IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Abu-Ali Abdur'Rahman	)	
Petitioner	)	
	)	
v.	)	**DAVIDSON COUNTY CRIMINAL**
	)	**No. M1988-00026-SC-DPE-PD**
	)	
State of Tennessee	)	**Filed March 5, 2003**
Respondent	)	

REPLY TO RESPONSE IN OPPOSITION
AND
REQUEST FOR ORAL ARGUMENT

Petitioner Abu-Ali Abdur'Rahman has filed a "Petition to Reinstate Petitioner's T.R.A.P. 11 Appeal and/or to Recall the Mandate of the Direct Appeal and/or to Exercise its Inherent Authority," hereinafter: February 28, 2003 Petition. The state filed a Response in Opposition. Petitioner submits this Reply to the state's Response in Opposition; and Petitioner further hereby requests oral argument at this Court's discretion.

I. Reply to Response

The state says, as it always does, that Petitioner should not have his claims reviewed on the merits. The state does not say, as it never has, that Petitioner had a fair trial or that the result of the trial was reliable. The post-trial/appeal record[1] demonstrates that this trial was not fair, that the result of this trial was not reliable, and that the sentence of death imposed at this trial was arbitrarily and capriciously imposed.

[1] See, Summary of the Case, Appendix A and the other Appendices filed as attachments to the February 28, 2003 Petition.

The state does not contest this Court's inherent authority to review this case. Instead, it rehashes its own detailed and inconsistent version of the procedural history of this case -- a version that conflicts with that described by Petitioner. In the process, the state's Response demonstrates the need for this Court to address the question of whether this case has been adequately and properly reviewed.

The review process has broken down in this case. No court has reviewed all of Petitioner's claims. No court has reviewed several substantial claims of prosecutorial misconduct. The record of prosecutorial misconduct and ineffective assistance of counsel was made after this Court's review on direct appeal. This Court has never addressed the merits of any of these subsequently arising claims that demonstrate the unfairness of this trial. On direct appeal this court reviewed a record that was largely a figment of the prosecutor's imagination -- a fantasy version of the case, in response to which defense counsel offered no rebuttal or defense; because, he did not know the difference.

No court has reviewed the cumulative effect of the numerous errors in the case. Any review of this case that does not consider the entire scope and the synergistic effect of the fraud by the prosecutor along with the failures of defense counsel to respond to this fraud cannot assess the unfairness of the trial in this case. The extent of the failure of fairness at the trial is a result of the cumulative effect of the commissions and omissions of both the prosecutor and defense attorney.[2]

[2] Neither this court nor the federal court has looked at the total case. No court has evaluated the cumulative effect of the numerous instances of the prosecutor's misconduct; nor has any court evaluated the synergistic combination of the failures of defense counsel with the prosecutorial misconduct, all of which together contributed to the unfairness of this trial and the unreliable nature of its result. See, e.g., Cargle v Mullins, 317 F.3d 1196 (10th Cir. 2003) (discussing the cumulative error analysis required in a case involving facts similar to the facts in this case and claims of prosecutorial misconduct and ineffective assistance of counsel similar to those in this case).

The February 28, 2003 Petition and Appendix A to that Petition summarize the failures of the prosecutor and defense counsel in this case and may be capsulized, as follows:

> The prosecutor -- who has been publicly censured twice and privately sanctioned by the Board of Professional Responsibility for misconduct in the prosecution of criminal cases, and who has been reprimanded on various occasions by state trial and appellate courts -- withheld exculpatory material information and misrepresented facts to Petitioner's psychological evaluators, defense counsel, court and jury about virtually every major aspect of this case.
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> The defense attorney -- who has since been forced to surrender his law license -- admitted that he did not even begin to investigate or prepare prior to trial because he had not received the balance of his fee withheld from him by a party in conflict with his client. Because he failed to prepare at all, defense counsel was unable to rebut the false representations made by the prosecution and was unaware of evidence that his client was likely not the assailant, his client was insane at the time of the offense, and his client had abundant mitigating evidence that would explain: lingering doubt about the identity of the assailant, Petitioner's ill-advised but altruistic motives as a vigilante under the direction of the principals of a religious organization, the exculpatory facts of his 1972 conviction, the traumatic source of his mental impairments, and his good character despite his mental illness.

The prosecutorial misconduct claims were not adequately reviewed. These claims were literally ignored by the post-conviction trial court; they were not analyzed by the court of criminal appeals[3]; and they were deemed by the federal district court on habeas corpus to be defaulted, a conclusion reached by that court in violation of this Court's Sup. Ct. R. 39.[4] In the end, numerous instances of prosecutorial misconduct were never addressed by any court at all.

[3] The state's Response attaches as an Appendix the *two page* court of criminal appeals opinion that dispatches the numerous claims of prosecutorial misconduct in only twelve lines.

[4] Nevertheless, both this Court on direct appeal, and the federal district court on habeas corpus, reviewed isolated instances of the prosecutor's misconduct. Both courts recognized the prosecutor's misconduct in those isolated instances, but did not consider those failures in cumulation of any of the other failures of the prosecutor or in cumulation with any of the failures of defense counsel.

[5] The scope of the failure of process in this case is symbolized by the fact that only a total of $2,000 was applied to the investigation of Petitioner's defenses and claims in trial and post-conviction – the entire direct and collateral review process in state court -- though the investigative challenge in this case was almost as work intensive and resource consuming as it possibly could have been, given the predominance of out-of-state contacts from numerous locations that literally spread from one corner of this country to another.

The failures of trial counsel were not adequately reviewed. The trial post-conviction court would not allow post-conviction counsel the resources or the opportunity to develop the record of the prejudice created by trial counsel's failures.[5] Petitioner was prevented, therefore, from presenting a sufficient record to this Court on the Rule 11 application on state post-conviction. The only court to have reviewed the full record of the failures of trial counsel – the federal district court[6] -- set Petitioner's death sentence aside[7] without even addressing the bulk of the instances of misconduct by the prosecutor.

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[6] Numerous material and relevant witnesses who testified in federal court were not allowed to testify in the state court post-conviction proceedings. See, Abdur'Rahman v Bell, 999 F.Supp. 1073, 1101-2 (M.D.Tenn. 1998) ("[T]he overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, . . . compels the Court's conclusion that Petitioner's death sentence cannot stand."). Many of these witnesses influenced the district court in its finding of prejudice. See, id. at n. 42 (federal district court lists 8 witnesses, whose testimony influenced the court, 7 of whom were from out-of-state and none of whom were allowed to testify in state post-conviction proceedings, though available). As the record demonstrates, these out-of-state witnesses were not allowed to testify in the state post-conviction proceedings. Petitioner's post-conviction counsel were denied the resources necessary to investigate and they were denied their request to bring in out-of-state witnesses or even to take telephonic depositions of out-of-state witnesses.

[7] See, Summary of the Case, Appendix A, at 30-39, attached to the February 28, 2003 Petition, which sets out portions of the federal district court's opinion in which that court analyzes the evidence that compelled it to set the death sentence aside.

Notwithstanding the state's protestations to the contrary, it would certainly be extraordinary for the state to execute Petitioner without this Court ever addressing these circumstances which demonstrate that the death sentence in this case was arbitrarily imposed. As well as being extraordinary, it would be a violation of this Court's statutory mandate that it "shall review the sentence of death" and "determine whether: . . . the sentence of death was imposed in any arbitrary fashion." T.C.A. § 39-13-206 (b) and (c). What is the "strong public policy," Response at 2, that a person sentenced to death under the circumstances of this case should be put to death without adequate judicial review? If this Petitioner is put to death under these circumstances, how would that reflect on the integrity of Tennessee's justice system?

II. Request for Oral Argument

Petitioner requests an opportunity to address in oral argument any issues presented by the substance or procedure of this case that this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bradley A. MacLean, do hereby certify that a copy of the foregoing was served by hand delivery upon Joseph F Whalen, Assistant Attorney General, Office of the Tennessee Attorney General, 425 Fifth Ave. N., Nashville, TN 37202-0207, on this the 5th day of March, 2003.

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Bradley A. MacLean

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