

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

ABU-ALI ABDUR'RAHMAN)	
(formerly known as James Lee Jones))	
)	
)	DAVIDSON COUNTY CRIMINAL
)	
vs.)	NO. M1988-00026-SC-DPE-PD
)	
)	
STATE OF TENNESSEE)	

Filed: 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**

Mr. Abdur'Rahman moves this Court to exercise its supervisory powers over the judicial and criminal justice system, pursuant to S.Ct.R. 11, including the prosecutorial function in this State, by setting aside the death sentence in this case. Alternatively, Mr. Abdur'Rahman moves this Court, pursuant to T.C.A. § 40-27-106 (1997) and S.Ct.R. 12.4, to certify to the Honorable Don Sundquist, Governor of the State of Tennessee, that because of the extenuating circumstances in this case, the punishment of death ought to be commuted to imprisonment for life.

The question presented by this case is whether the State of Tennessee should execute a man who has never had a fair trial, who has never had his day in court, and whose claims have never been fully addressed by any court.

Mr. Abdur'Rahman did not have a fair trial because the prosecutor, who has a well-documented history of misconduct, engaged in a fraudulent and deceptive scheme of withholding evidence and of making misrepresentations. It is also undisputed that Mr. Abdur'Rahman's trial counsel, who has since surrendered his law license to the Board of Professional Responsibility,

completely failed to investigate or prepare for trial. Consequently, the jury never heard any of Mr. Abdur'Rahman's compelling guilt and sentencing stage defenses, and the case the jury did hear from the prosecution was false and misleading in every important respect.

Only one judge has heard all of the evidence in this case – Judge Todd J. Campbell of the federal district court for the Middle District of Tennessee. After hearing the live testimony and reviewing the evidence presented in a two-week trial that included more than 20 witnesses and over 150 exhibits, Judge Campbell ruled that Mr. Abdur'Rahman's death sentence should be vacated on grounds of ineffective assistance of counsel at sentencing. Even Judge Campbell, however, refused to address the bulk of Mr. Abdur'Rahman's prosecutorial misconduct claims on grounds that, according to the district court, those claims were procedurally defaulted in the state post-conviction proceedings.

Judge Campbell's ruling to vacate the death sentence was reversed, and in the end Mr. Abdur'Rahman found that he had been whipsawed in the post-conviction and federal habeas proceedings.

In the state post-conviction proceedings, Mr. Abdur'Rahman was provided inadequate resources and was expressly prohibited from calling any out-of-state witnesses, even though his family and most of the other witnesses available to testify on his behalf were from different parts of the country. Consequently, Mr. Abdur'Rahman was deprived of any opportunity to present substantial portions of his case in the state proceedings. The state post-conviction courts never addressed the full body of Mr. Abdur'Rahman's claims in any of their opinions.

The federal court system applied its default rules inconsistently, to Mr. Abdur'Rahman's unfair disadvantage. On the one hand, the federal courts prevented Mr. Abdur'Rahman from presenting his prosecutorial misconduct claims in the federal habeas proceeding because his post-conviction counsel failed to include those claims in their post-conviction Rule 11 Application for

Permission to Appeal to this Court, and those claims were therefore considered to be procedurally defaulted in federal court. On the other hand, in the appeal from the district court's ruling to vacate the death sentence, two members of the Sixth Circuit panel voted to reverse the district court and reinstate the death sentence on an issue the state never raised on appeal, and therefore defaulted, and that the parties never briefed or argued to the Sixth Circuit. (The third member of the Sixth Circuit panel strongly dissented to the panel majority's reversal of the district court.) Accordingly, the procedural default rules relating to raising issues on appeal were inequitably and discriminatorily applied against Mr. Abdur'Rahman, to keep him out of federal court on the prosecutorial misconduct claims, but were ignored in regards to the state, which enabled the Sixth Circuit panel majority to reinstate the death sentence on grounds never presented by the state to the Sixth Circuit.

If the Attorney General has his way, Mr. Abdur'Rahman will be the first African-American to be executed in Tennessee since 1960 even though eight (8) of the jurors in this case now say, in written statements that are in the court record, that they probably would have voted for life if they had seen all of the evidence that should have been presented at trial. (See Appendix A hereto). Mr. Abdur'Rahman has not been convicted or sentenced by a jury of his peers who heard all of the significant and relevant evidence in the case. The jury only heard a fraudulent and inaccurate account of the facts of this case. Despite the "many avenues of judicial review which now exist and are available to prisoners sentenced to death," Workman v. State, 22 S.W.3d 807, 811-812 (Tenn. 2000), no court has addressed all of the claims presented in the judicial proceedings in this case.

Mr. Abdur'Rahman's requested relief is compelled by extenuating circumstances attending this case which are clearly established by facts entirely contained in the record, all of which are uncontroverted. Cf. Workman, 22 S.W.3d at 808. All of the facts supporting Mr. Abdur'Rahman's requested relief are facts "brought regularly into the cause" and are "a part of the record in [the] regular judicial proceeding[s]." Id. at 812-3.

The voluminous record indisputably demonstrates that every “avenue of judicial review” has broken down in this case. If this Court denies relief, it will constructively endorse a miscarriage of justice. Trial lawyers for both the defense and the prosecution committed grievous offenses: conflict of interest, complete failure to investigate or provide any kind of defense, and prosecutorial fraud and deception. To call these errors harmless, especially when no court has ever reviewed all of the errors together based upon all of the evidence presented, would be to deny how this kind of case contributes to the erosion of confidence in the legal system in general and the capital process in particular. This Court is in a unique position to strengthen the integrity of the judicial system and the administration of justice in this state through a grant of the extraordinary relief demanded by the extenuating circumstances of this case.

A. Summary of History of Case: Prosecutorial Misconduct.

Mr. Abdur’Rahman’s case for prosecutorial misconduct is set forth in greater specific detail in Appendix B hereto, with citations to the federal district court and state trial court records.

Mr. John Zimmermann, the Assistant District Attorney General who prosecuted this case at trial, has a documented history of prosecutorial misconduct, as reflected in reports in other cases. See Appendix C. In Mr. Abdur’Rahman’s case, Zimmermann engaged in a pattern of fraud and deception which cannot be countenanced by this Court.

Mr. Zimmermann’s misconduct included: the withholding of exculpatory (Brady) material and information; misleading statements to defense counsel leading them away from the crucial blood evidence raising doubt about whether Mr. Abdur’Rahman was the actual assailant; fraudulent and prejudicial misrepresentations to MTMHI regarding the circumstances of the offense and Mr. Abdur’Rahman’s background; fraudulent and prejudicial misrepresentations to defense counsel about the nature of Mr. Abdur’Rahman’s prior murder conviction; improper presentation of inadmissible and prejudicial evidence to the jury at trial, which this Court previously characterized as “border[ing]

on deception,” State v. Jones, 789 S.W.2d 545, 552 (Tenn. 1990); improper coaching and manipulation of witnesses; and improper jury argument that Zimmermann must have known was false based on information contained in his own files.

As a consequence of Mr. Zimmermann’s fraudulent conduct, the jury was presented with a false and misleading picture of every aspect of this case including: the circumstances surrounding the offense; Mr. Abdur’Rahman’s true motives; the circumstances surrounding Mr. Abdur’Rahman’s prior murder conviction; Mr. Abdur’Rahman’s mental condition and his background; and Mr. Abdur’Rahman’s personal character.

While Mr. Abdur’Rahman stated his prosecutorial misconduct claims in his state post-conviction petition and offered evidence supporting these claims at the post-conviction hearing, the post-conviction trial court did not mention any of the prosecutorial misconduct claims in its Memorandum and Order. The trial court addressed the ineffective assistance of counsel claims based on an incomplete record, and it summarily dismissed all of Mr. Abdur’Rahman’s “other” claims as being “without merit or previously determined on direct appeal.” Memorandum and Order at 28. In the post-conviction appeal, the Tennessee Court of Criminal Appeals listed some but not all of the prosecution’s Brady violations (and none of the other prosecutorial misconduct claims), but made no findings of fact regarding those violations and, again, summarily dismissed those claims as having “no merit,” without giving any explanation whatsoever. Jones v. State, 1995 WL 75427, *3 (Tenn.Crim.App. 1995). Through no fault of Mr. Abdur’Rahman, his 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, which this Court denied.

Because of post-conviction counsel’s failure to present the prosecutorial misconduct claims in their unsuccessful Rule 11 discretionary appeal to this Court, these claims were dismissed by the federal district court as not having been properly exhausted in the state courts and thus defaulted and

not available for federal review. 999 F.Supp. at 1079-80. The factual basis for the prosecutorial misconduct claims, however, is a matter of court record and has not and cannot be seriously disputed by the state -- Mr. Abdur'Rahman introduced the evidence supporting these claims in the federal habeas evidentiary hearing before the district court dismissed the claims on procedural default grounds, and the state did not rebut the evidence. Accordingly, even though a complete evidentiary record has been made, no court has addressed the bulk of Mr. Abdur'Rahman's prosecutorial misconduct claims either on their own merits or cumulatively with the ineffective assistance of counsel claims. Mr. Abdur'Rahman, therefore, has not had his day in court on these claims.

B. Summary of History of Case: Ineffective Assistance of Counsel.

Every court that has collaterally reviewed this case has concluded that Mr. Abdur'Rahman was not adequately represented by trial counsel at either the guilt or sentencing stages of this trial. Attached hereto as Appendix D is a description of many of the defense counsels' failures, with citations to the state and federal court records.

In the federal habeas corpus proceeding, the federal district court recited many of the numerous failures of trial counsel and proceeded to say:

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient.

... ..

The Court acknowledge[s] that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death. This is not a case of harmless error.

999 F.Supp. at 1095, 1101 (emphasis added).

Trial counsel in this case labored under a conflict of interest.¹ Mr. Allen Boyd and other members of a group called the Southeastern Gospel Ministry (the “SGM”) were accessories to the crime, and they furnished trial counsel with a \$5,000 retainer to represent Mr. Abdur’Rahman along with the promise to pay an additional \$10,000. Trial counsel admitted in the federal habeas hearing that he did not begin work on the case because he never received the promised \$10,000 retainer. By accepting a \$5,000 retainer and relying upon a promise for the additional \$10,000 retainer from a third party source who was also an accessory to the crime, trial counsel was involved in an actual conflict of interest that adversely influenced his performance in the case.

As the federal district court pointed out, trial counsel performed absolutely no investigation into the circumstances surrounding the offense or Mr. Abdur’Rahman’s background. Specifically, trial counsel were completely unaware of the fact that Mr. Abdur’Rahman’s clothes contained no blood stains, a fact completely contradictory to the state’s theory that Mr. Abdur’Rahman was the assailant. See, 999 F.Supp. at 1094. Trial counsel failed to furnish MTMHI with any background information relevant to their evaluation of Mr. Abdur’Rahman. Id. They failed to request Mr. Abdur’Rahman’s extensive mental health records, or his educational, prison, or military records. “This was a serious failure.” Id. Trial counsel never filed a motion requesting the trial court to declare Mr. Abdur’Rahman indigent, and requesting investigative and expert services. “This was a grave omission.” Id. Trial counsel never introduced at trial any information from the MTMHI records relating to Mr. Abdur’Rahman’s background or mental history. “These were substantial errors.” Id. Trial counsel did not call anyone in Mr. Abdur’Rahman’s family to testify during the sentencing hearing, and they never contacted any members of his family. “These were significant

¹ The record evidence of trial counsel’s conflict of interest is described in more detail, with citations to the federal court record, in Appendix E hereto.

mistakes.” Id. at 1075. Trial counsel completely failed to investigate the nature of Mr. Abdur’Rahman’s prior convictions. “This was a substantial error.” Id.

Because trial counsel conducted absolutely no investigation, they failed to present any witnesses or any evidence at all during the guilt stage of the trial, even though Mr. Abdur’Rahman had strong guilt stage defenses. The unrepresented guilt stage defenses included the fact that, in all likelihood, Mr. Abdur’Rahman was not the assailant, as indicated by the unrepresented forensic blood evidence.² The only evidence presented in the trial identifying Mr. Abdur’Rahman as the assailant was the uncorroborated testimony of his co-defendant, Devalle Miller. Miller identified Mr. Abdur’Rahman as the assailant pursuant to a deal that he struck with the prosecution in which he avoided the death penalty and instead plead guilty to an offense for which he has since been paroled.³

Moreover, Mr. Abdur’Rahman had insanity and diminished capacity defenses that his trial counsel failed to recognize or explore. The mental health testimony introduced at both the state post-conviction and the federal habeas corpus hearings establish that Mr. Abdur’Rahman suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder resulting from extreme physical, sexual and emotional abuse from early childhood, when he suffered unimaginable abuse at the hands of his parents, and through early adulthood when he was repeatedly raped in prison.⁴

Trial defense counsel also failed to present any meaningful mitigation evidence in the sentencing stage of the trial. Because trial counsel conducted absolutely no investigation into Mr.

² See Appendix F hereto for a description of the evidence indicated that Mr. Abdur’Rahman was not the assailant.

³ Because the only proof identifying Mr. Abdur’Rahman as the assailant was the uncorroborated testimony of Devalle Miller, a co-defendant who testified under a plea bargain, Mr. Abdur’Rahman’s case would be disqualified from death penalty consideration under the current Davidson County District Attorney’s Guidelines in death penalty cases. See Appendix G hereto.

⁴ Dr. Nurcombe, a psychiatrist who testified in the post-conviction hearing, and Dr. Sadoff, a psychiatrist, and Dr. McCoy, a psychologist, testified to Mr. Abdur’Rahman’s mental illnesses. The state has offered no mental health expert who would disagree with the diagnosis that Mr. Abdur’Rahman suffers from mental illness. These same experts also testified to Mr. Abdur’Rahman’s insanity and diminished capacity defenses.

Abdur'Rahman's background, the jury was never offered a reason to impose a life rather than a death sentence. As the federal district court pointed out, "This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence – none – being offered to the jury despite its availability and abundance." 999 F.Supp at 1101 (emphasis added). Consequently, the jury heard none of the evidence concerning Mr. Abdur'Rahman's good character; his good behavior and perfect work history; his extensively documented history of extreme physical, sexual and emotional abuse; or his well documented history of mental illness.

On direct appeal, after the relationship between trial counsel and Mr. Abdur'Rahman had deteriorated beyond recovery,⁵ the trial court appointed Mr. Richard Dinkins, without any prior notice to him, to represent Mr. Abdur'Rahman on appeal.⁶ Since Mr. Dinkins was a civil attorney with no prior experience with death penalty litigation, he initially thought that the judge had intended to appoint a different attorney with a similar name. Mr. Dinkins considered himself unqualified to handle this kind of case. Nevertheless, he handled the appeal on his own, with no outside help. After the appeal was completed, the trial court again forced Mr. Dinkins to remain on the case in post-conviction, without any prior notice or consultation. Mr. Dinkins objected to his appointment as post-conviction counsel because it created a conflict of interest: as post-conviction counsel, he would be under a duty to evaluate his own performance to determine whether he offered ineffective assistance of counsel as Mr. Abdur'Rahman's attorney in the direct appeal. Mr. Dinkins also explained that he had no experience with this kind of litigation, and that because of the recent retirement of one of his law partners and changes in his law practice, serving as post-conviction

⁵ Trial counsel's file contained a hand-written note in which trial counsel referred to Mr. Abdur'Rahman as a "dumb mother fucker." FEx. 99.

⁶ All of the circumstances surrounding the direct appeal and the state post-conviction proceedings are set forth in the record in Mr. Dinkins' testimony and accompanying exhibits introduced into evidence in the federal district court hearing. None of these facts are in dispute. (FT. 858-894; FEx. 144, 145).

counsel at compensation rates that would not even cover his overhead expenses would cause a severe financial hardship to himself and his law firm. The trial court overruled Mr. Dinkins' objection and directed him to remain on the case.

The trial court ultimately appointed Mr. William Shulman to assist Mr. Dinkins in the case. Although Mr. Shulman was formerly Davidson County Public Defender, by the time of this appointment he no longer maintained a law practice and was devoting his time as a teacher at Middle Tennessee State University. Mr. Shulman had no law office or support staff, contributed no resources to the case, and spent virtually no time on the case. Due to their various limitations, neither Dinkins nor Shulman was willing to assume the responsibility of directing the representation. At a time when the attorneys from the Capital Case Resource Center were rarely providing direct representation, staff attorney Paul Morrow entered an appearance in the case at the request of Dinkins and Shulman approximately three months before the evidentiary hearing in an attempt to salvage Mr. Abdur'Rahman's post-conviction case.

During the entire state post-conviction process, the trial court authorized only \$2,000 for investigation and \$6,317.50 for psychological and psychiatric services. The trial court refused to authorize any funds to bring out-of-state witnesses to the evidentiary hearing, or even to take the telephonic depositions of out-of-state witnesses including, for example, Mr. Abur'Rahman's brother, Mark Jones, who was a key witness to the unrepresented mitigation proof and who has since committed suicide.

These paltry sums, totaling slightly more than \$8,000, constituted the entire amount furnished to Mr. Abdur'Rahman for investigative and mental health resources during the entire course of the state court proceedings, from the time of indictment through the trial, the direct appeal, and the entire post-conviction process. Trial counsel had been paid only a partial retainer of \$5,000, which he never used on the case, and he never prepared the case for trial because the balance of his fee was

never paid. Trial counsel also ignored the advice of others and refused to move the trial court to declare Mr. Abdur'Rahman indigent and eligible for authorization of funds pursuant to T.C.A. § 40-14-207(b), even though Mr. Abdur'Rahman in fact was indigent and had no resources of his own. Thus, post-conviction counsel were forced to investigate this case from scratch, and the sum total of slightly more than \$8,000 made available in the post-conviction proceeding was grossly inadequate for the job. This was especially true in light of the fact that Mr. Abdur'Rahman, being from a military family, had lived in a number of states through the course of his life including North Carolina, California, Washington, Hawaii, Pennsylvania, South Dakota, and Illinois, and had been institutionalized in mental hospitals and correctional institutions throughout the country.

In the post-conviction appeal to the Court of Criminal Appeals, the panel consisted of only two judges, a recently appointed Court of Criminal Appeals judge and a trial-level judge who sat by special appointment. In a cursory opinion less than four pages long, authored by the specially appointed trial-level judge, Mr. Abdur'Rahman's claims were dispatched without significant or meaningful discussion. See, Jones v. State, 1995 WL 75427 (Tenn.Crim.App. 1995). The Rule 11 Application for Permission to Appeal filed with this Court was denied without elaboration.

In federal district court, Mr. Abdur'Rahman for the first time was offered an opportunity to properly prepare and present his case in a full two-week evidentiary hearing that included over twenty witnesses and over 150 trial exhibits. At the conclusion of the hearing, the federal court described the available but unrepresented mitigating evidence to be "abundant," "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming."

The district court's findings regarding Mr. Abdur'Rahman's prejudice at sentencing resulting from the ineffective assistance of his counsel are as follows:

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military

policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancée.

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage – James (Petitioner), Mark and Sylvia.

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good.

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. Petitioner's school, military and prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" and, in 1971, as having a "passive aggressive personality, aggressive type." These records also describe the Petitioner as: "very sick" and in need of immediate commitment; "in serious need of therapy;" and "highly disturbed." The records also reflect numerous suicide attempts. None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. Petitioner's brother, Mark, committed suicide while this case was pending in this Court.

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHI's Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past. By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiance, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine, testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief. The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the file history and character of the Petitioner, good and bad, that was absent from any prior proceeding

in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual conduct, and that Petitioner stabbed Stein during that confrontation. The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a “homosexual panic” and lost control when he killed Stein. As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. Petitioner’s testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. During cross-examination, the Petitioner initially lost his composure, and was not particularly articulate in answering the prosecutor’s questions. Mr. Camp described the Petitioner’s performance as “one of the saddest things I have seen in my legal career.”

Mr. Camp described trial counsels’ deficiencies regarding Petitioner’s testimony:

“It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life.

“And it was more than he could handle and that he just broke down.”

The only line of questioning put to Petitioner’s wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing. That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. As noted above, Petitioner was convicted for the second degree murder of Michael Stein at the age of 21.

Petitioner has been diagnosed as having a sociopathic personality disturbance with anti-social reaction and mild depression, as having an anti-social personality, and as having a psychopathic personality.

Petitioner has also been diagnosed as having no mental illness.

The prosecution could have introduced evidence that during his many years in prisons, Petitioner was involved in numerous citations for misconduct, including possession of a knife. Prison records would also show that Petitioner escaped shortly before his parole date in 1982, but was recaptured a few months later. While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable.

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife.

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence – none – being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

“I don’t know you. You don’t know me. So, it ain’t no feeling there what you should do to me.”

According to the prosecutor’s assessment after trial, given the paucity of evidence that was presented by Petitioner’s attorneys, the jury had little reason to hesitate in imposing the death penalty: “The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever.”

999 F.Supp. at 1073 – 1101 (citations to the record omitted).

Based upon these findings, the federal district court ruled that the death sentence should be vacated. In announcing its decision, the district court explained:

This conclusion is not one the Court reaches casually. The Court [is] mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, and the almost complete failure to present a defense at Petitioner’s sentencing hearing, compels the Court’s conclusion that Petitioner’s death sentence cannot stand. The Constitution of the United States, and this Court’s duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner’s death sentence.

Id. at 1101-2 (emphasis added).

The state appealed from the district court’s ruling, but in the appeal the state did not challenge any of the district court’s findings on ineffective assistance of counsel based on the district court record. Instead, the only issues the state raised on appeal concerned the district court’s authority to conduct an evidentiary hearing in the habeas proceeding and base its findings and conclusions on the evidence introduced at the hearing.⁷ The only argument the state made on appeal was that the district court should have ignored the “compelling,” “overwhelming” and “abundant” evidence presented in the district court hearing. Throughout the federal habeas appellate

⁷ The fact that the state’s only issues on appeal concerned the district court’s authority to conduct an evidentiary hearing is clear from the state’s briefs filed with the Sixth Circuit and has also been admitted by the state in other papers it has filed with the Sixth Circuit and the United States Supreme Court.

proceedings, the state's only position was that the courts should turn a blind eye to the facts in this case.

In the Sixth Circuit Court of Appeals, Mr. Abdur'Rahman drew a three (3) judge panel which included Judges Siler and Batchelder, two of the most conservative judges on the Sixth Circuit who have, without fail, voted against granting relief in every capital case they have been involved with. United State Supreme Court precedent made it absolutely clear that Judge Campbell had acted within his authority to conduct an evidentiary hearing and to consider the new evidence presented in that hearing. The Sixth Circuit panel had no choice, therefore, but to reject all of the state's arguments on appeal. Amazingly, however, Judges Siler and Batchelder, without any prior notice to Mr. Abdur'Rahman, and without any discussion or analysis, determined that the evidentiary record from the court of original jurisdiction, the district court, did not support that court's decision. The panel majority reversed the district court decision and reinstated Mr. Abdur'Rahman's death sentence. The panel majority decided, therefore, to reinstate the death sentence on a heavily fact-bound issue, ignoring credibility determinations by the district court who heard the proof first-hand, that was never challenged by the state in the appeal, and that accordingly was never addressed by the parties in either their briefs or in oral argument to the Sixth Circuit. Judges Siler and Batchelder decided to reinstate the death sentence on a cold appellate record without hearing from Mr. Abdur'Rahman. Once again the death sentence was imposed without a fair hearing (indeed, at the appellate level without any hearing at all). See, Abdur'Rahman v. Bell, 226 F.3d 696, 708-9 (6th Cir. 2000).

Judge Cole issued a strong dissent from the panel majority's decision. 226 F.3d at 720-4. Judge Cole reiterated the indisputable point that, "Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase." Id. at 721. At the conclusion of his detailed opinion, Judge Cole concluded:

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S.Ct. at 1513 (2000). Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; see also Austin, 126 F.3d at 848; Glenn v. Tate, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

Id. at 724.

In response to a petition to rehear *en banc*, the full Sixth Circuit Court of Appeals, on reliable information and belief, voted six-to-one to rehear the appeal. Five of the twelve active members of the Court abstained. Abstention was counted as a negative vote. Thus, the vote on the rehearing motion was counted as a tie: six-to-six. Upon a tie vote, the petition to rehear *en banc* was denied and the panel majority decision prevailed.

The petition to rehear filed with the Sixth Circuit focused on Mr. Abdur'Rahman's objection to the panel's *sua sponte* review of the merits of the ruling of prejudice due to ineffective assistance of counsel, and reinstatement of the death sentence without notice, briefing, or argument by the parties on this issue that had been abandoned by the state. To date, no federal judge has reviewed the merits of the prosecutorial misconduct claims in this case. Nor has any federal court addressed the question of how the ineffective assistance of counsel cumulated with the misconduct of the prosecution to the prejudice of Mr. Abdur'Rahman.

C. The Need for Relief.

It is a cruel irony that while Mr. Abdur'Rahman's death sentence was reinstated by the Sixth Circuit panel on an issue that was never raised by the state on appeal, at the same time Mr. Abdur'Rahman has been completely precluded from presenting the bulk of his prosecutorial

misconduct claims in the habeas proceedings merely because of his post-conviction counsel's failure to include those claims in a Rule 11 application for discretionary appeal to this Court. This is the ultimate whipsaw. The irony here is especially cruel and unfair in light of this Court's recent promulgation of Tenn.S.Ct.R. 39, on June 28, 2001, which provides that a Rule 11 discretionary appeal has never been available for the purpose of federal exhaustion. This Court's Rule 39 makes clear, therefore, that the district court erred by its refusal to hear the prosecutorial misconduct claims.

Death is different. The death sentence must not be imposed except in those limited cases involving the "worst of the worst." The death sentence should only be imposed pursuant to proper procedure under a heightened standard of due process. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). While this Court has noted the "many avenues of judicial review which now exist and are available to prisoners sentenced to death," Workman, 22 S.W.3d at 811-12, through no fault of Mr. Abdur'Rahman's, these avenues of judicial review have failed to address the injustices of this case. "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." Herrera v. Collins, 113 S.Ct. 853, 868 (1993). The fallibility of the judicial system is manifested in each stage of the proceedings of this case.

1. Certification for Commutation.

Although final clemency decisions are left to the Governor, this Court has both authority and good reason to recommend commutation. There will be cases where the judicial system has simply failed to provide a meaningful and fair review of a capital defendant's legitimate claims. This is such a case. Given the political problems surrounding the executive clemency process, in a case such as this where the judicial record indisputably demonstrates the prejudicial shortcomings in the judicial

system, it becomes this Court's duty at least to give voice to the demands of justice by issuing a certificate of commutation.

Clemency "is a constituent part of the judicial system." United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61, 8 L.Ed. 640 (1833) (cited in Workman v. State, 22 S.W.3d at 812). The United States Supreme Court has recognized clemency as "the 'fail safe' in our criminal justice system." Herrera v. Collins, 113 S.Ct. 853, 868 (1993). Unfortunately, however, executive clemency has been rarely granted during the modern era, even though clearly there have been many cases that have presented compelling grounds for clemency. Commentators have made the following observations:

Political considerations have figured prominently in the unwillingness of many governors to be merciful. The popularity of the death penalty suggests to these officials that the safest course of action is to avoid the exercise of their clemency powers.

Cobb, *Reviving Mercy in the Structure of Capital Punishment*, 99 Yale L.J. 389, 394 (1989).

In eschewing constitutional limits and relying on the political process, the Court has sanctioned a process [of judicial review in death penalty cases] in which many people play a small role in death decisions, no one takes sole, personal responsibility for the decision, and the final decision makers are subject to strong political pressures.

Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 Vand.L.Rev. 311, 313 (1996).

Because clemency decisions in capital cases have become so highly politicized, the exercise of clemency is often fraught with problems.

Acker, Bohm, Lanier, America's Experiment With Capital Punishment, Chap. 20, *The Evolving Role of Clemency in Capital Cases*, at 544 (Carolina Academic Press 1998).

Because the record facts in support of Mr. Abdur'Rahman's case have never yet been adequately reviewed (though they have been presented) due to breakdowns in every stage of the judicial review process, clemency is becoming the only avenue of review available in Mr. Abdur'Rahman's case. Recent experience in the Phillip Workman case, however, teaches us that the

clemency process in Tennessee apparently suffers from the same political problems that commentators have observed in other jurisdictions. This Court, therefore, has a vital role to play in this process.

For all of the foregoing reasons, under the extenuating circumstances of this case, this Court must at least grant a certificate of commutation, pursuant to T.C.A. § 40-27-106 (1997), in an effort to vindicate the failures of the judicial system, to overcome the inevitable political inertia against executive clemency, and to correct the injustices of this case.

2. Exercise by this Court of its inherent supervisory authority.

This Court also has the necessary inherent authority to see that justice is done in this case apart from a certificate of commutation. This Court has supervisory authority over the entire state judicial system. Tenn.Sup.Ct.R. 11. Specifically, this Court has supervisory authority to “take affirmative and appropriate action or alleviate any condition or situation adversely affecting the administration of justice within the state.” Rule 11(5). See, also, Van Tran v. State, 6 S.W.3d 257, 264-265 (Tenn. 1999) (as the “repository of the inherent power of the judiciary in his State,” this Court has the authority to exercise “all discretionary and inherent powers existing at common law at the time of the adoption of the state constitution”; it has “not only the power, but the duty, to consider, adapt, and modify common law rules,” and, “in the context of a capital case [] Tennessee courts have inherent power to adopt appropriate rules of criminal procedure when an issue arises for which no procedure is otherwise specifically prescribed.”). The various breakdowns of the judicial proceedings in this case justify extraordinary relief. Moreover, the extreme and egregious forms of prosecutorial misconduct that led to Mr. Abdur’Rahman’s conviction and death sentence are deserving of severe sanctions. This Court has the inherent authority to sanction the prosecutorial misconduct in this case by setting aside Mr. Abdur’Rahman’s death sentence and awarding such other relief as this Court deems appropriate.

For the reasons referenced above, we cannot trust that the egregious errors, thus far overlooked by the state and federal judiciary in this case, will be corrected by the Governor. Mr. Abdur'Rahman, therefore, asks this Court to fashion a remedy that fits the injustices committed in this case, and to set aside this sentence of death and grant such other relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand delivery and first class mail, postage prepaid, upon Gordon W. Smith, Esq. of the Office of the Tennessee Attorney General, 500 Charlotte Avenue, Nashville, TN 37202-0207, on this the 21st day of December, 2001.

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