IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 8, 2002 Session

STATE OF TENNESSEE v. PRESTON CARTER

Direct Appeal from the Criminal Court for Shelby County
No. 93-09760 and 93-09761 John Kerry Blackwood, Judge

No. W2000-02204-CCA-R3-DD - Filed February 8, 2002

Capital Defendant Preston Carter appeals as of right his sentences of death resulting from the 1993 murders of Thomas and Tensia Jackson. On January 24, 1995, Defendant Carter pled guilty to two counts of first-degree felony murder and, following a separate sentencing hearing, was sentenced to death. On direct appeal, our supreme court affirmed Carter's convictions for first-degree murder but reversed the sentences of death and remanded for a new sentencing hearing. Specifically, the Supreme Court found that, because the verdict forms omitted the beyond a reasonable doubt standard, the verdict forms were illegal, void, and of no effect. *See* State v. Carter, 988 S.W.2d 145, 153 (Tenn. 1999). Accordingly, the case was remanded to the Criminal Court for Shelby County for re-sentencing. At the conclusion of the resentencing hearing in February 2000, the jury found the presence of two statutory aggravating circumstances, i.e., (1) that the murder was especially heinous, atrocious or cruel, Tenn. Code Ann. § 39-13-204(i)(5), and (2) that the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person, Tenn. Code Ann. § 39-13-204(i)(2). The jury further determined beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and imposed sentences of death. The trial court approved the sentencing verdict. Defendant Carter appeals presenting for our review the following issues: (1) whether the State's introduction of color photographs of the victims' corpses was unduly prejudicial, (2) whether the trial court erred in permitting the introduction of victim impact testimony, (3) whether the trial court improperly restricted the introduction of mitigating evidence, (4) whether the evidence is sufficient to support application of the heinous, atrocious, cruel aggravating circumstance, and (5) whether the evidence is sufficient to support application of aggravating circumstance (i)(2), prior violent felony conviction. After review, we find no error of law requiring reversal. Accordingly, we affirm the jury's imposition of the sentences of death in this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOE G. RILEY and ALAN E. GLENN, JJ., joined.

Coleman W. Garrett and Howard Manis, Memphis, Tennessee, for the appellant, Preston Carter.

Paul G. Summers, Attorney General and Reporter; Elizabeth Ryan, Assistant Attorney General; William L. Gibbons, District Attorney General; and Phillip G. Harris and Reginald Henderson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Proof at the Resentencing Hearing

The resentencing hearing commenced on February 14, 2000, during which the following proof was presented.[1]

Derrick Lott testified that one of the victims, twenty-four-year-old Tensia Jackson, was his sister. She and her husband, twenty-six-year-old Thomas Jackson, had a daughter, Tyranny, who was three-years-old at the time of her parents' murders. Mr. Lott, Thomas Jackson, and Tensia Jackson, had all gone to school together. Derrick Lott testified that in May 1993 he was employed at Seessel's Bakery with the victim, Thomas Jackson. Mr. Lott related that he and Thomas Jackson began work at 4:00 a.m. at the bakery located on Elvis Presley Boulevard. On the morning of May 28, 1993, as customary, Mr. Lott and another co-worker, Donnie Gurnis, drove to the residence of Thomas Jackson to pick him up for work. Upon arriving at the Millbranch Park apartment complex, Mr. Lott observed that the door to the Jacksons' residence was open. Mr. Lott, concerned, got out of his vehicle and approached the apartment. Mr. Lott discovered Thomas Jackson's wallet, his sister's purse, and some papers on the ground. He also noticed that the door had been "kicked off the hinges." The two men continued into the apartment, where they discovered that the Jacksons' bedroom had been "trashed." It also appeared that no one was at home. The two men, next, went into three-year-old Tyranny's bedroom. Inside the bedroom closet, they discovered the body of Thomas Jackson with "his brains hanging out." Mr. Jackson was apparently dead. Mr. Lott then noticed "something move." He "pushed the closet door back some more, and there was Tyranny lying right next to him on a pillow in a puddle of blood." "She started crying, and I grabbed her, . . . she said, 'I told my daddy I had to go to the bathroom, but he didn't say nothing,' you know. And she had urinated on herself and stuff, you know." Mr. Lott then telephoned the police and his mother. At this time, Mr. Lott had not located his sister, Tensia Jackson.

Memphis Police Officer James Grigsby arrived at the Millbranch Park apartment of Thomas and Tensia Jackson at 4:30 a.m. Upon entering the apartment, Officer Grigsby confirmed that the kitchen door had been kicked in. The body of Thomas Jackson was found "in the baby's bedroom closet, almost in a squatting position." "[Mr. Jackson] was apparently dead from a gunshot wound." Officer Grigsby next went into the master bedroom. In the bathroom, "[he] found Mrs. Jackson lying

[1] Essentially the same proof was admitted at the resentencing hearing as was introduced during the original penalty hearing. *See* Carter, 988 S.W.2d at 147-48.

in the bathroom naked from the waist down, apparently dead from a gunshot wound."

In May 1993, Officer Robert G. Moore was assigned to the Crime-Scene Bureau of the Memphis Police Department. On May 28, 1993, Officer Moore was called to the scene at 3584 Millbranch, Apartment No. 4, the residence of Thomas and Tensia Jackson. He confirmed the location and wounds of the victims and testified that he observed a "knife on the bed . . . in the master bedroom."

Captain Mike Houston of the Memphis Police Department testified that, after receiving a tip implicating the Defendant Carter in the murders of the Jacksons, he arrested Preston Carter for the murders of Thomas and Tensia Jackson on May 28, 1993, at 10:15 p.m. At the time of his arrest, the twenty-three-year-old Carter informed Captain Houston that he had an eleventh-grade education and was working toward earning his GED. Defendant Carter read a consent-to-search form and signed the form at 10:20 p.m. Captain Houston recalled that Defendant Carter did not appear to be under the influence of any drugs or alcohol at the time. The Defendant acted calm; "he never raised his voice, never hollered, never screamed - polite, never did anything out of the way." Upon searching the apartment, officers discovered "[a]n Ithaca 12-gauge, sawed-off, double-barrel shotgun." Two spent shells were in the shotgun. The officers also seized clothing worn by Defendant Carter during the double homicides. Defendant Carter was advised of his rights, and at 11:30 p.m. Captain Houston transported Carter to the homicide office. After being again advised of his rights, Defendant Carter "admitted that he was responsible for killing two people down in Whitehaven and that the shotgun that we had was the one that he used to shoot two people with." In a subsequent statement, Defendant Carter related:

> This past Friday evening, a guy I know named Tony told me that the guy he was buying his dope from, it was real easy for us to go in there, stick him up for the dope and the money.
>
> So after he told us about that, we asked him where did the guy stay. So he said, 'Well, I can show you.' So Tony took me and Louis down there on Millbranch to the apartments. That's the same place where the people got killed. So I told him we couldn't get in these apartments without some kind of a code. I'm talking about the gate in the parking lot. So he punched in the code – was 0377- and got the gate open.
>
> Then we went on around to the front of the apartments, and he pointed out where they lived. And all I had to do was just knock on the door, and this girl would open the door to just anyone who said they wanted to buy some. So we left after he had showed [sic] us where to come to and gave us the code.
>
> So about 12:30 a.m. Friday morning, May 28, me, Louis Anderson, and Darnell Ivory, went back over there to where the people later got killed. Louis Anderson knocked on the door first. So when the guy came to the door, he asked who was it, and Louis said he wanted to get something. The guy said, 'I don't have anything. What you talking about?' Then Louis said, 'Your brother, Corey, sent me over her[e]

to get something.' And after that – after the guy didn't open up the door - he was talking through the door with it closed.

First, I had the sawed-off in my hands, and I thought we had the wrong door, and I started to step down, and then Louis Anderson said, 'F–k it. Hand me the shotgun and kick the door in.' After I kicked the door in, Louis went straight in and went straight to the back. So I asked the guy where was the money, and he said he didn't know what we was [sic] talking about. Then Louis told the man, 'Yes, you do. Get over in the closet.' Before the guy got in the closet, he told Louis his wife was in the bathroom, and Louis told him to tell her to come on out.

After that, Louis went on into where the wife . . . was in the master bedroom. After I was searching around in the living room, kitchen, looking for money or drugs, and didn't find any, I went back to the back of the room where Louis and the guy's wife was [sic]. As I was going in there, I told him to give me the sawed-off. And when I walked in, Louis was on top of the girl having sex with her on the bed, and the sawed-off shotgun was lying beside Louis on the bed, and I picked it up.

And then – so I came back out to search again around the house to see could I find anything. And while my back was turned – while I was searching, the owner of the house, he tried to come at me, and I shot him.

Then after that I went into the room where Louis was, and by that time, I was a little hysterical from what had just happened, and she was standing in the bathroom door still undressed, and Louis was pulling his pants back up, and he started asking her – Louis started asking her where was the money, and she kept hollering about she didn't know anything about any money.

Then she started hollering and screaming real loud. And I was already upset 'cause I had to shoot the guy. And she went on hollering and screaming, and Louis got to asking her again about the money. Then she said she didn't know, and so Louis picked up her little silver jewelry box and threw it at her and told her to shut up and stop doing all that hollering. And she was still doing all that screaming and hollering, so I shot her, too, in the bathroom. She had backed up all the way in there, and before I shot here, she was begging and pleading me, 'Please don't shoot me. I'll do anything. Please don't shoot.' But I just turned away from – pointed the gun at her and shot her. It looked like it hit her up side her head somewhere.

As we were walking out, Louis reached in the closet in the master bedroom and took some stuff out. . . . When we got downstairs, Ivory was sitting in the back seat of the car – a Cadillac we had stole. When I got close to my house, I got out of the car and walked over to my cousin's house and left the sawed-off with my cousin's boyfriend. . . . I told them to put it up for me, and he must have brought it back to my apartment

yesterday morning . . .

Defendant Carter later admitted to the officers that the victim, Thomas Jackson, "ran back in the kid's room, and I ran in the closet, and that's where he was when I shot him." Defendant Carter also admitted that the victims' three-year-old daughter was in the apartment at the time of the homicides, however, no harm was done to the child. Captain Houston described Defendant Carter's attitude during the "five hours and seventeen minutes" that he had contact with him as cooperative, "calm and cool."

Evidence was admitted revealing that on October 20, 1994, Defendant Carter was convicted in the Shelby County Criminal Court of aggravated robbery. The offense was committed on March 9, 1993, less than three months prior to the double homicide. The indictment contained information indicating that a shotgun was used to perpetrate the aggravated robbery.

Dr. O.C. Smith performed the autopsies on both Thomas and Tensia Jackson. Dr. Smith concluded that Thomas Jackson "died as a result of a shotgun wound to the head; that wound was at a contact range which [sic] the muzzle of the weapon was up against the skin at the time it was discharged." Specifically, "the shotgun wound was above his right eye just inside the hairline." Dr. Smith opined that Mr. Jackson's death was instantaneous. Tensia Jackson, similarly, died as a result of "a shotgun wound to the head." "This entered through her left eye and destroyed the orbit." Dr. Smith concluded that Mrs. Jackson's death was also instantaneous. Both Thomas and Tensia Jackson's blood tested negative for drugs and/or alcohol.

Betty Mister, the mother of Tensia Jackson, testified that she and her husband, Leb, have custody of the Jacksons' daughter, Tyranny, now ten-years-old. Tyranny receives Social Security in the amount of $485.00 per month. The child also attends Harding Academy, which costs approximately $ 5,000.00 per year. Betty Mister and her husband provide for Tyranny's tuition. She added that Tyranny misses her parents very much and states that "she wishes that her[] mama and daddy was here so they could see the girl she is now" and that they would be proud of her.

Tensia Jackson was Betty Mister's firstborn child. Betty Mister related that she and her daughter were "real close" and that Thomas Jackson was "like a son of mine." Betty Mister stated that Tensia and Thomas had been high school sweethearts. She testified that Tensia was one of four children in the family and had a large extended family. Ms. Mister related that Tensia was especially close with her brother Derrick, the second born child. Her death has been hard on all of the children. Describing their lives since Tensia and Thomas' deaths, Betty Mister stated:

> It's like I said – it's like holiday times, it's just a void without Thomas and Tensia being with the family. And our home, it's like every- Tensia and Thomas was real close. They was just – when you saw one, you saw the whole family – you saw the three. And every Saturday, Tensia and Thomas and Tyranny would always come over to our house. So it's like, on Saturdays and days when, you know, you expect to see them, and you don't see them anymore because, you know, they are not there. So it's just like a – there's a void there. And the holidays, you know, Tensia and Thomas always would be the first somebody to come over when we have dinners and

things. And Tensia would always come over and help make the slaw. And you know, she's not there for that.

And Thomas always came over to help Leb with the charcoal and all that kind of stuff. You know, they are missing very much in our lives.

Thomas Jackson's brother, Kenneth, testified that Thomas and Tensia had met in junior high and "were just in love with one another." He stated that he and his brother shared a very close relationship and were co-workers at Seessel's Bakery. The two brothers carpooled to work every morning. Kenneth Jackson was present when his brother and sister-in-law's bodies were discovered. In remembering his brother, Kenneth stated:

> Thomas was a beautiful person. He never . . . been to jail, never been to a club. Like I said, he was like a celebrity, I mean, to a lot of people, too, because he was a good person – I mean a good-hearted person – I mean always wanted to keep you with a smile on your face. And his main priority was his wife and his little girl. I mean we could probably go shoot ball at the gym. I would probably leave my kids with their mom; but Tyranny, she got to go and she got to go with us.

This concluded the State's proof.

As mitigation evidence, Defendant Carter presented the testimony of Dr. Joseph Charles Angelillo, a clinical psychologist. Prior to the resentencing hearing, Dr. Angelillo interviewed Defendant Carter. Before interviewing Defendant Carter, Dr. Angelillo reviewed various background materials on the Defendant, including interviews with family members and friends and the Defendant's records from the Shelby County School System. Dr. Angelillo administered three tests to the Defendant.

The first test, the Wechsler Adult Intelligence Scale, commonly referred to as an I.Q. test, measures an individual's aptitude. From this test, Dr. Angelillo discerned that Defendant Carter's "full-scale I.Q. was in the borderline range, and the verbal I.Q. was in the lower end of the below-average range. The performance I.Q. was also in the borderline range." He explained that the average range was from 90 to 109; scores between 80 and 89 would be below average range. "Borderline" is used to refer to borderline retardation. Scores below "borderline" would be mild retardation. Dr. Angelillo reported that Defendant Carter's full-scale I.Q. was 78.

The second test, the Woodcock Johnson Test of Achievement, measures what a person knows, not what that person is capable of knowing. In other words, it measures your current knowledge and not your potential. The test is comprised of multiple sub-tests involving areas of mathematics, reading, passage comprehension, science, humanities, grammar, etc. The Defendant was given two tests in mathematics and two tests in the reading area. On the mathematical calculation test, Defendant Carter's "score was percentile rank of twenty-four, which means his score would have been higher than twenty-four percent of the people, corresponding to a grade level of 7.3." In applied mathematics, Defendant Carter's percentile rank was seven, or a grade equivalency

of 5.8. The two mathematics tests combined corresponded to twelfth percentile, or a grade equivalent of 6.6. The first test in reading involved "encoding." Dr. Angelillo explained, "It's actually quite simple. You've just got to read a bunch of words. The words get more difficult as it goes along, so it really taps your ability to sound out the words." Defendant Carter performed in the 9th percentile, or a grade equivalent of 7.6. The second reading test involved passage comprehension, *i.e.*, passages are a couple of sentences long, you've got to put the word in that goes there, it shows you are understanding what you've read. Defendant Carter scored in the twenty-third percentile, or a grade equivalent of 11. The two reading tests combines corresponded to fifteenth percentile, or a grade equivalent of seven.

The final test administered by Dr. Angelillo was the Milan Clinical Multi Axial Inventory, Third Edition (MCM-MCMI). The MCM-MCMI is basically a personality test consisting of 175 true and false answers. According to Dr. Angelillo, Defendant Carter's tests results revealed that "he was experiencing some anxiety." Specifically, the diagnosis was "generalized-anxiety disorder." "Generalized-anxiety disorder is a - the most prominent feature is anxiety - fear, worry, trepidation. There's also symatic [or physical] symptoms that are common - like palpitations, rapid heartbeat, upset stomach, diarrhea." The test also indicated the following personality traits: obsessive-compulsive personality traits; histrionic personality features, and schizotypal personality features. Dr. Angelillo explained the features of the personality traits, beginning with the "obsessive-compulsive personality traits":

> Obsession means a thought that a person has that kind of runs through their mind over and over again. And compulsive means that they're driven to perform a certain action. The difference between the personality trait in the diagnosis of an obsessive-compulsive disorder is this is a part of the individual's makeup. It's a developmental characteristic. . . . Tony Randall, in "The Odd Couple," would be a good example of an obsessive-compulsive person.
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> Histrionic is kind of dramatic, shallow, difficulty with empathy – that is understanding other people's feelings.
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> Schizotypal is a very rare personality disorder. It is seen – behaviors or characteristics of individuals who prefer solitude and have somewhat eccentric beliefs and sometimes eccentric behaviors - fantasies- that kind of thing. It's views as a – it's not a benign disorder.

On cross-examination, Dr. Angelillo stated that he only spent approximately seven hours interviewing Defendant Carter. He also conceded that, although Defendant Carter "was not the smartest guy around," he was not mentally retarded and was fully capable of understanding what was going on around him. Furthermore, regarding his diagnosis for "generalized-anxiety disorder," Dr. Angelillo admitted that this result would be consistent with someone who was in prison for killing two people.

In his own behalf, Defendant Carter testified that he was twenty-nine-years-old and is the father of three children, ages seven, eight, and nine. He conceded that a month prior to the murders

of Tensia and Thomas Jackson he had been involved in a robbery during which he used a gun. Defendant Carter explained that, although not an excuse for his actions, during this time he "was living a lifestyle of just drinking and using drugs and taking things that I wanted." Carter's employment in the landscaping business was conducive to his lifestyle as he explained he did not work regular hours, he went to work when he wanted to and stayed at home when he wanted. On the date of the murders, Carter stated that he had been "drinking and using drugs all day." He admitted that after he, Anderson and Ivory decided to commit the robbery, he returned to his apartment to retrieve the sawed-off shotgun. Carter also conceded that the weapon was purchased for "the lifestyle that I was living and the things I was doing. . . ." He stated that the plan was to rob drug dealers, but when he realized that they had the wrong apartment, the plan was not thwarted because they believed they could still obtain money.

Defendant Carter testified, "I know I have to be punished for what I did." However, he wants to live because "[m]aybe I can help somebody – prevent the things that I did- - stop them from doing the things that I did." He also asked for forgiveness from the family of his victims. Defendant Carter stated that, during his seven years on death row, he has learned "[h]ow precious life is." He has learned "to respect other people and respect authority and learned to - how to love and [have] compassion toward people." He "thinks about [Thomas and Tensia Jackson] all the time." Defendant Carter continued to explain his typical day on death row. He stated that he works at Track Well on computers doing data processing. He is permitted outside "a couple hours a day." Other than this time outside and his time spent at work, he is in his cell.

Since Defendant Carter has been incarcerated, he has not had any disciplinary problems. He has attempted twice to earn his G.E.D., but "missed it by a point." Defendant Carter also "write[s] poetry a lot." He attends Christian worship twice a week. Defendant Carter has also changed his name to Akil Jahi on January 4, 1996. He explained that the name Akil means "one who uses reason" and Jahi means "dignity." He believes that he is no longer "Preston Carter." On March 27, 1999, Defendant Carter married; his wife visits him on a weekly basis.

On cross-examination, Defendant Carter admitted to the following prior convictions: aggravated robbery, 1994, and breaking into and burglarizing a vehicle, 1991. He conceded that, at the time of the homicides, he was on probation for a felony offense.

Brenda K. Morrison, the Inmate Relations Coordinator at Riverbend Maximum Security Institution, testified that Defendant Carter is classified as Level A. "Level A" is the least secure level at the death row facility. She stated that Defendant Carter reached this status in the "minimum amount of time." Ms. Morrison confirmed that Defendant Carter has not had any disciplinary write ups since being incarcerated. She described Defendant Carter as "very helpful. He volunteers to do jobs in other areas where we're maybe short, or if an inmate is not there or ill or something, he will volunteer to help. I've asked him, on several occasions, to help do different things, and I have never had any problems with him." Since his incarceration at Riverbend, Defendant Carter has entered the "arts and crafts program." Ms. Morrison concluded her testimony by stating that she believed Defendant Carter "would not have a problem fitting in with the general [prison] population [if a sentence of life was returned.]"

Cheryl Donaldson, the unit manager at Riverbend Maximum Security Institution, was previously a counselor for Unit 2, death row inmates, at Riverbend. She explained that she counseled these inmates once a month, although she was accessible to the inmates at anytime. While a counselor, Ms. Donaldson met Defendant Carter. She explained that she had daily interaction with Defendant Carter as he "worked for us in E pod." Ms. Donaldson testified that, through his actions, Defendant Carter demonstrated that he was trustworthy. An ex-smoker, Ms. Donaldson assisted Defendant Carter in his effort to stop smoking. She concluded her testimony by stating that, while incarcerated, Defendant Carter has never exhibited any violent tendencies.

The final mitigation witness presented was Melita Padilla, an ordained United Methodist minister. Ms. Padilla testified that she met Defendant Carter in January 1996 while she was a student at Vanderbilt Divinity School. She explained that she volunteered for a program where prisoners who desired visitors would make an initial request to the organization. Ms. Padilla initially began correspondence with Defendant Carter through written letters, then she began visiting him at the prison. In describing a typical meeting with the Defendant, Ms. Padilla stated:

> I'd ask him about his family, his children, how his week had been, how his day had been. I could usually tell if it hadn't been a good week. He's asked me about mine. . . . And he'd ask about my daughter, and we talked about the church I was appointed to did not want a woman pastor, and my first year was terrible. And Akil [Preston Carter] . . . [would] write me letters of poetry, and he makes cards and draws things.

She described his personality:

> . . . he's the same age as my daughter, so some of the same issues of not being able to handle things that come your way – impatience some anger. . . .[T]here were issues of trying to deal with people in the system. . . people who were incarcerated who push - who want to fight. I watched him grow over the four years into someone who could - who could handle that better knowing that. . . .

During the period of their visitations, Ms. Padilla watched Defendant Carter "grow as a person," "grow spiritually," and grow intellectually. Ms. Padilla related that through her visits with Defendant Carter, the two have become friends. To exemplify her testimony, Ms. Padilla read into evidence a letter written to her by the Defendant in which he expressed his gratitude to her for teaching him how to love himself and others.

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances:

> (1) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. The State is relying upon the crime(s) of Aggravated Robbery, which is (are) a felony involving the use of violence to the person.
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> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.

See generally Tenn. Code Ann. § 39-13-204(i)(2), (5) (1991).

The jury was also instructed that it should consider any mitigating circumstances supported by the proof. The trial court instructed, but did not limit, the jury as to all mitigating circumstances delineated in section 39-13-204(j) (1-9).

Following submission of the instructions, the jury retired to consider its verdict. After deliberations, the jury found that the State had proven the aggravating circumstances (i)(2) and (i)(5) beyond a reasonable doubt. The jury further found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. In accordance with these findings, the jury sentenced Defendant Carter to death for the murders of Thomas and Tensia Jackson.

I. Introduction of Color Photographs of Corpses

During the sentencing phase, the State was permitted, over objection, to introduce photographs of Thomas Jackson and Tensia Jackson taken at the crime scene.[2] One photograph depicts the victim, Thomas Jackson, sitting in a crouched position in the closet with blood and part of his brain hanging out. A second photograph shows Tensia Jackson laying prone behind the commode with a gunshot wound to her left eye. The third photograph again depicts Tensia Jackson lying on the bathroom floor unclothed from the waist down and with a gunshot wound to her left eye. At trial, Defendant Carter objected to the admission of these photographs, stating that the photographs "are objectionable and improper, and they are highly inflammatory. . . ." In admitting the first two photographs, the trial court noted that these photographs were admitted during Defendant Carter's first sentencing hearing and the same objection was made. The trial court overruled the objection and reinstated its prior ruling.

This Court addressed this identical issue in Appellant's initial appeal. In concluding that the trial court did not err in admitting the photographs, this Court held:

> In this case, the trial court spent an extended period of time listening to the arguments of counsel regarding the admissibility of the photographs the State of Tennessee wanted to introduce. The court spent additional time carefully viewing these photographs. The court excluded some of the photographs. The balance of the photographs were introduced as evidence during the sentencing hearing.
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> This Court has viewed the photographs which are attacked in this issue. They depict the victims as they were found by the police officers who were called to the scene. The trial court did not abuse its discretion in admitting these photographs because the photographs were admissible as background information regarding the commission of the crimes in question. In addition, the photographs establish where the victims were shot.

State v. Preston Carter, No. 02C01-9601-CR-00002 (Tenn. Crim. App. at Jackson, May 5, 1997),

[2] As recognized by the State, Defendant Carter also argues that the trial court erred by permitting the introduction of photographs taken of the victims at the morgue. The record contains no such photographs, and there is no indication in the record that photographs from the morgue were shown to the jury during the sentencing hearing.

aff'd in part, rev'd in part, and remanded by, 988 S.W.2d at 145.

The State, citing the doctrine of "the law of the case," asserts that this Court is bound by its earlier ruling as to the admissibility of the challenged photographs. Our supreme court recently applied the principles of the "law of the case" doctrine in State v. Jefferson, 31 S.W.3d 558 (Tenn. 2000), a case involving the resentencing of the defendant on his conviction for premeditated first-degree murder. In finding that the "law of the case" doctrine barred the trial court from granting Defendant Jefferson's motion for new trial, the court relied upon principles stated in Memphis Publg. Co. v. Tennessee Petroleum Underground Storage Tank Bd., 975 S.W.2d 303 (Tenn. 1998). As in Jefferson, we conclude that the following principles quoted from Memphis Publg. Co. govern the outcome in the present case:

> The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. The doctrine does not apply to dicta.
>
> The law of the case doctrine is not a constitutional mandate nor a limitation on the power of a court. Rather, it is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts.
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> Therefore, **when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand**. There are limited circumstances which may justify reconsideration of an issue which was [an] issue decided in a prior appeal: (1) the evidence offered at a trial or hearing after remand was substantially different from the evidence in the initial proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal.

Jefferson, 31 S.W.3d at 560-61 (quoting Memphis Publg. Co., 975 S.W.2d at 306 (internal citations omitted)) (emphasis added).

The prior decision of this Court regarding the photographs' admissibility is not contrary to now existing law. Finally, in determining whether the "prior ruling was clearly erroneous and would result in manifest injustice if allowed to stand," this Court must make two determinations. *See*

Jefferson, 31 S.W.3d at 561. First, the defendant must show that the prior decision was clearly erroneous. Id. If the defendant succeeds in this showing, he or she must then prove that the clearly erroneous decision "would result in a manifest injustice if allowed to stand." Id. In resolving these issues, we turn to case law governing the admissibility of photographs.

Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases. *See* State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies within the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." Id.; *see also* State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98 (2000). Notwithstanding, a photograph must be found relevant to an issue that the jury must decide before it may be admitted into evidence. *See* State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1988), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467 (1999); State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); *see also* Tenn. R. Evid. 401. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. Additionally, the admissibility of evidence at a capital sentencing hearing is controlled by section 39-13-204(c), Tennessee Code Annotated, which allows the admission of any evidence "the court deems relevant to the punishment . . . regardless of its admissibility under the rules of evidence." *See* Hall, 8 S.W.3d at 601. In essence, section 39-13-204(c) permits introduction of any evidence relevant to sentencing in a capital case, subject only "to a defendant's opportunity to rebut any hearsay statements and to constitutional limitations." *See* Hall, 8 S.W.3d at 601.

Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. Banks, 564 S.W.2d at 950-51. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. Vann, 976 S.W.2d at 103; Braden, 867 S.W.2d at 758; *see also* Tenn. R. Evid. 403. In this respect, we note that photographs of a murder victim are prejudicial by their very nature. However, prejudicial evidence is not *per se* excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather, what is excluded is evidence which is "unfairly prejudicial," in other words, that evidence which has "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily an emotional one." *See* Vann, 976 S.W.2d at 103 (citations omitted).

Defendant Carter entered guilty pleas to the two counts of murder in the first degree. Thus, the jury was without benefit of the proof normally introduced during the guilt phase hearing relating the circumstances of the offense. In such cases, our supreme court has advised that, although the proof need not be as detailed as that offered at a guilt-innocence phase of the trial, some proof is essential to ensure both individualized sentencing by the jury and effective comparative proportionality review by the appellate courts. *See* State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994), *cert. denied*, 513 U.S. 1114, 115 S. Ct. 909 (1995)(rejecting a defendant's claim that proof regarding the circumstances of the offense is not admissible at resentencing hearings and holding that such proof is necessary to provide individualized sentencing); *see also* State v. Smith, 993 S.W.2d 6, 44 (Tenn.), *cert. denied*, 528 U.S. 1023, 120 S. Ct. 536 (1999); State v. Odom, 928 S.W.2d 18,

31 (Tenn. 1996). Moreover, the purpose for introducing photographs into evidence is to assist the trier of fact. As a general rule, the introduction of photographs helps the trier of fact see for itself what is depicted in the photograph. State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1997). The photographs in the present case show the position of the victims' bodies where the homicides occurred and relate the circumstances surrounding the offense. They illustrate the execution-style murders of the Defendant's helpless victims. Additionally, they depict the crime scene, clarifying the testimony of the police officers about what they found, and illustrate the testimony of the medical examiner as to the nature and extent of the victims' wounds. Their admission was appropriate under the criteria set by the court in Banks, *supra*. Accordingly, this Court's prior ruling that the photographs were admissible as background information and illustrative of the nature of the victims' wounds was not erroneous. Thus, Defendant Carter fails to make a sufficient showing that the prior ruling was clearly erroneous.

For these reasons, we find that this Court's prior decision regarding the admissibility of the first two photographs governs the present appeal. The law of the case doctrine bars Defendant Carter's objection to the admissibility of these photographs.

The third photograph, depicting Tensia Jackson lying on the bathroom floor unclothed from the waist down, was not introduced in the prior trial. A review of the record reveals that the trial court exercised an abundance of caution with regard to the relevancy of the rape of Tensia Jackson at the first sentencing hearing. As a result, the court declined to admit a photograph such as the one at issue because of its tendency to highlight the rape. On appeal, however, this Court specifically addressed the relevancy of the rape of Tensia Jackson and held that it "was a relevant circumstance which, along with other relevant circumstances, established the severe mental pain inflicted by the defendant . . . ." Armed with this Court's holding on that issue, the state asked the trial court to reconsider its prior decision regarding the admissibility of this photograph.

The trial court reviewed the admissibility of the photograph anew and found that photograph was relevant and its probative value was not substantially outweighed by the prejudicial effect. In support of its finding, the trial court stated that the photograph showed "the position of the body, as well as the fact that [the victim] was unclothed, corroborates the rape. It's also probative, the court feels like, on the question of the mental torture in the case."

We have reviewed the photograph and find no error in the trial court's findings. Based upon the law governing the admissibility of photographs, discussed *supra*, and our previous conclusion regarding the relevancy of the rape, we conclude that the photograph was admissible as evidence of the circumstances of the crimes. Having reviewed the photograph, we note that the portion of the photograph depicting the unclothed part of the victim's body is obscured by a shadow, and is, therefore, not unfairly prejudicial. This challenge is without merit.

II. Introduction of Victim Impact Testimony

While Defendant Carter acknowledges that the United States Supreme Court has held that the Eighth Amendment erects no *per se* bar to the admission of certain types of victim impact

evidence during the sentencing phase of a capital case, he asserts that the introduction of victim impact evidence is not mandated nor is it admissible in all capital cases. *See* Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991). Specifically, he asserts that, under Tennessee's statutory capital sentencing scheme, victim impact evidence is irrelevant. This exact argument was heard and rejected by the Tennessee Supreme Court in State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998), *cert. denied*, 526 U.S. 1052, 119 S. Ct. 1359 (1999). In reaching its conclusion regarding the admissibility of victim impact evidence, our supreme court held:

> The language of the statute is broad. On its face the statute [39-13-204(c)] appears to authorize the admission of any reliable evidence that is relevant to punishment, with the only requirement being that the defendant be accorded a fair opportunity to rebut hearsay statements. The statute, consistent with constitutional mandate, permits admission of all relevant mitigating evidence, whether or not the category of mitigation is listed in the statutory scheme. State v. Cazes, 875 S.W.2d 253, 266 (Tenn. 1994) (discussing McKoy v. North Carolina, 494 U.S. 433, 442, 110 S. Ct. 1227, 1233 (1990) and Mills v. Maryland, 486 U.S. 367, 375, 108 S. Ct. 1860, 1865-66 (1988)). However, this Court repeatedly has held that the State may not rely upon nonstatutory aggravating circumstances to support imposition of the death penalty, but is limited to those aggravating circumstances listed in the statute. State v. Thompson, 768 S.W.2d 239, 251 (Tenn. 1989); Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979). Indeed, we stated in Cozzolino that "evidence is relevant to the punishment, and thus admissible, only if it is relevant to an aggravating circumstance, or to a mitigating factor raised by the defendant." Id. at 768.
>
> Nonetheless, that general statement, upon which the defendant in this case relies to support his contention that victim impact evidence is not admissible, has not been literally applied to limit admission of evidence at a capital sentencing hearing. Even in Cozzolino, the case in which the rule was announced, the jurors heard proof at the sentencing hearing about how the crime had been committed which was not necessarily relevant to an aggravating circumstance. Moreover, in several subsequent decisions we have expressly recognized that a sentencing jury must be permitted to hear evidence about the nature and circumstances of the crime even though the proof is not necessarily related to a statutory aggravating circumstance. State v. Harris, 919 S.W.2d 323, 331 (Tenn. 1996); State v. Teague, 897 S.W.2d 248, 251 (Tenn. 1995); Nichols, 877 S.W.2d at 731; State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994)(citing cases). Indeed, we have recognized that evidence carefully limited to allow an "individualized sentencing determination" based upon the defendant's character and the circumstances of the crime is constitutionally required. Nichols, 877 S.W.2d at 731. **We have also opined that once a capital sentencing jury finds that a defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment to the offense and the individual defendant**. Nichols, 877 S.W.2d at 731 (citing cases). **In our view, the impact of the crime on the victim's immediate family is one of those myriad factors encompassed within the statutory language nature and circumstances**

> **of the crime. To conclude otherwise would be equivalent to divorcing the defendant from the crime he or she has committed. As the United States Supreme Court recognized, a defendant is entitled to individualized consideration, but that consideration is not to occur "wholly apart" from the crime for which he or she has been convicted**. Payne, 501 U.S. at 822, 111 S. Ct. at 2607.
>
> The Tennessee statute delineates a procedure which enables the sentencing jury to be informed about the presence of statutory aggravating circumstances, the presence of mitigating circumstances, and the nature and circumstances of the crime. **The statute allows the sentencing jury to be reminded "that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family**." Payne, 501 U.S. at 825, 111 S. Ct. at 2608 (internal citations and quotations omitted). As this Court emphasized in its decision in Payne, **it would be "an affront to the civilized members of the human race" to allow unlimited mitigation proof at sentencing in a capital case, but completely preclude proof of the specific harm resulting from the homicide**. Accordingly, the defendant's claim that victim impact evidence is not admissible under the Tennessee capital sentencing statute is without merit.

Nesbit, 978 S.W.2d at 890 (emphasis added). Defendant Carter essentially asks this Court to trespass upon the authority of our supreme court and overrule its decision in Nesbit. We decline Defendant Carter's invitation to do so.

Defendant Carter additionally asserts that the introduction of victim impact evidence pursuant to the dictates of State v. Nesbit is inapplicable because the crimes for which he was convicted occurred prior to the supreme court's decision in Nesbit. This argument is advanced notwithstanding the fact that the statute reviewed by our supreme court in Nesbit is the same statute applicable in this case. *Compare* Tenn. Code Ann. § 39-13-204(c) (1998 Supp.) (amending statute to specifically permit victim impact testimony).

In essence, Defendant Carter contends that the application of State v. Nesbit in his case violates his right to be free from *ex post facto* laws. *See generally* Tenn. Const. Art. I, § 11. This identical claim was recently rejected by this Court in State v. Paul Dennis Reid, Jr., No. M1999-00803-CCA-R3-DD (Tenn. Crim. App. at Nashville, May 31, 2001). In declining to find that Nesbit operates *ex post facto*, this Court held:

> An *ex post facto* law within the meaning of the federal and state constitutions has been defined as one that
>
> > makes an action done before the passing of the law, and which was innocent when done criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. **Fourth, every law that alters the legal rules of**

evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Rogers, 992 S.W.2d at 401-402 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *see also* State v. Pearson, 858 S.W.2d 879, 881 (Tenn. 1993); Miller v. State, 584 S.W.2d 758, 761 (Tenn. 1979) (adopting the categories identified in Calder and stating that "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage" constitutes an *ex post facto* law)) (emphasis added); *see also* Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 1627 (2000); State v. Bragan, 920 S.W.2d 227, 241 (Tenn. Crim. App. 1995). An *ex post facto* law contains two critical elements: (1) the law must apply to events occurring before its enactment and (2) it must disadvantage the offender affected by it. *See* State v. Ricci, 914 S.W.2d 475, 480 (Tenn. 1996); *see generally* State v. Rickman, 972 S.W.2d 687, 693 (Tenn. Crim. App. 1997).

The rule announced in State v. Nesbit is neither an unexpected nor unforeseen judicial construction of a principle of criminal law. As the Nesbit court acknowledged, prior to the Nesbit decision, evidence about the nature and circumstances of the crime was admissible in a capital sentencing hearing regardless of the fact that "the proof is not necessarily related to a statutory aggravating circumstance." Nesbit, 978 S.W.2d at 890 (citing Harris, 919 S.W.2d at 331; Teague, 897 S.W.2d at 251; Nichols, 877 S.W.2d at 731; Bigbee, 885 S.W.2d at 813). The rule announced in Nesbit merely clarified existing practice in admitting victim impact testimony and established specific guidelines to be followed in admitting such testimony. Moreover, the United States Supreme Court has consistently held that laws which change a rule of evidence, but which do not increase the punishment nor change the elements of the offense or the ultimate facts necessary to establish guilt, but only remove existing restrictions on the competency of certain classes of evidence or of persons as witnesses do not constitute ex post facto laws. *See* Carmell v. Texas, 529 U.S. at ----, 120 S. Ct. at 1632-1633; Bragan, 920 S.W.2d at 241 (citing Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922 (1898); Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202 (1884)). Indeed, laws which change rules of procedure but which do not affect any substantial right of a defendant are not *ex post facto* laws. Bragan, 920 S.W.2d at 241. Victim impact testimony does not reduce the quantum of evidence necessary to return a death sentence. Victim impact testimony does not eliminate the necessity of finding the presence of a statutory aggravating circumstance(s) nor does it eliminate the necessity of finding that the aggravator(s) outweigh any applicable mitigating circumstances. Finally, victim impact testimony does not lower the burden of the State's proof. For these reasons, Nesbit 's application to the Appellant's case does not violate the Appellant's right to be free from *ex post facto* laws. Additionally, we note that, although the offenses in the present case occurred prior to the court's decision in Nesbit, it is undisputed that the Nesbit ruling was established prior to the Appellant's trial. *See generally* State v. Pilkey, 776 S.W.2d 943, 945 (Tenn. 1989), *cert. denied*, 494 U.S. 1046, 110 S. Ct.

> 1510 (1990) (trial occurred after effective date of statute authorizing use of *ex parte* videotaped statement of child victim, thus, no *ex post facto* claim). This claim is without merit.

State v. Paul Dennis Reid, Jr., No. M1999-00803-CCA-R3-DD; *cf.* Neill v. Gibson, 263 F.3d 1184, 1190-91 (10th Cir. 2001) (state statute permitting admission of victim impact evidence during capital sentencing proceeding to retrial for offenses committed prior to statute's enactment does not constitute *ex post facto* law because statute did not change quantum of evidence necessary for State to obtain death sentence). This Court finds no logical basis on which to disagree with the analysis set forth by a prior panel of this Court in State v. Paul Dennis Reid, Jr. This argument is without merit.[3]

III. Restriction on Admission of Mitigating Evidence

As mitigation evidence, Defendant Carter presented the testimony of Pastor Melita Padilla. Pastor Padilla testified that she had been visiting Defendant Carter since January 1996 as part of a prison ministry program. Pastor Padilla visited Defendant Carter and regularly communicated with Defendant Carter through letters. During the time in which she has corresponded with Defendant Carter, Pastor Padilla testified that she has watched him grow spiritually and grow as a person. Pastor Padilla additionally stated that Defendant Carter sent her numerous letters and poetry. She explained that she had brought several of the letters and poems to court. Defense counsel asked Pastor Padilla to "pick out [one] letter that [she] could read to the jury." The State objected to the introduction of the letter on the grounds that "this is rank, self-serving hearsay." The trial court overruled the objection and permitted Pastor Padilla to read the letter into evidence. Defense counsel then attempted to introduce the other letters and poems into evidence, asserting that

> those letters [and poetry] articulate the true feelings of [Defendant Carter] that he is unable to articulate, for whatever reason, when on the stand. The final factor in mitigation is that the jury can consider anything that individual jurors feel to be appropriate for mitigation. Clearly, the most important thought of our client, as expressed in poetry and letters to the person that he has clearly formed the tightest bond to, is relevant to the issues of mitigation.

These documents consisted of the following, as made an exhibit for identification purposes only: three cards containing personal notations to the pastor, scriptural references and poetry; six short writings/poems relating primarily to God's love and grace; and two letters to the pastor expressing gratitude for her friendship and the defendant's love for and "thanks to God." In response to the state's argument that the defendant had already testified and could not be cross-examined concerning the documents, defense counsel conceded the state could recall the defendant to testify.

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[3] Defendant Carter does not challenge the propriety of the victim impact testimony admitted at trial as violative of the Nesbit mandates.

After examining the numerous documents, the trial court made the following findings:

> And the court, first, finds that they are, in fact, hearsay. The court recognizes that the rules of evidence are not applicable with regard to hearsay. The court has examined them for the issue of probative – their probative nature. The court finds they're probative in two aspects:
>
> 1. They're probative in they show that this man has a friend in this lady. But that's not probative to the issue on trial here today.
> 2. Second, they're probative in that they show his religious feelings. Now, certainly during the context of their conversations, this lady should be competent to testify about what religious conversions or religious feelings he has expressed orally to her. And the court thinks that's the best way to go about that other than by these letters, which the court finds are probative only on the question of the nature of his friendship with this witness and his feelings regarding his religion. And I think, since she is a minister, she can be able to relate those feelings better than those letters.
>
> And the court will sustain the objection with regard to the letters and make them an offer of proof. . . .

Defendant Carter now contests the ruling of the trial court, stating that the letters constitute mitigating evidence which is expressly permitted by our legislature.

> In a capital sentencing proceeding,
> evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or of the State of Tennessee.

Tenn. Code Ann. § 39-13-204(c). "This statute expressly exempts evidence adduced in capital sentencing proceedings from the usual evidentiary rules." *See* State v. Sims, 45 S.W.3d 1, 13 (Tenn.), *cert. denied*, _U.S._, 122 S. Ct. 357 (2001) (citing Odom, 928 S.W.2d at 28); *see also* Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999), *cert. denied*, 529 U.S. 1091, 120 S. Ct. 1728 (2000) (rules of evidence do not limit the admissibility of evidence at capital sentencing).

Our supreme court has construed the statute and prior case law decisions to provide "trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence." Sims, 45 S.W.3d at 14; *see also* State v. Stout, 46 S.W.3d 689, 702 (Tenn.), *cert. denied*, _ U.S._, 122 S. Ct. 471 (2001). Indeed, the supreme court has held that "[t]he Rules of Evidence should not

be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant." Sims, 45 S.W.3d at 14. Notwithstanding, the trial courts are not granted unfettered discretion. Id. Constitutional standards require inquiry into reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. Id. Thus, the Rules of Evidence may serve as helpful guides in reaching the determination of admissibility. Id. Additionally, we are cognizant that the admissibility of evidence ultimately is entrusted to the sound discretion of the trial court. *See* State v. Richard Hale Austin, No. W1999-00281-CCA-R3-DD (Tenn. Crim. App. at Jackson, Mar. 6, 2001) (citations omitted). Absent an abuse of that discretion, such rulings will not be reversed on appeal. Id. (citations omitted).

The exclusion of proposed mitigation evidence raises constitutional concerns. The Eighth and Fourteenth Amendments to the United States Constitution require that the sentencer be allowed to consider mitigating evidence. McKoy v. North Carolina, 494 U.S. 433, 442, 110 S. Ct. 1227, 1233, 108 L. Ed. 2d 369 (1990). This includes "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973 (1978). Article I, § 16 of our state constitution also requires that the sentencer not be precluded from considering similar evidence. State v. Odom, 928 S.W.2d 18, 30 (1996). Tennessee Code Annotated section 39-13-204(c) contains a similar requirement.

The exclusion of proper mitigating evidence is constitutional error. *See* Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986). Harmlessness of such error must be established by the state beyond a reasonable doubt. State v. Cauthern, 967 S.W. 2d 726, 739 (Tenn. 1998).

In Cauthern, our supreme court found error in the trial court's refusal to admit a note written to the defendant by his son expressing his love and support. 967 S.W.2d at 738-39. The court rejected the state's argument that the letter was of negligible probative value and was cumulative to other evidence. Id. Nevertheless, the court concluded the error was harmless beyond a reasonable doubt because the essence of the excluded evidence was presented to the jury in other forms. Id. at 739.

We reach a similar conclusion in this case. The proffered correspondence was relevant to the defendant's character and was a "potential basis upon which a juror could decline to impose the death penalty." Id. at 738-39. Nevertheless, the essence of this excluded evidence was presented to the jury through the one letter, which was admitted, and the testimony of the pastor and the defendant himself. We, therefore, conclude that the error was harmless beyond a reasonable doubt.

IV. Sufficiency of (i)(5) Aggravating Circumstance

At the time the murders were committed in the present case, Tennessee Code Annotated

section 39-13-204(i)(5) provided that an aggravating circumstance existed if the murder "was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." "'Torture' is defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *See* State v. Morris, 24 S.W.3d 788, 797 (Tenn. 2000), *cert. denied*, 531 U.S. 1082, 121 S. Ct. 786 (2001) (citing State v. Mann, 959 S.W.2d 503, 511 (Tenn. 1997), *cert. denied*, 524 U.S. 956, 118 S. Ct. 2376 (1998); State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985)). The Defendant contends that the facts in this case fail to establish that the murders involved "torture." In support of this assertion, the Defendant relies on the fact that "[b]oth victims were shot to death by a single shotgun blast to the head." Additionally, Defendant Carter asserts that the state's theory that the "torture" arises from the fact that the victims "worried about whether they would be killed and what would happen to the other" is based purely on speculation and is, therefore, insufficient to support application of the (i)(5) aggravator. In determining the sufficiency of the evidence necessary to uphold a statutory aggravating circumstance, this Court, after reviewing the evidence in the light most favorable to the state, must conclude that any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *See* Nesbit, 978 S.W.2d at 887.

Pursuant to section 39-13-206(c)(1)(B), Tennessee Code Annotated, this Court must determine whether the evidence supporting the jury's finding of an aggravating factor(s) is sufficient. We are cognizant that our supreme court previously found the evidence sufficient to support the application of the (i)(5) aggravating circumstance. *See* Carter, 988 S.W.2d at 150-51. The court acknowledged that physical torture was not present in these murders as both victims were shot once and died instantaneously. Id. at 150. Thus, the court concluded that the "issue facing the Court is whether the evidence supports a finding that the victims suffered mental torture." Id. In finding the existence of "mental torture," our supreme court found:

> The anticipation of physical harm to oneself is torturous. Nesbit, 978 S.W.2d at 886-87; State v. Hodges, 944 S.W.2d 346, 358 (Tenn. 1997), *cert. denied*, 522 U.S. 999, 118 S. Ct. 567 (1997). This mental torment is intensified when a victim either watches or hears a spouse, parent, or child being harmed or killed, or anticipates the harm or killing of that close relative and is helpless to assist. *See* State v. Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (Ariz. 1996), *cert. denied*, 520 U.S. 1231, 117 S. Ct. 1826(1997) (killing is especially cruel when a victim suffers mental anguish by watching or hearing the defendant kill another or while waiting his own fate while parent or spouse is killed); *see also* State v. Gillies, 135 Ariz. 500, 662 P.2d 1007, 1020 (Ariz. 1983) (uncertainty as to ultimate fate relevant to establish cruelty); Dampier v. State, 245 Ga. 882, 268 S.E.2d 349 (Ga. 1980); Hawkins v. State, 891 P.2d 586 (Okla. Crim. App. 1994) (mental suffering includes uncertainty over one's ultimate fate).
>
> The evidence demonstrates that the defendant armed himself with a sawed-off shotgun and went to the Jacksons' apartment in the middle of the night. He kicked in the apartment door and, along with Anderson, demanded money and drugs. They continued to make the demands even though the couple repeatedly said they did not know what the two men were talking about. Although the defendant quickly realized

he and Anderson had the wrong apartment, he pursued the senseless attack on the unsuspecting family.

Mr. Jackson certainly endured mental torture. He was forced to lure his wife out of the safety of the bathroom. He knew the men were violent because the defendant was armed with a shotgun and had kicked in his door. After luring his wife out of the bathroom, she was raped. Although Mr. Jackson was not in the bedroom when the attack on his wife occurred, he surely knew or at least strongly suspected that his wife was being injured or raped because Anderson repeatedly told the defendant to close the bedroom door. Mr. Jackson, who was held at gunpoint, was helpless to assist his wife.

The jury could have reasonably inferred that the child was placed in the closet or entered the closet prior to the shooting of her father because the child's uncle found her beside her dead father. **The jury could even infer that her father tried to protect her in the closet.** Her nightgown was covered with blood. Thus, a jury could find that she was there when the defendant placed the shotgun to Mr. Jackson's head and pulled the trigger.

Mr. Jackson inevitably feared for his daughter's safety during the time the two were in the closet before he was shot. Mr. Jackson feared for the safety of his wife whom he knew was with one of the attackers in another room. Mr. Jackson's anguish over the safety of his family was compounded by fear of what fate he might suffer.

Mrs. Jackson certainly endured mental torture. While she was being raped in the bedroom, she surely wondered what was happening to her husband and daughter in the other part of the apartment. While she was being attacked, Mrs. Jackson would certainly have heard the shotgun blast and wondered if her husband and daughter were both still alive. She would also realize that her own life was at risk because the robbery had escalated into a murderous attack. When the defendant entered the bedroom, she asked what had happened to her husband. She screamed when the men responded only by demanding money. Anderson threw a jewelry box at Mrs. Jackson, and the defendant backed Mrs. Jackson into the small bathroom. As she tried to shield herself with her hands, she certainly thought about her fate and the fate of her husband and daughter. The defendant admitted that in the last moments of her life she begged and pleaded with him not to shoot. She offered to "do anything." The defendant shot Mrs. Jackson at close range.

We find the proof is sufficient to support the jury's finding of mental torture beyond a reasonable doubt.

Carter, 988 S.W.2d at 150-51 (emphasis added). The same facts relied upon by our supreme court in the initial appeal were presented at the resentencing hearing. The law has not been substantially

changed since the initial appeal nor do we find the prior ruling erroneous. Accordingly, we are bound by the prior holding of our supreme court regarding the sufficiency of the (i)(5) evidence. *See* Jefferson, 31 S.W.3d at 560-61. Notwithstanding this conclusion, we would find the evidence sufficient to support the (i)(5) aggravator independent of our supreme court's previous ruling. *See* Tenn. Code Ann. § 39-13-206(c)(1)(B). This issue is without merit.

V. Sufficiency of (i)(2) Aggravating Circumstance

The proof at the resentencing hearing revealed that on May 9, 1993, the Defendant committed an aggravated robbery by use of a deadly weapon, *i.e.*, a shotgun. He was not convicted of this offense until October 20, 1994. Based upon this evidence, the jury found that "the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2). Within his challenge to the evidence establishing this aggravator, Defendant Carter asserts that, because his conviction for the prior violent felony, *i.e.*, aggravated robbery**,** occurred after the commission of the double homicides, the State should have not been permitted to rely upon the (i)(2) aggravator.[4] Our supreme court has repeatedly rejected the Defendant's argument. Specifically, our supreme court has held that "so long as a defendant is **convicted** of a violent felony **prior** to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable." Hodges, 944 S.W.2d at 357 (emphasis in original); *see also* Stout, 46 S.W.3d at Appendix at 719; Nichols, 877 S.W.2d at 736: State v. Caldwell, 671 S.W.2d 459, 465 (Tenn. 1984). We decline the Defendant's invitation to overrule this precedent. Accordingly, this issue is without merit.

VI. Evidence Insufficient to Support Verdict

In his final challenge, Defendant Carter asserts that the evidence presented at the sentencing hearing was insufficient to support his sentences of death. After a thorough review of the record, we have concluded that the evidence is sufficient to support the two statutory aggravating circumstances, i.e., (2) the defendant was previously convicted of a violent felony, and (5) the murder was heinous, atrocious, or cruel in that it involved torture. *See* Tenn. Code Ann. § 39-13-204(i)(2), (5). Additionally, we find that the sentences of death were not imposed in any arbitrary fashion and that the evidence supports the jury's finding that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

VII. Proportionality Review

This Court is required by section 39-13-206(c)(1)(D), Tennessee Code Annotated, and under

[4] The State did not rely on the (i)(2) aggravating circumstance at Defendant Carter's original sentencing hearing. This fact, however, does not preclude the State from relying on new aggravating circumstances at resentencing. *See* Harris, 919 S.W.2d at 331; *see also* Harris, 919 S.W.2d at 332 n. 1 (White, J., dissenting) ("On those rare occasions in which defendant was convicted of a violent felony after the original sentencing hearing but prior to resentencing, I would hold that the state could assert prior violent felony conviction(s) as a new aggravating circumstance under Tennessee Code Annotated Section 39-13-204(i)(2).").

the mandates of State v. Bland, 958 S.W.2d 651, 661-674 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998) to conduct a proportionality review. *See* State v. Bobby G. Godsey, No. E1997-00207-SC-R11-DD (Tenn. at Knoxville, Nov. 29, 2001) (*for publication).* The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "disproportionate to the punishment imposed on others convicted of the same crime." Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 662) (quoting Pulley v. Harris, 465 U.S. 37, 42-43, 104 S. Ct. 871, 875 (1984)). If a case is "'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (citations omitted).

In conducting our proportionality review, this Court must compare the present case with cases involving similar defendants and similar crimes. *See* Stout, 46 S.W.3d at 706 (citation omitted); *see also* Terry v. State, 46 S.W.3d 147, 163 (Tenn. 2001), *cert. denied*, 122 S. Ct. 553, 151 L. Ed. 2d 428 (Nov. 13, 2001) (citations omitted). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. *See* State v. Carruthers, 35 S.W.3d 516, 570 (Tenn. 2000), *cert. denied*, _ U.S._, 121 S. Ct. 2600 (2001) (citations omitted); *see also* State v. Bobby G. Godsey, No. E1997-00207-SC-R11-DD. We begin with the presumption that the sentence of death is proportionate with the crime of first-degree murder. *See* Terry, 46 S.W.3d at 163 (citing State v. Hall, 958 S.W.2d 679, 799 (Tenn. 1997), *cert. denied*, 524 U.S. 941, 118 S. Ct. 2348 (1998)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual defendant.'" Terry, 46 S.W.3d at 163 (citing McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909 (1976))).

Applying this approach, the Court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. *See* Terry, 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered including: (1) the means of death, (2) the manner of death, (3) the motivation for the killing, (4) the place of death, (5) the victim's age, physical condition, and psychological condition, (6) the absence or presence of provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the injury to and effect on non-decedent victims. Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 667); *see also* Terry, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record, (2) age, race, and gender, (3) mental, emotional, and physical condition, (4) role in the murder, (5) cooperation with authorities, (6) level of remorse, (7) knowledge of the victim's helplessness, and (8) potential for rehabilitation. Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." Terry, 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed. *See* State v. Richard Hale Austin, No. W1999-00281-CCA-R3-DD. Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical," but rather, our objective is only to "identify and to invalidate the aberrant

death sentence." Terry, 46 S.W.3d at 164 (citing Bland, 958 S.W.2d at 665).

The circumstances surrounding the murders in light of the relevant and comparative factors reveal that, on Friday, May 28, 1993, at approximately 12:30 a.m., Defendant Carter and his two accomplices, went to the apartment of Thomas and Tensia Jackson with the intention to rob the victims of money and illicit narcotics. After knocking on the Jacksons' apartment door, the men realized that they were at the wrong apartment. Notwithstanding, Carter and Anderson made the decision to rob and terrorize the innocent and unsuspecting Jacksons. When Carter and Anderson's demands for money went unanswered, the two men took out their frustrations on the Jacksons and their property. The Defendant ransacked the apartment looking for money and/or drugs. Thomas Jackson was forced into a closet with his three-year-old daughter. Tensia Jackson, meanwhile, was forced into the master bathroom, where she was raped by Anderson. The Defendant went to the closet where Mr. Jackson had been placed, and there, shot Mr. Jackson point blank with a shotgun just above his right eye. Mr. Jackson's daughter was later found lying next to her dead father, her nightgown splattered with blood. Defendant Carter then found Mrs. Jackson in the bathroom, still unclothed from the preceding rape. Mrs. Jackson pleaded for her life to no avail; Defendant Carter shot her in the head near her left eye. No money was obtained by either Defendant Carter or Anderson from the apartment.

The twenty-four-year-old Defendant confessed to the murders. Proof was presented indicating that Defendant Carter was cooperative with law enforcement officers investigating the murders. Approximately one month prior to the double murders, Defendant Carter used the murder weapon to perpetrate an aggravated robbery. He was convicted of the aggravated robbery in 1994. He is the father of four children and has married since his incarceration at Riverbend. Despite efforts to obtain his GED, the Defendant, an eleventh-grade dropout, has been unable to meet the passing requirements. Expert testimony was introduced to demonstrate that Defendant Carter, although not mentally retarded, had a "borderline" I.Q. Defendant Carter was diagnosed with generalized anxiety disorder, obsessive-compulsive disorder, and histrionic and schizotypal personality features. Additionally, Carter admitted that at the time of the murders he was using drugs and alcohol and was basically leading a life of crime. This is verified by his virtually non-existent employment history. Notwithstanding his prior behavior, Defendant Carter asserts that he has substantially changed since his incarceration. He avers that this is exemplified by the fact that he is a model death-row inmate. Numerous witnesses were presented by the defense to confirm this fact. Additionally, Defendant Carter maintains that he has learned to respect other people and have love and compassion for them. Melita Padilla, an ordained minister, verified Defendant Carter's spiritual and intellectual development.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first-degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. *See, e.g.*, Stout, 46 S.W.3d at 689 (finding (i)(2), (i)(6), and (i)(7) aggravating circumstances and imposing death where twenty-year-old defendant abducted victim from her vehicle and fired single gunshot to victim's head); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000), *cert. denied*, _ U.S. _, 121 S. Ct. 1367 (2001) (finding (i)(2) and (i)(7) aggravating circumstances and imposing death

where defendant shot and robbed sixty-nine-year-old victim); Smith, 993 S.W.2d at 6 (twenty-three-year-old defendant admitted to drinking alcohol and taking drugs prior to robbery and murder of victim and cooperated with authorities, death sentence upheld based upon (i)(2) aggravator); State v. Burns, 979 S.W.2d 276 (Tenn.), *cert. denied*, 523 U.S. 1039, 119 S. Ct. 2402 (1998) (defendant shot and killed victim during course of attempted robbery; evidence presented of defendant's religious faith and activities, death sentence upheld based upon (i)(5) aggravator); State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998), *cert. denied*, 525 U.S. 932, 119 S. Ct. 343 (1998) (twenty-three-year-old defendant murdered female victim during robbery of victim's residence, death sentence upheld based upon (i)(2) aggravator); State v. Bush, 942 S.W.2d 489 (Tenn.), *cert. denied*, 522 U.S. 953, 118 S. Ct. 376 (1997) (finding (i)(5) and (i)(6) aggravating circumstances and imposing death despite evidence that defendant had troubled childhood and mental disease or defect); State v. Howell, 868 S.W.2d 238 (Tenn. 1993), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339 (1994) (twenty-seven-year-old defendant shot clerk in the head during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993) (nineteen-year-old defendant killed seventy-four-year-old woman during robbery of Chinese restaurant by shooting victim in head, death sentence upheld based upon (i)(5) and (i)(12) aggravators); State v. Harris, 839 S.W.2d 54 (Tenn. 1992), *cert. denied*, 507 U.S. 954, 113 S. Ct. 1368 (1993) (thirty-two-year-old defendant murdered two employees of hotel during robbery; jury imposed death sentences based upon (i)(2), (i)(5), and (i)(7) aggravating circumstances despite evidence of defendant's lack of education and troubled childhood); State v. Bates, 804 S.W.2d 868 (Tenn.), *cert. denied*, 502 U.S. 841, 112 S. Ct. 131 (1991) (affirming sentence based on (i)(2), (6) & (7) where defendant tied victim to tree and shot victim in head with shotgun); State v. Henley, 774 S.W.2d 908 (Tenn. 1989), *cert. denied*, 497 U.S. 1031, 110 S. Ct. 3291 (1990) (death penalty affirmed based upon finding aggravating circumstance (i)(5), where defendant, intoxicated on drugs and alcohol, forced married couple to their house at gunpoint demanding money, defendant later refused offered money and without provocation shot husband and wife, wife shot two more times, defendant then poured gasoline on her body and set house on fire, wife died from burns and smoke inhalation); State v. King, 718 S.W.2d 241 (Tenn. 1986) (affirming death sentence based on aggravating circumstances (i)(2), (5), (6) & (7) where victim placed in trunk of car then shot once in head with high-powered rifle); State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3309 (1986) (affirming sentence of death based on (i)(5) & (7) where defendant robbed victims then shot them and slit their throats); State v. King, 694 S.W.2d 941 (Tenn. 1985) (thirty-three-year-old defendant murdered the proprietor of a tavern during the course of a robbery, death sentence upheld based upon (i)(2) and (i)(7) aggravators); State v. Harries, 657 S.W.2d 414 (Tenn. 1983) (thirty-one-year-old male defendant shot and killed clerk during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Coleman, 619 S.W.2d 112 (Tenn. 1981) (twenty-two-year-old defendant shot and killed sixty-nine-year-old victim during course of robbery, death sentence upheld based upon (i)(2) aggravator).

Our review of these cases reveals that the sentences of death imposed upon Defendant Carter are proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reach the decision that the sentences of death were not imposed arbitrarily, that the evidence supports the finding of the (i)(2) and (i)(5) aggravators, that the evidence supports the jury's finding that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable

doubt, and that the sentences are not excessive or disproportionate.

Conclusion

In accordance with the mandate of section 39-13-206(c)(1), Tennessee Code Annotated, and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find the sentences of death were not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentences of death are neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the sentences of death imposed by the trial court.

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JOHN EVERETT WILLIAMS, JUDGE