

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN)	
)	
Petitioner)	No. 3:96-0380
)	Judge Campbell
v.)	
)	Capital Habeas Corpus
RICKY BELL, Warden)	
)	<u>Oral Argument Requested</u>
Respondent)	

**PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO FED.R.CIV.P. 60(b)**

Petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones) hereby moves the Court for relief from this Court's judgment entered April 8, 1998 (Docket Nos. 205, 206), in which this Court dismissed a number of Petitioner's prosecutorial misconduct claims on non-exhaustion and procedural default grounds. See Abu-Ali Abdur'Rahman v. Ricky Bell, 999 F.Supp. 1073, 1079-83 & n.8. Petitioner's prosecutorial misconduct claims that were dismissed by this Court should be reinstated and addressed by this Court on the merits because of the recent promulgation of Rule 39 of the Rules of the Supreme Court of the State of Tennessee. These prosecutorial misconduct claims should be addressed both independently and cumulatively with the ineffective assistance of counsel claims and the other errors in this case. The evidentiary record supporting these claims has already been established in this proceeding. This Motion is made under Rule 60(b)(6) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases. This Motion is also made under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

In support of this Motion, Petitioner states as follows:

BACKGROUND

1. This capital habeas corpus proceeding was commenced by a *Pro Se* Petition filed on April 23, 1996 (Docket No. 1), seeking federal habeas relief under 28 U.S.C. § 2254.¹ Petitioner's claims for relief are set forth in Petitioner's Amended Petition for Writ of Habeas Corpus in a Capital Case filed with this Court on December 2, 1996 (Docket No. 37) (the "Amended Petition").

2. On May 28, 1996, this Court entered an Order staying Petitioner's execution until further order of the Court. (Docket No. 24). The stay of Petitioner's execution under this Order remains in effect.

3. The Amended Petition seeks relief from Petitioner's Tennessee first degree murder conviction (as well as his other Tennessee convictions) and his death sentence (as well as his other sentences). The grounds for relief include, but are not limited to, ineffective assistance of counsel and prosecutorial misconduct in violation of Petitioner's rights under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Petitioner's prosecutorial misconduct claims are set out in Part D of the Amended Petition.

4. This Court conducted an evidentiary hearing in this case commencing in February, 1998. The record established in that hearing supports the claims for habeas relief the Petitioner is raising in this Motion.

5. On April 8, 1998, this Court entered a judgment in this case, which is reported at 999 F.Supp. 1073 (the "April 1998 Judgment") (Docket Nos. 205, 206). This Court granted

¹ This case is governed by the provisions of Section 2254 that were in effect at the time of the filing of the Petition, before the effectiveness of the amendments provided in the Antiterrorism and Effective Death Penalty Act of 1996.

Petitioner relief from his death sentence on grounds of ineffective assistance of counsel. This Court denied Petitioner relief from his first degree murder conviction.

6. In the April 1998 Judgment, this Court addressed two of Petitioner's prosecutorial misconduct claims: (i) the Brady claim arising from the prosecution's failure to turn over the "1972 transcript" from Petitioner's prior murder case and (ii) the Brady claim arising from the prosecution's failure to turn over the T.B.I. report on the "blood evidence." See Amended Petition, ¶¶ D.1.(1) and D.1.(7). With respect to the "1972 transcript" prosecutorial misconduct claim, this Court found that the prosecution did violate its Brady obligation by failing to produce the transcript to the defense; but this Court concluded that, "standing alone," this violation was not material. 999 F.Supp. at 1089-90. With respect to the prosecutorial misconduct claim concerning the T.B.I "blood evidence" report, this Court determined that there was no Brady violation. Id. at 1090.

7. In a previous Order, this Court addressed Petitioner's "sentencing stage prosecutorial misconduct" claim relating to the prosecution's presentation of inadmissible information to Petitioner's sentencing jury in blatant violation of the trial court's prior ruling (issued just moments before the information was passed to the jury) that the information was inadmissible and after the prosecution assured the court that would not happen. See Amended Petition, ¶ D.6. In Petitioner's direct appeal, the Tennessee Supreme Court reprimanded the prosecution and said that this conduct "bordered on deception" and was "improper." State v. Jones, 789 S.W.2d 545, 551-2 (Tenn. 1990). This Court evaluated this error in isolation and found that it was harmless.

8. This Court dismissed Petitioner's remaining prosecutorial misconduct claims on the ground that those claims were not presented in Petitioner's motion to the Tennessee Supreme

Court for permission to appeal from the lower state courts' denial of post-conviction relief. See 999 F.Supp. at 1081, n.8. Petitioner had presented the substantial body of his prosecutorial misconduct claims to the Tennessee Court of Criminal Appeals, as more fully set forth below. Tennessee Supreme Court review of a post-conviction case is merely discretionary. Despite Petitioner's contention to this Court that federal exhaustion did not require that claims must be presented to the Tennessee Supreme Court on a request for discretionary appeal,² this Court held that these claims were not exhausted and were therefore procedurally defaulted. Id. at 1080.

9. Respondent appealed from this Court's Judgment granting Petitioner relief from his death sentence. Petitioner appealed from this Court's Judgment denying relief from his conviction.

10. In Respondent's appeal, in the face of the overwhelming and unrebutted mitigation evidence presented to this Court which demonstrated that Petitioner was prejudiced by ineffective assistance of counsel, Respondent never challenged and therefore abandoned any claim concerning this Court's finding of ineffective assistance of counsel at sentencing based upon this Court's evidentiary record. Respondent's only argument on appeal was that this Court should not have conducted an evidentiary hearing and instead should have relied entirely upon the state court's ruling on ineffective assistance of counsel. The issue of whether the evidentiary record in this Court supports this Court's finding of ineffective assistance of counsel at sentencing was never briefed by the parties nor discussed at the oral argument before the Sixth Circuit.

11. On September 13, 2000, the Sixth Circuit issued its decision, reported at 226 F.3d 696. Each of the members of the three judge panel issued a separate opinion. In a split decision (Judges Siler and Cole), the Sixth Circuit panel ruled that this Court did have the authority to

² See Response to Respondent's First Motion for Summary Judgment, pp. 45-52 (Docket No. 91).

conduct an evidentiary hearing and to expand the record on Petitioner's claims. However, also in a split decision, the Sixth Circuit panel *sua sponte* addressed the issue that Respondent had never raised and therefore had abandoned on appeal, and that the parties neither briefed nor argued in the appeal: whether this Court's evidentiary record supports a finding of ineffective assistance of counsel at sentencing. On this issue, the majority of the panel (Judges Siler and Batchelder) ruled that this Court's finding of ineffective assistance of counsel at sentencing was in error, and accordingly the Sixth Circuit reversed this Court's finding of prejudice at sentencing and vacated this Court's judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence. Id. at 715. Judge Cole dissented.

12. Petitioner filed a Petition with the Sixth Circuit requesting a rehearing or a rehearing *en banc*. Respondent was directed to respond to this Petition and this Petition was circulated to the full Court. This Motion was subsequently denied.

13. Petitioner filed with the United States Supreme Court a Petition for a Writ of Certiorari. This Petition, Respondent's Response, and the other briefs filed in support of this Petition, have been filed with this Court. (See Docket Nos. 240-245).

14. On October 9, 2001, the Supreme Court just denied Petitioner's petition for certiorari. Out of deference to the Supreme Court, Petitioner's counsel have waited until the Supreme Court ruled on the petition for certiorari before filing this Motion.

15. On October 10, 2001, Petitioner filed with the United States Court of Appeals for the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. The Sixth Circuit directed Respondent to respond to this Petition. Respondent filed a Response, and Petitioner filed a Reply to the Response. Copies of these papers (without accompanying appendices) have been filed with this Court. See Petitioner's

Status Report Dated November __, 2001, being filed contemporaneously herewith. Petitioner also intends to file with the Supreme Court a petition for rehearing of the order denying Petitioner's petition for certiorari. See Rule 44.2 of the Rules of the Supreme Court (allowing 25 days for the filing of such a petition).

TENNESSEE SUPREME COURT RULE 39

16. On June 28, 2001, while Petitioner's United States Supreme Court petition for certiorari was pending, the Tennessee Supreme Court clarified pre-existing Tennessee law on exhaustion of claims by issuing an Order which established new Rule 39 of the Rules of the Supreme Court of the State of Tennessee, a copy of which is attached hereto as Exhibit A. This Order provides:

In 1967 the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn.R.App.Proc.11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

17. Tenn.S.Ct.R. 39 unambiguously demonstrates that a Tennessee Appellate Rule 11 discretionary appeal to the Tennessee Supreme Court has never been available under Tennessee law in order to exhaust state remedies. This Court must give sanction to the Tennessee Supreme Court's interpretation of the exhaustion requirements in Tennessee.

18. Based upon Tenn.S.Ct.R. 39, it is now apparent that this Court erred in dismissing a substantial body of Petitioner's prosecutorial misconduct claims on "non-exhaustion" and "procedural default" grounds. As set forth below, these claims were properly presented to the Tennessee Court of Criminal Appeals in Petitioner's state post-conviction appeal and were therefore exhausted and preserved for federal habeas review.

THE PROPERLY PRESENTED AND EXHAUSTED CLAIMS

19. Attached hereto as Exhibit B is a true copy of the Brief of Appellant timely filed on April 25, 1994, with the Tennessee Court of Criminal Appeals in Petitioner's appeal as of right from the trial court judgment in the state post-conviction proceeding. In accordance with Tenn.S.Ct.R. 39, all of the claims stated in this Brief were properly exhausted.

20. The properly exhausted prosecutorial misconduct claims that Petitioner presented in his state court appeals as of right and that this Court must consider on the merits in this habeas proceeding are set forth in Petitioner's Amended Petition under the following paragraphs:

Claim D.1.(1). Brady violation -- prosecution's failure to produce 1972 murder trial transcript.

Claim D.1.(2). Brady violation -- Prosecution's failure to produce transcription of Miller's pretrial statement.

Claim D.1.(3). Brady violation -- Prosecution's failure to produce Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offenses.

Claim D.1.(4). Brady violation -- Prosecution's failure to produce other Miller statements.

Claim D.1.(6). Brady violation -- Prosecution's failure to produce the redacted portion of Detective Garafola's report.

Claim D.1.(7). Brady violation -- Prosecution failure to produce lab reports indicating no blood stains on clothes.

Claim D.1.(8). Brady violation -- Prosecution's failure to produce other police reports.

Claim D.1.(12). Brady violation -- Prosecution's failure to produce information about Petitioner's bank account.

Claim D.2.(1). Altering evidence -- Prosecution's improper alteration of Miller's testimony.

Claim D.2.(2). Altering evidence -- Prosecution's false and misleading information to MTMHI.

Claim D.2.(3). Altering evidence -- Prosecution's improper manipulation of Norman's testimony.

Claim D.3. Prosecution's misrepresentations to defense counsel regarding the prior 1972 conviction.

Claim D.6. Sentencing stage misconduct -- Prosecution violated trial court's instructions and passed inadmissible information to the jury after assuring the trial court that would not happen.

Claim D.8.(4). Prosecutorial Misconduct -- Prosecution made improper sentencing stage instruction regarding the SGM.

CUMULATIVE EFFECT OF THESE CLAIMS

21. Prosecutorial misconduct claims must be considered by the Court in the context of, and cumulatively with, all of Petitioner's other claims; these kinds of claims cannot be considered in isolation, "standing alone."

22. Accordingly, the prosecutorial misconduct claims identified in Paragraph 21 above that were improperly dismissed by this Court must be considered cumulatively with all of Petitioner's other claims, including: those prosecutorial misconduct claims that this Court did previously consider [the ¶ D.1.(1) Brady claim relating to the 1972 transcript, the ¶ D.1.(7) claim

relating to the blood evidence, the ¶ C.7.(1) claim relating to the “Heinous, Atrocious and Cruel” sentencing stage instruction and aggravator,³ and the ¶ D.6 claim relating to the prosecution’s presentation of inadmissible information to the jury]; and Petitioner’s ineffective assistance of counsel claims at both the guilt and sentencing stages of Petitioner’s trial. These claims must be cumulated to determine (i) guilt stage issues, including but not limited to Petitioner’s defenses that, based on the blood evidence, he was not the assailant and, based upon the mental health evidence, he was insane or at least lacked the *mens rea* for first degree capital murder; (ii) the effect of the viable but unrepresented guilt stage defenses on the sentencing stage prejudice analysis; and (iii) the effect of all the errors on the prejudice Petitioner suffered at the sentencing stage. To the extent this Court has previously addressed these other claims, this Court must reconsider them in light of the cumulative effect created by all of the errors that occurred in this case.

23. As this Court previously found, this is a case where “abundant,” “compelling,” and important evidence was never investigated by Petitioner’s trial counsel and therefore never presented to the jury. But, when all of Petitioner’s claims are viewed cumulatively and in context, this case is more than that. The foregoing prosecutorial misconduct claims, when considered in their totality along with the other errors in this case, establish more than the withholding of evidence and even more than individual instances of intentional prosecutorial

³ The ¶ C.7.(1) relating to the unconstitutional “Heinous, Atrocious and Cruel” aggravator and sentencing stage jury instruction was rejected by this Court. (Docket No. 123). Petitioner appealed this ruling to the Sixth Circuit. The Sixth Circuit did not uphold the constitutionality of this aggravator and sentencing stage instruction, but denied this claim on the separate ground that the “error” was “harmless in that it did not have a substantial and injurious effect or influence in determining the jury’s verdict.” 226 F.3d at 711. The Sixth Circuit, however, explicitly considered this claim in isolation, without viewing it in the context of the unrepresented mitigation evidence or the combined effects of the ineffectiveness of Petitioner’s trial counsel and the prosecutorial misconduct in this case. As other claims are addressed on the merits, this claim must be reevaluated under a new harmless error analysis that views this claim in the context of all and cumulatively with the other errors in the case.

fraud and deception. They also establish a deliberate pattern and scheme of prosecutorial fraud and deception during the entire course of the case, from indictment to sentencing. Because of the prosecution's persistent and deliberate pattern of misconduct combined with the ineffective assistance of defense counsel and other errors in this case, the jury was presented with a completely false picture of every aspect of this case. As a result of all of wrongs, Petitioner's trial was a sham. Petitioner never had his day in court. There can be no confidence in the outcome of Petitioner's capital trial with respect to either guilt or sentencing.

24. The prosecutorial misconduct claims provide independent and sufficient grounds for granting Petitioner relief. The fraud and deception practiced by the prosecution amounts to a *per se* violation of Petitioner's due process and Eighth Amendment rights. Moreover, the prosecutorial misconduct claims, when viewed cumulatively along with Petitioner's ineffective assistance of counsel claims and the other errors that occurred in Petitioner's case, establish that Petitioner was grossly prejudiced at both the guilt and sentencing stages of Petitioner's trial.

RULE 60(b) GROUNDS FOR RELIEF

25. Fed.R.Civ.P. 60(b)(6) allows the Court to relieve a party from a final judgment or order, upon such terms as are just, "for any reason justifying relief from the operation of the judgment."

26. Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. When a federal court denies relief based upon its understanding and application of state law, but a subsequent action by the state supreme court establishes that the federal court misunderstood state law, relief under Rule 60(b)(6) is appropriate to ensure justice. Rule 60(b)(6) relief is particularly appropriate in habeas proceedings involving extraordinary circumstances, such as Petitioner's case, in which conventional notions of finality have no place.

27. The claims asserted by Petitioner in this Motion are not new claims, but are claims that were asserted from the outset of this habeas proceeding. The evidence supporting these claims is contained in the evidentiary record already established in this proceeding. Cf. Petitioner's Post-Hearing Brief, pp. 49-79 (Docket No. 202). Accordingly, this motion does not constitute a "successive" or "second" habeas petition.

28. In light of the recent promulgation of Tenn.S.Ct.R. 39, it is clear that this Court's dismissal of a substantial body of Petitioner's prosecutorial misconduct claims was in error. The improperly dismissed claims, viewed both independently and cumulatively along with Petitioner's ineffective assistance of counsel claims, establish that Petitioner should be granted habeas relief.

29. For all of the reasons stated above, Rule 60(b)(6) relief is warranted because of the existence of extraordinary circumstances and because the April 1998 Judgment would cause extreme and undue hardship, to say the least. It would be a profound and irreparable miscarriage of justice to deny Petitioner the relief requested herein.⁴

⁴ It would be a cruel irony to preclude Petitioner from presenting his prosecutorial misconduct claims only because his state court-appointed counsel failed to present those claims in a petition for discretionary appeal in the state proceedings when, in this federal habeas proceeding, the Sixth Circuit reinstated Petitioner's death sentence on a ground that was never presented and was therefore abandoned by the state in its appeal.

30. In support of the relief requested herein, Petitioner relies upon the entire record in this case.

WHEREFORE, Petitioner prays for the following relief:

Withholding of the issuance of any final judgment or mandate until this motion

1.

can be fully considered by the Court.

2. Oral argument on this Motion.

3. An Order indicating that this Court is inclined to grant this Motion and permitting Petitioner to file any appropriate or necessary motion with the Sixth Circuit for a remand of the case on appeal for purposes of deciding this Motion; and, in that connection, certification of an order to the Sixth Circuit requesting that the record of this case be returned to this Court so that this Motion can be decided.

4. An Order granting Petitioner relief from this Court's April 1998 Order, and declaring that all of Petitioner's prosecutorial misconduct claims described above were properly exhausted in the state proceedings and shall be addressed on the merits by this Court in this habeas proceeding.

5. Upon final review of all of Petitioner's claims, viewed both independently and cumulatively, an Order granting Petitioner a writ of habeas corpus setting aside Petitioner's convictions and sentences.

6. Such other relief as the Court may find appropriate in the interests of justice.

Respectfully submitted,

Bradley A. MacLean (BPR # 9562)

STITES & HARBISON PLLC

SunTrust Center, Suite 1800

424 Church Street

Nashville, Tennessee 37219

(615) 244-5200

William P. Redick, Jr. (BPR #6376)

810 Broadway

Suite 201

Nashville, TN 37203

(615) 742-9865

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail, postage prepaid, on this _____ day of November, 2001 upon:

Glenn R. Pruden, Esq.

Gordon W. Smith, Esq.

Office of the Tennessee Attorney General

425 Fifth Avenue North

Nashville, TN 37243

Bradley A. MacLean