

Missing files raise doubts about death sentences

07/22/01

By JOHN SHIFFMAN
Staff Writer

A key research tool the Tennessee Supreme Court created to ensure the fairness of death sentences is riddled with errors and omissions, *The Tennessean* has found.

Court officials say the mistakes and omissions are legally harmless. But the author of Tennessee's death penalty law and other legal experts say so much information is missing that it raises serious questions about the validity of the sentences of dozens of death row inmates.

The little-known tool is a database of information, filed by trial judges, about first-degree murder convictions. It was created to address U.S. Supreme Court concerns in the 1970s that juries were issuing arbitrary death sentences. It was intended to help appeals judges here comply with a state law requiring them to compare "similar" cases to make sure the sentences are evenhanded.

As envisioned, the court would compare similar crimes — for example, domestic slayings. If the database indicated a death sentence was out of line when compared with other domestic slayings, the court could change the death sentence as a matter of fairness.

But this research tool for comparing cases is more than half empty.

Three of every five first-degree murder convictions are missing from the database. So, too, is one of every five death penalty cases, records show.

What's more, hundreds of cases included in the database have holes and are missing important details about the crime, defendant and victim.

This makes the court database "dangerously unsuitable" for its stated purpose, said Vanderbilt University professor David Cordray, who reviewed the court's database for *The Tennessean*.

"The court is trying to create a sophisticated argument about fairness essentially based on quicksand, which is what this data boils down to," said Cordray, co-director of Vanderbilt's Center for Evaluation Research and Methodology and past president of the American Evaluation Association, a group of professional analysts.

A Tennessee Supreme Court spokeswoman, Sue Allison, said the justices "take seriously" both the 1977 state law that requires them to compare "similar cases," as well as their own court rules, which have required collection of the data on first-degree murder convictions since 1978.

The court has acknowledged that some information in the database may be missing or incorrect, but Allison would not say whether the justices were aware so many cases and so much data are omitted. Allison and other state officials said the appeals judges use other resources, including published opinions and personal memories, to supplement the database.

"It is a helpful tool — a beginning — but it is not the be-all, end-all," said state Solicitor General Michael Moore, noting that while comparative review is still re-quired by state law and court rule, it's not constitutionally required by the U.S. Supreme Court.

Moore, the state's top appeals lawyer, said the database's flaws are not legally significant because it was "designed to identify cases that are aberrations, not to ensure that every single" case can be compared with similar cases.

"You just can't compare human beings and the circumstances of criminal behavior as if they were algebraic equations," Moore said.

But several lawyers who closely follow the issue disagree that the omissions are harmless. They say problems with the court's database are significant because they show that the state's highest court is not following the letter and spirit of the law requiring the comparison. This, they say, raises a fundamental question: Did the state deny constitutionally guaranteed due process of law to those on death row?

David Raybin, who supports capital punishment and drafted the state's current death penalty law when he was an assistant attorney general in 1977, called the gaps in the database "appalling."

"I am astounded that this was never checked on," Raybin said. "It calls into question all the reviews that have been done in the past. They may have to reopen all of these appeals and see if the review was appropriate."

Don Dawson, who as post-conviction defender is the state's highest-ranking death row defense lawyer, said the amount of missing information "certainly talks to the haphazard nature" of the state's capital punishment system.

Karla Gothard, an assistant public defender in Chattanooga who has tried 20 first-degree murder cases, said, "The death penalty is supposed to be reserved for the worst of the worst.

"How do we know if we have the worst of the worst if we don't have an accurate database?"

The genesis

To understand why the state Supreme Court created this system for comparing cases, it's necessary to travel back to 1972. That year the U.S. Supreme Court declared the death penalty unconstitutional because it was being too randomly applied. Noting that only about 50 people a year were getting a death sentence while many times that number had committed similarly "reprehensible" crimes but got lesser sentences, the court found the death sentence "freakish."

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual," Justice Potter Stewart wrote. Of all the people convicted of capital crimes, those actually sentenced to death "are among a capriciously selected random handful."

As a result of this decision, hundreds of inmates were removed from death rows across the nation to serve prison terms. Anyone convicted under the constitutionally flawed laws could not be executed.

In response, most states rewrote their death penalty laws. Most gave juries specific standards that spelled out which crimes were punishable by death and under what circumstances. Most states also split the trials into a guilt phase and penalty phase to allow jurors to weigh the crime and the appropriate punishment separately.

In 1976 the U.S. Supreme Court reinstated the death penalty, approving death penalty laws in Texas, Florida and Georgia.

Georgia went further than the two other states to ensure sentences were evenhanded. It mandated that the state supreme court not only review death sentences, but also compare them to sentences for similar crimes to ensure they were not disproportionate.

This review, Stewart wrote for the high court majority, "serves as a check against the random or arbitrary imposition of the death penalty. In particular, (it) substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."

The court made clear this new "fairness" standard was not intended to remove a prosecutor's discretion to seek death, a jury's right to show mercy or a governor's authority to grant executive clemency.

Tennessee's death law

In 1977 Tennessee enacted a new death penalty law, modeled after Georgia's statute. It included specific standards for imposing death, separate guilt and punishment hearings, and a required fairness review by appeals courts.

"We wanted to make sure it would pass constitutional muster," recalled Raybin, the 1977 law's author.

The new law created specific situations in which the death penalty could be sought — for example, if the victim was a child or if the defendant had prior violent felonies. The law also created categories of mitigating factors juries could consider, such as the defendant's mental state, remorse or cooperation with authorities.

On automatic appeal, the new Tennessee law required state appeals courts to determine whether each death sentence is either:

- "Imposed in any arbitrary fashion."
- "Excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."

To comply with this required review, the Tennessee Supreme Court created a system to compare cases, a system that eventually evolved into today's database.

The state Supreme Court enacted a formal rule requiring judges presiding over all trials that resulted in a first-degree murder conviction to complete a report on the case and file it with the Supreme Court clerk in Nashville. The report has changed slightly over the years but has always included blanks for trial judges to fill in information about the crime, defendant and victim.

"The idea was to get as large a pool of cases as possible so they would have better points of comparison," Raybin said.

This comparative review was not adopted in every state. And in 1984 the U.S. Supreme Court rejected the claim of a California death row inmate that he was constitutionally entitled to such a review, even though California law did not require it. Noting that the Texas law it had approved in 1976 required no such review, the court said California could adopt a similar law.

Six states subsequently repealed laws or court rules requiring this comparative review. But about a dozen other states, including Tennessee, left those laws and rules in place.

"The people and legislature of Tennessee didn't have to require (comparative) review, but once they did, you have to comply with that and provide some meaningful review of the death sentences," said Paul Bottei, an assistant federal public defender.

Risk of randomness

Tennessee's number of totally missing cases appears higher than normal, compared with other states that collect such information, said David Baldus, a University of Iowa law professor who is a national expert on the subject and is conducting a comparative review study for Nebraska.

However, Baldus said, the amount of information missing from forms that have been filed is "typical of other states." Judges in other states are equally sloppy about completing forms properly, he said.

Moore, the state's top appeals lawyer, said it's important to remember that the data aren't kept for statistical comparisons and that federal courts have frowned on the use of statistics to try to show that the death penalty has been applied unfairly.

"Those defense attorneys who are saying that's what we must have in order to have a fair death penalty ... it's an abolitionist argument. And we reject that."

Raybin, a death penalty proponent, said Moore misses the point. He agrees the purpose of the database is not to produce statistical analysis but to help judges and lawyers compare cases. To do so, it must be reliable, Raybin said.

"You should always strive for accuracy, not as a means to do away with the death penalty but as a means to accomplish what you really want to have, which is a fair comparative review. Where the data is deficient, then your decision-making process is also deficient.

"What (the state) is saying is that we don't want to have it too accurate because we're afraid of what it might show," said Raybin, now a Nashville defense attorney.

"Does that mean if we find that the death penalty is being imposed unfairly do we do away with it? No. You can use this to begin a constructive way to make the system better. I can't understand why there's this tremendous resistance to doing an accurate comparative review."

Others who follow the issue closely agree that if the state can't track all the cases, it can't properly compare them one against another.

University of Tennessee College of Law professor Dwight Aarons, who supports the death penalty, said the amount of missing information troubles him.

"If we're going to have a death penalty in Tennessee and administer it fairly, it only seems reasonable that we should understand how it is actually being operated," Aarons said.

Former Tennessee Supreme Court Justice Penny White, who lost a retention election in 1996 largely for her vote to reverse one death sentence, said appeals court reviews are essential.

If states don't properly perform them, she said, they risk slipping back into the earlier period when death sentences were issued, as the U.S. Supreme Court said, as randomly as lightning.

"Without meaningful comparative review, there is a great likelihood that the death penalty in this country will once again be arbitrarily imposed," said White, who now teaches law at UT.

"If the checks and balances are in rule only and not in reality," she added, the state's death penalty statute is in danger of being declared arbitrary — "exactly the fault" that caused the U.S. Supreme Court to overturn it in 1972.