

**IN THE SUPREME COURT  
AT NASHVILLE**

**IN RE:            )DAVIDSON COUNTY  
ABU-ALI ABDUR'RAHMAN)NO. M1988-00026-SC-DPE-PD**

**Filed December 11, 2001**

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**AMENDED MOTION TO STRIKE STATE'S MOTION TO SET EXECUTION DATE**

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On December 3, 2001 the state filed a Motion to Set an Execution Date (hereinafter "Motion to Set") requesting this Court to set an execution date for Mr. Abdur'Rahman, asserting that Mr. Abdur'Rahman "has completed the standard three-tier appeals process. *See* Rule 12.4(A)." Motion to Set at 2, ¶ 4.

Mr. Abdur'Rahman denies that he has completed the standard three-tier appeals process and hereby moves this Court to strike the state's Motion to Set on the following grounds:

(1) This Court is stayed by operation of a federal district court order from setting an execution date in Mr. Abdur'Rahman's case. In Mr. Abdur'Rahman's federal habeas corpus proceedings, Abu-Ali Abdur'Rahman v. Bell, Case No. 3:96-0380 (M.D.Tenn.), the federal district court issued an Order staying Mr. Abdur'Rahman's execution. A true copy of this Order is attached hereto as Exhibit 1. These federal habeas proceedings are still pending, and the Order staying Mr. Abdur'Rahman's execution has been neither lifted nor dissolved. Accordingly, the stay of execution remains in full force and effect, and pursuant to 28 U.S.C. §2251 and Tenn. Sup. Ct. R. 12.4(E), an execution date cannot be set for Mr. Abdur'Rahman at this time.

(2) The state's motion to set an execution date is premature, under Tenn. Sup. Ct. R. 12.4(A), because Mr. Abdur'Rahman's federal habeas corpus proceedings are ongoing and therefore have not been completed. Mr. Abdur'Rahman's federal habeas corpus proceedings are currently before the United States Court of Appeals for the Sixth Circuit on the following matters:

- (i) Mr. Abdur'Rahman's "Motion to Withhold the Mandate and Grant Rehearing *En Ban* or Remand for Further Proceedings," Sixth Circuit Docket Nos. 98-6568 / 98-6569. (See Appendix 2, hereto).
- (ii) The district court's referral to the Sixth Circuit of Mr. Abdur'Rahman's "Rule 60 Motion," Sixth Circuit Docket No. 01-6487. (See Appendix 12, hereto).
- (iii) Mr. Abdur'Rahman's appeal from the district court's ruling on the "Rule 60 Motion," Sixth Circuit Docket No. 01-6504. (See Appendices 14 and 17, hereto).

In connection with these pending matters, Mr. Abdur'Rahman would show this Court that since the time the United States Supreme Court denied Mr. Abdur'Rahman's petition for a writ of certiorari in the habeas corpus proceedings, no mandate has issued from the Sixth Circuit, and the case remains on appeal. The state acknowledged this when, in papers it recently filed with the district court, the state said:

Because the mandate has not issued from the Sixth Circuit, it is respondent's position that this case is still on appeal.

(See Appendix 11 hereto, p. 2, fn. 4). Moreover, the district court more recently stated:

The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See First Nat'l Bank of Salem, Ohio, v. Hirsch, 535 F.2d 343 (6<sup>th</sup> Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

(See Appendix 15 hereto, p. 1, fn. 1).

### **Procedural History of the Case Demonstrating that the State's Motion to Set is Premature.**

Although the state's Motion to Set sets forth a brief procedural history of the case, it is incomplete and misleading. A more accurate history of the case is as follows:

1. Mr. Abdur'Rahman commenced his federal habeas corpus proceedings by filing with the district court a *pro se* petition on April 23, 1996. On May 28, 1996, the district court entered an Order appointing the undersigned as counsel for Mr. Abdur'Rahman and staying his execution. (See Appendix 1, hereto, also attached as Exhibit 1 to this Motion). The district court's stay of execution remains in full force and effect.

2. On April 8, 1998, the district court issued its decision in Mr. Abdur'Rahman's habeas proceeding affirming the conviction but vacating the death sentence on grounds of ineffective assistance of counsel. The state appealed from the district court's judgement vacating the death sentence, and Mr. Abdur'Rahman appealed from the district court's judgment affirming the conviction.

3. On September 13, 2000, the Sixth Circuit, in a split opinion, reversed the district court's judgment vacating the death sentence. The panel majority reversed the district court on a ground that was never raised by the state in the appeal.

4. Mr. Abdur'Rahman filed with the Sixth Circuit a petition for rehearing and a suggestion for rehearing *en banc*, which was denied, and then proceeded to file with the United States Supreme Court a petition for a writ of certiorari. On October 8, 2001, the Supreme Court denied the certiorari petition. Mr. Abdur'Rahman then timely filed

with the Supreme Court a petition to rehear the denial of the certiorari petition.

5. On October 10, 2001, Mr. Abdur'Rahman also filed with the Sixth Circuit his Motion to Withhold the Mandate and Grant Rearing *En Banc* or Remand for Further Proceedings. (Appendix 2, hereto).

6. On October 17, 2001, the Sixth Circuit directed the state to file a response to Mr. Abdur' Rahman's Motion to Grant Rehearing *En Banc*. (Appendix 3, hereto).

7. On or about October 17, 2001, the state filed its Response to Mr. Abdur'Rahman's Motion before the Sixth Circuit. (Appendix 4, hereto).

8. On October 29, 2001, Mr. Abdur'Rahman filed with the Sixth Circuit his Motion for Leave to File Reply in Support of Rehearing *En Banc*. (Appendix 5, hereto).

9. On November 30, 2001, the Sixth Circuit granted Mr. Abdur'Rahman's motion for leave to file a reply in support of the petition for rehearing *en banc*. The Sixth Circuit also accepted for filing Mr. Abdur'Rahman's reply in support of the motion to withhold the mandate or remand for further proceedings. (Appendix 6, hereto).

10. Accordingly, on November 30, 2001, the Sixth Circuit filed Mr. Abdur'Rahman's Reply in Support of Motion to Withhold the Mandate and to Remand (Appendix 7, hereto) and his Reply in Support of Rehearing *En Banc* (Appendix 8, hereto).

11. In the meantime, on November 2, 2001, Mr. Abdur'Rahman filed with the district court his Motion for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b) (Appendix 9, hereto) together with his Memorandum in support thereof (Appendix 10, hereto) (the "Rule 60 Motion").

12. On or about November 26, 2001, the state filed with the district court its Response in Opposition to Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b). (Appendix 11, hereto). It was in this pleading that the state made the statement: "Because the mandate has not issued from the Sixth Circuit, it is respondent's position that this case is still on appeal." (*Id.* at 2, fn. 4).

13. On November 27, 2001, the district court entered an Order transferring the Rule 60 Motion to the Sixth Circuit. (Appendix 12, hereto).

14. On November 30, 2001, Mr. Abdur'Rahman filed with the district court his Application for Certificate of Appealability relating to the district court's order regarding the Rule 60 Motion. (Appendix 13, hereto).

15. On November 30, 2001, Mr. Abdur'Rahman filed with the district court his Notice of Appeal, appealing from the district court's November 27 Order. (Appendix 14, hereto).

16. On December 4, 2001, the district court entered an Order finding that it does not have jurisdiction to

rule on Mr. Abdur'Rahman's Application for Certificate of Appealability. (Appendix 15, hereto). It was in this Order that the district court said, "The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time." (Id. at 1, fn. 1).

17. On or about December 5, 2001, Mr. Abdur'Rahman filed with the Sixth Circuit his Motion to Hold Proceeding in Abeyance Pending Final Determination of Two Pending Appeals. (Appendix 16, hereto).

18. On or about December 6, 2001, Mr. Abdur'Rahman filed with the Sixth Circuit his Application for Certificate of Appealability, etc., relating to the Rule 60 Motion. (Appendix 17, hereto).

These matters are currently before the Sixth Circuit. Therefore, as acknowledged by both the state and the district court, Mr. Abdur'Rahman has not "completed the standard three-tier appeals process," and the state's Motion to Set is premature and unauthorized under Tenn. S. Ct. R. 4(A).

The state's Motion to Set also violates the stay of execution previously issued by the district court, which remains in full force and effect, and a setting of an execution date at this time would constitute a further violation of the district court's stay of execution.

Wherefore, for the foregoing reasons, Mr. Abdur'Rahman prays for the following relief:

1. An Order of this Court striking the state's Motion to Set an Execution Date.
2. In the alternative, if this Court determines that the state's Motion to Set an Execution Date is not premature and does not violate the district court's stay of execution, an extension of time, of ten (10) additional days from the date this Court makes such a determination, for Mr. Abdur'Rahman to file the response to the Motion to Set required by Tenn. S. Ct. R. 4(A).
3. Such other relief as the Court deems just and proper in the circumstances.

Respectfully submitted,

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Counsel for Mr. Abdur'Rahman

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**DESIGNATION OF ATTORNEY OF RECORD  
FOR MR. ABDUR'RAHMAN**

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Mr. Abdur'Rahman designates the following attorneys of record:

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Strike was served by hand delivery and first class mail, postage prepaid, upon Glenn R. Pruden, Esq. of the Tennessee Attorney General 425 Fifth Avenue North Nashville, TN 37243, on this the \_\_\_ day of \_\_\_\_\_, 2001.

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Bradley A. MacLean

