than ideal as to racial, gender and different practice backgrounds. Ideally the team would have had a current district or assistant district attorney, a member of the Tennessee Attorney General's Office and a current or retired criminal court judge from the trial or appellate bench. We certainly tried to achieve ideological and practice background diversity when extending invitations to serve. Every prosecutor who we invited declined to serve. Though no current prosecutor served, the team's research efforts were guided by directions given by one prosecutor. The retired state court judges we contacted were already committed to other public service projects. One trial court judge gave serious consideration to joining the team and I'm confident that that judge would have brought valuable insight and information to our work. However, the judicial canons prevented the judge from joining the team. In extending invitations, it was made clear that there was no litmus test: team members were not required to support or oppose the death penalty or a moratorium on executions. It was also emphasized that the ABA would leave the matter of recommendations of all types to the team. The one requirement was that each team member had to be willing to study the operation of the death penalty in Tennessee and see where the research took us. Of those who did serve on the team, views on the death penalty covered the spectrum.

Collecting the Research

A genius of the project was to have the research conducted within the state, and to be based on the evidence within the state. Each team received an Assessment Guide. Ours was an 88-page document that I came to know well. We reported on 15 topics. Each topic contained from about 25 to over 70 broadly worded questions, each with discrete subparts generally seeking "all laws, rules, procedures, standards, and guidelines" with regard to each question or subpart. In other words, the questions were a combination of "list interrogatories," "identification interrogatories," and "factual interrogatories." The Assessment Guide appeared to have been written by aggressive civil litigators who were unconstrained by discovery limits. Many questions literally took days of research before we had a satisfactory answer.

As team chair, I recruited law students and supervised their research. There were two types of research: library and investigatory research. I characterize as library research those questions that could be answered through the means typically available in a library, such as through computer research, the *Tennessee Code Annotated*, case law or court rules. Eventually we were able to answer the overwhelming majority of questions and explain our perception of current practices based on the data we gathered. The investigatory research, that is, questions that required that researchers collect the information outside of traditional library sources, such as by telephone calls or office visits to persons within the state, was a little more daunting. At times, it was not clear which person or entity, if any, had recent or accurate information relevant to what we sought. Fully aware that the validity of the report depended on accurate information, delays were incurred in collecting the information, by pursuing reasonable efforts to obtain answers, and

continued on page 22

Recommendations

Research Team:

A team of Tennessee legal experts, working under the auspices of the American Bar Association Death Penalty Moratorium Implementation Project, in April cited problems in the state's use of capital punishment that range from excessive caseloads and inadequate standards for defense counsel to racial disparities and inadequate review of death row inmates' claims of actual innocence.

The team concluded that Tennessee's death penalty system is so flawed that a temporary halt in executions should be continued to permit a thorough review of every aspect of capital punishment administration in the state. It urged Gov. Phil Bredesen to continue past May 2 a stay he initially imposed on Tennessee executions to examine protocols for administering lethal injection, the execution method used in the state.

"Gov. Bredesen clearly has given sober consideration to how executions are carried out in Tennessee," said American Bar Association President Karen J. Mathis. "Now it is time for him, and for the state as a whole, to devote even more thorough analysis to how the state reaches the decision to sentence someone to death. The families and friends of capital crime victims in Tennessee, the people accused of committing those crimes, and the citizens who place their trust in their legal system deserve better justice than they are now receiving," she said.

Gov. Bredesen did not extend the moratorium.

The ABA neither supports nor opposes either the death penalty or

Death Penalty System 'So Flawed' That it Should be Halted

any particular means of carrying out executions, but it does urge a moratorium on executions in each jurisdiction until fairness and due process are assured in death penalty cases. At press time, the Tennessee report had not been presented to the ABA's policy-making arm, the House of Delegates, and so does not constitute association policy.

The recommendation to continue a temporary halt in executions in Tennessee is the product of a three-year study by a team of seven prominent state lawyers. Evaluating state systems against ABA protocols for a fair and accurate capital case system that complies with constitutional standards, the team found Tennessee meets only seven of the standards, partially meets 31 of them, and fails to comply with 26 of them. The team was unable to access adequate information to assess Tennessee's compliance with 29 of the protocols.

The Tennessee Death Penalty Assessment Team included a former prosecutor, a federal judge, defense lawyers and lawyers in private practice. Dwight L. Aarons, chair, is an associate professor of law at the University of Tennessee College of Law, teaching courses on criminal law, advanced criminal law and the death penalty.

The team issued 14 specific recommendations, in addition to urging continuation of the moratorium to broaden review of the state system. They are:

- Create an independent commission to review claims of factual innocence, with power to investigate, hold hearings and test evidence
- Create an independent statewide authority to appoint, train and monitor defense, appellate and post-conviction lawyers in capital cases
- Require preservation and storage of all biological evidence in capital cases as long as defendant remains incarcerated
- Develop statewide protocols to standardize decisions about which cases are charged as capital crimes
- Increase qualification standards and monitoring procedures for defense, appellate and postconviction lawyers in capital cases
- Provide a right to post-conviction counsel before, not after, filing of post-conviction petitions
- Amend court rules to allow defendants to obtain expert and investigative services at any time after being charged, providing an opportunity to demonstrate why a capital charge may be inappropriate
- Include in proportionality review cases in which the death penalty could have been sought but was not, and cases in which the penalty was sought but not imposed
- Require judges presiding over trials resulting in first degree murder convictions to file complete proportionality reports
- Assure each death row inmate an opportunity for a hearing before the Board of Pardon and Parole
- Redraft capital jury instructions to prevent misunderstandings
- Sponsor a state study to determine if there are disparities in capital sentencing based on race, socio-economic status, geography or other factors
- Exclude from eligibility for execution people with serious mental disorders
- Adopt a uniform state standard to determine defendants' competency through trial, appeals and post-conviction proceedings.

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The full report and executive summary, including charts that identify specific recommendations and state compliance levels, are available on the ABA's Web site at http://www.abavideonews.org/ABA340 Additional information about the Death Penalty Moratorium Implementation Project and the assessment project is also posted there.

Tennessee is the sixth of eight states being assessed under the ABA project, which developed the protocols in 2001. Georgia, Alabama, Florida, Arizona and Indiana preceded Tennessee. Other assessments are being conducted in Ohio and Pennsylvania. Neither the protocols nor the individual state assessment reports have been adopted by the ABA House of Delegates.

Studying the Death Penalty

continued from page 20

by verifying the information through multiple-point sources, if possible.

For the topic reports to be complete, in addition to answering each question with pertinent citations and quotations from cases and statutes, it was often necessary to provide a narrative description to put each answer into context. Of course, sending original documents to the ABA was done regularly. For both the library and investigatory research, I had students complete a pathfinder. Most had seemingly forgotten about the device, which they may have encountered in a legal research class. In any event, the device is not just a listing of sources but an instrument that "explains the research process itself, illustrating how and where to find the most relevant materials. It details the best and most easily navigable databases and identifies nontraditional ways of obtaining information.[1] The pathfinder helped verify the accuracy and thoroughness of the research. It also allowed me to know where to direct further research, when necessary.

Notwithstanding our efforts, I know that there were some questions we did not answer completely. For example, the Assessment Guide asked: "Since your state reenacted the death penalty, how many capital defendants were offered plea bargains and how many plea bargains were accepted? If possible, identify the name of the capital defendant, the date of the offense, the county in which the crime occurred, the date of the plea, and describe the circumstances of the crime." While we came up with the name and verifiable information on about 120 persons, I'm confident that our list is incomplete. One has to use multiple information sources to gather this information. Indeed, other than visiting each District Attorney's office and going through all of their case files (assuming they have not been destroyed), it may be impossible to accurately answer the question.

"The Assessment Guide appeared to have been written by aggressive civil litigators who were unconstrained by discovery limits. Many questions literally took days of research before we had a satisfactory answer."

Also different sources were reporting the same information differently. For example, one private entity dedicated to improving Tennessee's criminal litigation process sent information indicating that in Tennessee 277 death sentences had been imposed on 207 persons since 1977. I discovered that the information actually counted each death sentence that was imposed, even if it was after the original sentence was reversed on appeal. However, if the defendant had more than one victim or death sentence imposed for that crime, it was counted as a single capital case. While the logic of these approaches continues to escape me, it was good to have the list and to know of the group's methodology. Available state sources were not as complete, and of the information reported, it sometimes conflicted with multiple other sources. Today it is still unclear how many persons have been sentenced to death in Tennessee since 1977. An on-going research project is to compose a list of all persons who have been listed as being on death row and to determine what has happened to each. The raw numbers seem to indicate that in the 30 years since the death penalty was re-enacted, thousands of Tennesseans have been murdered, an unknown number of suspects have been prosecuted capitally, more than 200 have been sentenced to death, with around 100 currently on death row; 2 have been

executed. Millions of dollars and an unknown number of hours have been spent to get us this far.

The Report

The research we turned in was digested by the project staff and turned into a report. The research was laid side-by-side against the protocols and an assessment was made on the extent that Tennessee law and practices complied with the protocols. For ease of reference, there are charts in the Executive Summary, which indicate levels of compliance. The report is divided into 12 chapters, each one addressing an area of assessment.

Our report was issued in April 2007. I encourage everyone mildly interested in the death penalty in this state to at least read the Executive Summary. The entire report is worth reading. It is the most comprehensive report on the death penalty in Tennessee, even though we were unable to obtain all of the information we sought. The report provides a snapshot of how some aspects of the death penalty operate in Tennessee. The recommendations are thoughtful proposals on how to improve the state's capital punishment process. Ten areas of reform are highlighted in the Executive Summary and fourteen recommendations are made there. The reform areas include properly ensuring that claims of factual innocence receive adequate judicial review; reducing the caseloads of district public defenders; providing adequate access to experts and investigative services for defendants; establishing adequate qualification and performance standards for defense counsel; adopting meaningful judicial comparative proportionality review; a more transparent clemency process; clarification of capital jury instructions; eliminating the racial and geographic disparities in capital sentencing; and ensuring that persons with severe mental disabilities are neither sentenced to death nor executed. *Read the overview on page 20.*

The team recommended a moratorium on executions. Despite the name of the project, we were never obligated to come to that conclusion. The moratorium recommendation was not lightly adopted. Whether to recommend a moratorium and to what extent was the single most discussed issue within the team. Ultimately, as stated in the report: "It is therefore the conclusion of the members of the Tennessee Death Penalty Assessment Team that the State of Tennessee should impose a temporary moratorium on executions until such time as the State is able to appropriately address the issues and recommendations throughout this report."

Quo Vadis?

I accepted the invitation to serve on the team because it was within my princi-

continued on page 24

Studying the Death Penalty

continued from page 23

pal area of scholarship and teaching. At the time, I was in the middle of writing an article exploring the empirical basis, if any, for the death penalty in the United States. This experience has underscored the need for such an exploration. Until there is complete information made publicly available on Tennessee's capital punishment process, we are just guessing about how the death penalty actually works.

One thing that needs no guess work is that Tennessee needs a means by which factually or legally innocent capital defendants, who uncover credible exonerating evidence, can have their conviction and sentences reversed or vacated. The plights of Philip Workman and Paul House, and perhaps others, are prime examples that convicted capital defendants lack meaningful access to either judicial or gubernatorial review of their claims. House, who has been on death row since 1986, is the inmate of whom the United States Supreme Court, after reviewing the evidence proffered in support of his conviction,

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wrote, "we conclude that this is the rare case where — had the jury heard all the conflicting testimony — it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."[2] In other words, there was enough doubt as to whether House committed the crime for which he was convicted and sentenced to death. This may be the first time in this nation's history that the United States Supreme Court has made such a declaration in a capital case. Workman was convicted of felony murder and sentenced to death in 1982. Subsequently disclosed materials suggest that the fatal bullet didn't come from his gun. If true, this eviscerates the felony murder theory of liability and means that he was never eligible for the death penalty. *[Note: Philip Workman was executed May 9, days after the governor's moratorium was lifted.]*

There are still major areas for further research and investigation, such as the actual impact that race, geography and poverty seem to have on the capital litigation process statewide and why there is still not a single state-run source that has thorough, verifiable information on all first-degree murder cases in Tennessee. Most death-penalty states seem also to lack a comprehensive research source. It is a shameful indict-

ment on the capital punishment system that the governments that authorize the execution of its citizens do not collect and make available complete and accurate information on its capital punishment scheme.

Serendipitously, soon after we met and discussed the first draft of the report, Gov. Bredesen issued a moratorium on executions because the execution protocol is a jumbled patchwork of instructions. We believe that if those in authority took a comprehensive look at the death penalty in Tennessee they would see a similar hodge-podge of a system. We anticipate that they would also call for a moratorium until fairness and accuracy can be assured in the Tennessee death penalty process.

Several bills related to capital punishment are currently pending before the General Assembly. One calls for a study of the system;[3] another for a moratorium on the death penalty and for a study of the system;[4] a third for the creation of an Innocence Commission to investigate the wrongful conviction of innocent persons (not just capital defendants);[5] and a fourth disqualifies defense attorneys from representing capital defendants if they have been found to have rendered ineffective assistance of counsel in a capital case.[6]

Our work is done. The next step is for others. Will those with the power to order a moratorium, study and review of Tennessee's capital punishment process, do so? It remains to be seen.

DWIGHT L. AARONS is a professor at the University of Tennessee College of Law, teaching criminal law, criminal law seminar (capital punishment), civil procedure II and legislation. He earned his bachelor's and law degrees from the University of California at Los Angeles, where he was the editor-in-chief of the National Black Law Journal during his third year of law school. Aarons has served since 2003 as the Tennessee Assessment Team leader of the American Bar Association's Death Penalty Moratorium Implementation Project.

Notes

1. See Carita Shanklin, "Pathfinder: Environmental Justice," 24 *Ecology Law Quarterly,* (1997): 333, 336.

2. House v. Bell, 126 S. Ct. 2064, 2086 (2006).

3. HB 799/SB1184 (requiring Attorney General and Reporter to study the state's readiness to meet the constitutional prerequisites to improving capital punishment and to issue a report on the mater by Oct. 1, 2007).

4. HB 1357/SB 635 (requiring House and Senate Judiciary committees to study all aspects of capital punishment and to report findings by Jan. 15, 2008).

5. HB 1333/SB538 (establishing a Tennessee Innocence Commission to investigate post-conviction exonerations and pardons, identify errors in the criminal justice system and recommend solutions).

6. HB 1975/SB 2034 (disqualifying any capital defense attorney who a court has found or who admits to rendering ineffective assistance of counsel in a capital case).