IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN,	)	
	)	
Petitioner/Defendant,	)	
	)	
v.	)	**S.Ct. No. M1988-00026-SC-DPE-PD**
	)	
STATE OF TENNESSEE,	)	**Filed March 4, 2003**
	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO "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"

Alleging, once again, that he "has never had his case heard" and that his claims have "never been completely addressed,"[1] petitioner submits yet another request for extraordinary relief to this Court[2] in an effort to further delay the lawful imposition of his 1987 death sentence.[3] Reasserting various claims of prosecutorial misconduct and ineffective assistance of counsel,[4] petitioner seeks the reinstatement of his Rule 11 post-conviction appeal and/or the recall of this Court's mandate on

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[1] *Compare* Petitioner's December 21, 2001,"Motion for Certificate of Commutation Pursuant to S.Ct.R. 12.4 And T.C.A. § 40-27-106, And For Other Relief Pursuant to S.Ct.R. 11," p. 1 (alleging that petitioner "has never had his day in court" and that his claims "have never been fully addressed by any court").

[2] *See* note 1, *supra*; *see also* Petitioner's March 22, 2002, "Motion to Recall Mandate And To Consider Post-Judgment Facts Establishing Intentional Racial Discrimination In the Selection Of The Petit Jury."

[3] By filing the instant petition, petitioner avails himself of the April 8, 2002, stay of execution issued by the United States Supreme Court. But that stay has since been dissolved. On December 10, 2002, the Supreme Court dismissed, as improvidently granted, the writ of certiorari from a judgment of the Sixth Circuit Court of Appeals, and a petition for rehearing of that decision was denied on February 24, 2003.

[4] Petitioner raised these same claims in support of his 2001 motion seeking a certificate of commutation and other relief under Rule 11.

direct appeal. But, as this Court observed when it denied petitioner's previous request to recall its mandate, this is an extraordinary remedy "and should be exercised sparingly."[5] Furthermore, "the circumstances should be 'sufficient to override the strong public policy that there should be an end to a case in litigation.'"[6] No such circumstances exist here.[7]

Petitioner's extravagant assertion that he "is on the verge of having his life taken by this state without a fair review and, in substantial part, without any review of his case at all" is belied by the findings and conclusions of the various state and federal courts that *have* reviewed his case over the course of the last thirteen years. On direct review of petitioner's conviction and sentence in 1990, this Court considered and rejected petitioner's claim that his counsel failed to offer proof at trial of his mental capacity, finding no evidence that petitioner was incompetent at the time the offense was committed. *State v. Jones*, 789 S.W.2d 545, 552 (Tenn. 1990). On appeal from the denial of petitioner's post-conviction petition in 1995, the Tennessee Court of Criminal Appeals considered and rejected the following additional claims: (1) ineffective assistance of counsel for failure to investigate petitioner's background and psychological history (finding no prejudice); (2) prosecutorial misconduct (finding the claim to be without merit), including claims that the prosecution failed to disclose a copy of the transcript from petitioner's 1972 murder trial, failed to disclose a lab report of tests conducted on petitioner's clothing, and failed to disclose a police report regarding petitioner's behavior at the time of his arrest; (3) that petitioner's attorney had a conflict

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[5] *State v. Abdur'Rahman*, No. M1988-00026-SC-DPE-PD, slip op., p. 2 (April 5, 2002) (order denying motion to recall the mandate and to consider post-judgment facts).

[6] *Id*.

[7] Assuming that this Court has the power to reinstate petitioner's Rule 11 appeal some eight years after the fact, petitioner likewise fails to offer this Court any legitimate basis for granting such an extraordinary remedy.

of interest due to his receipt of a fee from an "unindicted coconspirator" (finding that the attorney was unaware of the source of the funds). *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 *2 -3 (Tenn.Crim.App. Feb. 23, 1995), *permission to appeal denied* (Tenn. Aug. 28, 1995)(copy attached).

On federal habeas review in 1998, claims that the federal district court considered and rejected included: (1) prosecutorial misconduct in the sentencing phase argument regarding the Southeastern Gospel Ministry's role in the offense (concluding that the argument was not improper), *see Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1078 (M.D. Tenn. 1998);[8] (2) prosecutorial misconduct for failing to provide a copy of the transcript from petitioner's 1972 murder trial (finding that this evidence was not material), *id.*, 999 F.Supp. at 1089-90; (3) prosecutorial misconduct for failing to provide a copy of a lab report showing no evidence of blood on petitioner's clothing (finding that the report was not withheld), *id*., 999 F.Supp. at 1090; (4) a conflict of interest in petitioner's attorney's receipt of a fee from an alleged accessory, which caused the attorney to delay representation (finding no conflict and no effect on counsel's performance), *id.*, 999 F.Supp. at 1090-91, *affirmed*, 226 F.3d 696, 713-14; and (5) ineffective assistance of counsel at the guilt phase for failure to present mental health evidence and evidence contained in the laboratory report (finding no prejudice), *id.*, 999 F.Supp. at 1095-96, *affirmed*, 226 F.3d at 714-715.

In 2000, the Sixth Circuit Court of Appeals considered and rejected petitioner's claim that counsel was ineffective at sentencing for failing to present mental health and other mitigating evidence at trial. Reversing the district court's decision, and agreeing with the Tennessee Court of Criminal Appeals, the appeals court found no prejudice. *See Abdur'Rahman v. Bell*, 226 F.3d 696, 708 (6th Cir. 2000). Moreover, the Court reached this conclusion "even considering the evidence

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[8] *Affirmed in part, reversed in part*, 226 F.3d 696 (6th Cir. 2000).

presented at the evidentiary hearing [conducted by the district court]," *id.* — the same "voluminous evidentiary record" upon which petitioner now relies in support of his motion.[9]

All of the claims listed above are claims to which petitioner now points in support of his assertion that his case has never been heard.[10] This is simply not so — his case has been heard, many times. Assuming, then, that petitioner's precise complaint is instead that his claims have not previously been considered by *this* Court, he misses the point. First, some of these claims *were* presented to this Court in petitioner's post-conviction Rule 11 application, which the Court denied. Indeed, the federal courts considered the claims listed above only because the district court found that they had been presented to this Court. Second and moreover, a court can only review claims that have been presented to it by a claimant. To the extent that petitioner has claims that have never been considered by this Court, he has only himself to blame. These claims were not included in petitioner's 1995 Rule 11 application for permission to appeal — a fact that petitioner admits.[11] Having abandoned these claims when he had the opportunity to present them to this Court, he may not now be heard to complain that the claims have not been "completely addressed."[12] Lastly, and insofar as petitioner now also complains of a "failure of judicial process" based upon the alleged

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[9] Petition to Reinstate T.R.A.P. 11 Appeal, p. 3.

[10] *See* Petition to Reinstate T.R.A.P. 11 Appeal, pp. 7-11.

[11] *See* Petitioner's Motion for Certificate of Commutation, p. 5 (petitioner's post-conviction counsel "failed to present the bulk of the prosecutorial misconduct claims in their Rule 11 Application for Permission to Appeal filed with this Court").

[12] The State notes the irony inherent in petitioner's charge that "the attorney general has successfully hidden" behind "a wall of procedural barriers" to avoid having the merits of petitioner's claims addressed. Petition to Reinstate T.R.A.P. 11 Appeal, p. 21. The procedural default rules in federal court are designed to ensure that a state's highest court has been afforded an opportunity to consider a prisoner's constitutional claims before the federal court does so. Petitioner's claims were procedurally barred in federal court, therefore, because *petitioner* did not present them to this Court when he had the chance — the very circumstance about which petitioner now complains.

inadequacy of the Tennessee Court of Criminal Appeals' review of his case, he ignores this Court's previous dismissal of such concern in this case:

> We emphasize that the brevity of an appellate opinion does not indicate that the appellate court did not thoroughly review the record and the relevant law in deciding the case. We have no doubt that at every level judges have thoroughly reviewed this case and pursued justice, as they are required to do by their oath of office.

State v. Abdur'Rahman, supra, p. 3.

Petitioner has long since exhausted the standard three-tier appeals process in this case. He has sought, and been properly denied, permission to file a second federal habeas corpus petition. *See Abdur'Rahman v. Bell*, No. 01-6487 (6th Cir. Feb. 11, 2002), *cert. dismissed*, 123 S.Ct. 594 (2002) (order denying leave to file second habeas petition) (copy attached). He has also sought, and been properly denied, an opportunity to reopen his state post-conviction proceedings. *See Abdur'Rahman v. State*, No. M2002-01561-CCA-R28-PD (Tenn.Crim.App. Sept. 18, 2002), *application for permission to appeal denied* (Tenn. Jan. 27, 2003) (copy attached). The instant motion for extraordinary relief amounts to a request to establish a *five-tier* review process; furthermore, it does so on the basis of claims that have been or could have been presented previously.[13] "[T]here should be an end to a case in litigation," *State v. Abdur'Rahman, supra*, p. 2, even capital litigation. Petitioner has had a complete review of his case; the mere fact that he may be dissatisfied with the results of that review is not, and cannot be, a basis upon which to continue litigating it. Sixteen years ago, petitioner "was sentenced to death, not simply to a lifetime of litigating about death." *In*

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[13] Petitioner concedes that none of the facts upon which his claims are based are new; "the facts have been available since state post-conviction review . . .." Petition to Reinstate T.R.A.P. 11 Appeal, p. 19. *See State v. Abdur'Rahman, supra,* p. 1 (motion to recall the mandate not well-taken where materials upon which it is based had been previously available).

re Sapp, 118 F.3d 460, 463 (6th Cir. 1997). Petitioner's motion should be denied and an execution date should be set forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing, with attachments, was served

on the defendant by delivering a copy of same, by facsimile and by first-class mail, postage prepaid, to Bradley Maclean, Stites & Harbison PLLC, Suntrust Center, Suite 1800, 424 Church Street, Nashville, Tennessee 37219, and William P. Redick, Jr., 810 Broadway, Suite 201, Nashville, Tennessee 37203, on this the _____ day of March, 2003.

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JOSEPH F. WHALEN
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