A SUMMARY OF
***TENNESSEE v. ABU-ALI ABDUR'RAHMAN*,**
A CASE OF INJUSTICE

Introduction

No court, state or federal, has *ever* reviewed all of Petitioner's claims cumulatively in light of the entire evidentiary record which was developed for the first time in the federal district court hearing.

In 1987 Abu-Ali Abdur'Rahman was convicted of first degree murder and sentenced to death. Over the past several years in collateral litigation in state and federal court, new evidence has been uncovered and introduced in court. Most of this new evidence is documented, and the state has not attempted to refute it. This new evidence has been characterized by Judge Todd Campbell of the federal district court as "abundant" and "compelling." It demonstrates that the version of the case heard by the jury in the 1987 trial misrepresented Mr. Abdur'Rahman's altruistic motives, his relative involvement in the commission of the crime, the involvement of others in the commission of the crime, Mr. Abdur'Rahman's background and mental impairments, and his history of good character despite his mental illnesses. The version of the evidence presented in the 1987 trial falsely portrayed both the crime and the defendant.

There is a two-fold reason why the case presented to the trial jury was false and misleading: (1) the prosecutor, who has been repeatedly sanctioned by the state courts and the Board of Professional Responsibility for misconduct in the prosecution of criminal cases (see, Ex. 65-68A), withheld evidence in his possession that was favorable to Mr. Abdur'Rahman, and he misrepresented evidence to all persons concerned – the mental evaluators at MTMHI, defense counsel, the trial court, and the jury – regarding all significant aspects of the case; and (2) the trial defense counsel, who has since surrendered his law license because of numerous

disciplinary complaints during his career, and who in this case agreed to accept a fee from an uncharged accessory before and after the fact to the offense, by his own admission literally did nothing to prepare for trial. Simply put, defense counsel failed to do his job, and the prosecutor unfairly and wrongfully took advantage of defense counsel's failure. Consequently, the jury never heard any of the compelling defenses that trial defense counsel should have developed, but instead the heard only the false and misleading picture portrayed by the prosecution.

The state cannot dispute the fact that Mr. Abdur'Rahman's attorney, in the words of Judge Todd Campbell, "utterly failed" to represent him at trial. Every state and federal court that has collaterally reviewed the case has concluded that trial defense counsel's performance fell below the minimum constitutional standard of care. Furthermore, both the Tennessee Supreme Court on direct appeal and the federal district court in the habeas corpus proceeding have found specific instances of prosecutorial misconduct in this case. However, no state or federal court has addressed the most serious instances of prosecutorial misconduct, though the claims have been properly presented for review. Similarly, no court has viewed all of the claims of constitutional error cumulatively in light of all of the evidence which is now a matter of record.

In 1998, Judge Campbell of the federal district court for the first time allowed Mr. Abdur'Rahman to present all of his evidence. At the conclusion of the lengthy evidentiary hearing, Judge Campbell unequivocally entered an emphatic decision that Mr. Abdur'Rahman did not receive a fair trial because of the ineffectiveness of defense counsel, and accordingly the federal district court set aside the death sentence. Judge Campbell, however, never ruled on the bulk of Mr. Abdur'Rahman's prosecutorial misconduct claims because, allegedly, those claims were "procedurally defaulted" in the prior state court proceedings. We now know, however, that

this procedural default ruling was error, because the Tennessee Supreme Court has since clarified the law which Judge Campbell incorrectly applied. The most serious prosecutorial misconduct claims have yet to be substantively addressed by any state or federal court.

From the time Judge Campbell issued his ruling, the prosecution has *never* argued that Mr. Abdur'Rahman received a fair trial. The prosecution concedes that Mr. Abdur'Rahman's trial attorney's performance was constitutionally deficient. The prosecution has only presented procedural arguments to prevent court review of the entire case. The prosecution has simply but successfully maintained that Mr. Abdur'Rahman is not entitled to judicial review of the merits of his claims viewed collectively in light of all of the evidence.

Though the prosecution never contested the merits of Judge Campbell's determination decision based on the federal district court evidentiary record, the Sixth Circuit panel, in a sharply divided decision, reversed Judge Campbell's prejudice determination. The two-judge majority on the federal appellate panel acted *sua sponte.* Mr. Abdur'Rahman was never given notice or an opportunity to be heard on the prejudice issue the Sixth Circuit panel considered in reinstating the death sentence. Neither party ever addressed the fact-intensive prejudice issue to the appellate court; and, the panel based its decision on the woefully incomplete state court record, ignoring the substance of the complete version of the record made in Judge Campbell's court. Since that time, the prosecution has successfully prevented judicial review of Mr. Abdur'Rahman's claims by relying on procedural technicalities to keep the case out of court.

This case raises this question, which demands an answer: Why is Mr. Abdur'Rahman facing execution when he has never received a fair trial, and when the courts have never reviewed his entire case?

What follows is a brief summary chronology of the case which emphasizes the

importance of that question. (A timeline outlining the history of the case is attached as Ex. 1-3A as part of Appendix B hereto.) The history of this case makes the point that it would violate our basic notions of justice and fairness to execute Mr. Abdur'Rahman without a complete review of all of his claims in light of all of the evidence—something that has never happened. The evidentiary record was established in the federal district court habeas hearing. We are merely asking that this record be carefully and fairly considered before the any final decision is made to execute Mr. Abdur'Rahman.

Attached as Appendix B hereto are certain exhibits that were introduced into evidence at the federal district court habeas corpus hearing. These exhibits are cited herein as "Ex. __". This summary also cites to the original trial transcript ("T"), the state post-conviction hearing transcript ("P.C."), and the federal habeas corpus evidentiary hearing transcript ("H.T.").

The Offense

The activities leading up to the killing of Patrick Daniels on February 17, 1986, were set in motion under the influence and direction of Allen Boyd and the other members of the small paramilitary arm of an organization called the Southeastern Gospel Ministry (the "SGM").

Mr. Abdur'Rahman and Devalle Miller, who also belonged to the SGM, went to Patrick Daniels' apartment with unloaded guns furnished by their SGM leaders Allen Boyd and William Beard. As Devalle Miller has explained in sworn testimony at his own sentencing hearing in late 1987:

> "The organization that I'd gotten myself involved in [the SGM] was to help the community to rid the drug dealers, and things like that, you know, because it was a bad influence. And I just got in over my head."
>
> "Well, I knew that he [Mr. Abdur'Rahman] had went to prison. But that he had, you know, came out and that he had kept himself together. You know, he came out with the attitude of helping the community, preferably the black community. And just wanting to do right. So that really impressed me about

him. For a man who had went to prison and spent time, and come out with the attitude of, hey, you know, I'm going to be an asset to the community. That impressed me."

More recently, in 1993, Miller gave the following sworn testimony:

Q. And do you recall telling us as to how you began to get involved in this organization and talking with Mr. Jones about the issues that the Southeast Gospel Ministry was discussing; that you had felt like here in Nashville you wanted to become involved in a cause or have something to believe in?

A. That was my motivation.

Q. And do you recall telling us that you went over there that night of the offense solely for the purpose of taking away drugs from the drug dealer?

A. Yes.

Q. And that going to Patrick Daniels' house was in accordance with the plan to eliminate drugs from the dealers in the neighborhood?

To which Miller answered in the affirmative.

(P.C. Vol. III, 18-9). Neither the prosecution nor the defense elicited this testimony at Mr. Abdur'Rahman's trial.

At trial, the prosecutor showed the jury the that Mr. Abdur'Rahman took with him to the crime scene – an apparently unloaded gun that was never fired. In the federal district court hearing, it was established that Mr. Abdur'Rahman's gun was originally purchased by Allen Boyd, and was therefore furnished by Allen Boyd to Mr. Abdur'Rahman. In the post-conviction hearing, Mr. Daniels testified that he obtained his gun from William Beard. (P.C. Vol. 16, 35). These facts were not known by defense counsel and were not offered into evidence at Mr. Abdur'Rahman's trial.

When Mr. Abdur'Rahman and Miller entered Daniels' apartment, they were met by Daniels, Norma Norman, and her two children. The children were put into a bedroom during the

assault that ensued. According to the plan, Miller was to bind up Daniels with duct tape, but Miller froze. Mr. Abdur'Rahman took the duct tape and bound and blindfolded Daniels and Norman with the duct tape. For some reason that remains unclear, the plan went terribly wrong and Daniels and Norman were each stabbed several times with a knife from Daniels' kitchen. Norman survived but could not identify her assailant. Daniels died from six stab wounds to the heart and chest. After leaving the apartment, Mr. Abdur'Rahman and Miller left the apartment and, according to Miller, immediately met with Boyd. (P.C., Vol. III, 26).

Two days later, police arrested Mr. Abdur'Rahman at work at the Nashville Baptist Publishing Board. At the time of his arrest, according to police records and his wife, he was unable to recall the actual assaults on Daniels and Norman. (Ex.10). That same day Miller was fleeing the state with money furnished by Beard and the SGM. (P.C. Vol. III, 30). The SGM supplied money to Miller's wife and family until they eventually joined with Miller in his hometown in Pennsylvania. (P.C. Vol. III, 35-6). The jury never knew about this.

Devalle Miller was apprehended more than one year later, in his home town in Pennsylvania, as the prosecution was preparing for Mr. Abdur'Rahman's trial. Allen Boyd, William Beard and other members of the SGM were never investigated or questioned by the prosecution.

The Blood Evidence

Mr. John Zimmermann, the lead prosecutor in this case, knew very well from the outset that, in his words, Nashville jurors are "tougher to get death sentences from" than other Tennessee jurors. (H.T. 905). They will not impose death verdicts unless, in his words, they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." (Id.) As Zimmerman admitted in federal court, to get

the death penalty, the defendant must be "the shooter or the sticker." (H.T. 907). Even then, "you … have to explain everything to the jury" about aggravation and the absence of mitigation. "They want that comfort." (Id.)

The prosecutor, therefore, needed to find a way to convince the jury that Mr. Abdur'Rahman was the actual assailant – the "sticker." The blood evidence in the case, however, stood in his way. To get around this problem, the prosecutor engaged in concealment and deception.

The medical examiner's autopsy report and trial testimony reveal that Daniels was killed by stab wounds to the heart, one piercing the aorta – a vessel "about the size of a garden hose" that "carries blood from the heart to … the body" – and another piercing an "artery carrying blood to the heart." The police reports describe the crime scene as bloody – there were pools of blood on the floor and blood splatter on the walls. Crime scene photographs show extensive blood splattering on the walls. The prosecution never disclosed to the defense any of the police reports or their descriptions of the blood splattering.

Norma Norman, the surviving victim, described both Mr. Abdur'Rahman and Miller up to the point when she was blindfolded, just moments before the killing. She repeatedly said that Mr. Abdur'Rahman was wearing a long dark wool coat at the time. (T. 1332-4, 1343, 1364, 1366-7). Miller, the co-defendant, also described Mr. Abdur'Rahman as wearing the long dark wool coat during the entire evening. (T. 1451, 1454, 1462, 1465). One of the children gave a statement to the police, explaining that after the assault she looked out from behind her bedroom door and saw one of the defendants (Mr. Abdur'Rahman) wearing the dark wool coat. The prosecution argued to the jury that, at the time of the offense, Mr. Abdur'Rahman was wearing the long dark wool coat, which the prosecution characterized as a "gangster coat." (T. 1672-3).

On the day of Mr. Abdur'Rahman's arrest, police searched his apartment and seized the gun along with his clothes and the long dark wool coat that he was wearing at the time of the offense. The coat was sent to the T.B.I. crime lab where it was tested chemically for blood stains. The T.B.I. crime lab issued a report stating that no blood stains were found on any of Mr. Abdur'Rahman's clothes. (Ex. 4-5). Interestingly, Miller's clothes have never been tested for blood stains.

In light of the blood splattering and the description of the crime scene, the lack of blood stains on Mr. Abdur'Rahman's coat presented the prosecutor with his problem. The prosecutor clearly explained this problem in an internal memo to the District Attorney requesting permission to seek the death penalty. In this memo the prosecutor discussed "weaknesses in the case" including the most serious weakness concerning the blood evidence:

> "T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen. Either the defendant removes his coat before he began to stab these people, the defendant had his coat cleaned, the defendant replaced the coat found by the police with another coat (which is not likely since he would have obviously gotten rid of the shotgun) *or if the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred.*"

(Ex. 7) (emphasis added).

In the federal district court hearing, Dr. Kris Sperry, the Chief Medical Examiner for the State of Georgia, testified that Daniels' wounds would undoubtedly have splattered blood on the assailant's clothes, and those stains could not have been removed from the coat even if the coat had been cleaned. Further, Dr. Sperry testified that the tests administered by the T.B.I. Lab would have detected blood stains despite any possible cleaning. This testimony is unrebutted.

Moreover, in the federal district court hearing both the prosecutor and the chief detective in the case acknowledged that the assailant would have had blood on his clothes. Detective

Garafola, the chief detective, admitted, "[T]here was more than one wound and after the first one there probably was blood spurting out of the first wound or second wound, and if you hit the second or third time it would cause it to splatter." (Garafola Deposition, entered into evidence, at pp. 42-43). The prosecutor acknowledged in federal court, "I think when you have a murder with this much blood splatter, you would think some would have gotten on the defendant, yes." (H.T. 917).

The prosecution has never offered an explanation for this gaping inconsistency in their case: a messy blood-splattered crime scene but no blood on the alleged assailant. (For further discussion of the blood evidence, and other evidence indicating that Mr. Abdur'Rahman likely is not the assailant, see Appendix D hereto.)

Mr. Abdur'Rahman's defense lawyers were completely unaware of the blood evidence. In fact, the defense (including Mr. Abdur'Rahman) operated on the false assumption that blood was found on his clothes. Indeed, the institutional records in this case demonstrate that Mr. Abdur'Rahman was told that blood was found on his clothes. (See, Ex. 8). Given Mr. Abdur'Rahman's own lack of memory of the crime, he believed what he was told. He was never told the truth, that there were no blood stains on his clothes.

Pre-Trial and Trial

Mr. Abdur'Rahman has a long, well-documented institutional history of mental illness and emotional disturbance marked by recorded episodes of dissociation and "hysterical blindness" (i.e. blackouts). Because his defense lawyer conducted absolutely no investigation, defense counsel never became aware of this history or of Mr. Abdur'Rahman's emotional instability. The prosecution, however, did have knowledge of some of Mr. Abdur'Rahman's mental problems. According to police reports, when Mr. Abdur'Rahman was arrested, he

banged his head against the wall and the table, and the police found it necessary to place him in a padded cell for at least two days. The prosecution, however, never turned these reports or this information over to the defense. Ex. 9 is a copy of a redacted report that was turned over to the defense after Detective Garafola testified at the trial. Ex. 10 is the same report, without the redaction, that was never turned over. The redacted portion of the report described the head banging at the time of the arrest. Other withheld police reports describe how, immediately after the arrest, the police found it necessary to place Mr. Abdur'Rahman in a padded cell for approximately two days in order to protect Mr. Abdur'Rahman from his self-destructive head banging.

Mr. Abdur'Rahman's headbanging immediately after his arrest, and his consequent confinement in a padded cell, was significant. In the federal habeas hearing, the state's mental health expert testified that this kind of headbanging is symptomatic of serious mental illness, a point confirmed by other experts who testified at that hearing. (H.T. 125). The headbanging, occurring within 48 hours of the offense, was also relevant to Mr. Abdur'Rahman's state of mind around the time of the offense. However, because the prosecution withheld the headbanging reports, and because the defense never conducted their own investigation, the defense had no awareness of this event or its significance.

On September 23, 1986, the prosecutor wrote a letter to Mr. Lewis Trammell, Mr. Abdur'Rahman's probation officer. This letter contained the following statements which the prosecutor later contradicted (see Ex. 24 –25, discussed below):

> "You advised me that he, Devall [sic] Miller and Sam Blackstock had established a *new church* known as the Southeastern Church of the Gospel of Ministry and that church's main objection [sic] was to rid the community of prostitution and drugs. You further advised me that the defendant informed you that the victims in the present murder case were part of their first vigilante mission."

> [With reference to Mr. Abdur'Rahman's prior second degree murder conviction] "I am advised by Federal Court officials where the defendant was convicted for both being an accessory to Armed Robbery and later for Second Degree Murder and that the defendant attempted to raise the *insanity defense* at those federal criminal trials."

(Ex. 11 – 12) (emphasis added, for purposes of comparing the prosecutor's subsequent statements to MTMHI – see Ex. 22-25, and pp. 13-15 below).

The prosecution's own investigation also revealed that the victim, Patrick Daniels, was a drug dealer who sold cocaine. Ex. 14 is an internal memo from the prosecutor's file about an interview with the victim's brother, in which the brother said "that his brother [Patrick Daniels] would talk about selling coke every now and then, but did not like to fool with it much because it had too much liability involved with it." "Mr. Daniels also advised that his brother probably sold to several people at the Overnight company." This information was never turned over to the defense, the defense never learned of this information, and the prosecution subsequently gave false information on this point, as well. (See Ex. 24 – 25, discussed below).

After his arrest, Mr. Abdur'Rahman initially asked attorney Neal McAlpin to represent him in the case. Mr. McAlpin had no prior death penalty experience. Also, he had no resources to handle this kind of case. Allen Boyd, the leader of the SGM and an accessory to the crime, offered to pay Mr. McAlpin's fee. Due to Boyd's involvement in the commission of the offense, Mr. McAlpin realized that receiving a fee from Boyd would create a conflict of interest for him as Mr. Abdur'Rahman's lawyer, and he eventually decided that he could not handle the case.

Mr. Abdur'Rahman then asked Lionel Barrett to represent him. It appears that Barrett was first contacted about this case in October, 1986. Barrett dealt with Gail Hughes, who was the intermediary between Allen Boyd, the fee source, and Barrett. (Ex. 15). Meanwhile, Mr. McAlpin, as he was leaving the case, moved the court to order a mental evaluation of Mr. Abdur'Rahman. (Ex. 16).

On November 3, 1986, Barrett dictated a memo to his secretary Gwen, saying: "Please call Gail Hughes at work … and tell her that due to the serious charges in the case of James Lee Jones we would have to have $15,000.00 in advance before we could get involved in the case." (Ex. 17).

In November, 1986, the court ordered the mental evaluation of Mr. Abdur'Rahman. (Ex. 18 – 19). This evaluation, however, did not take place until February, 1987.

Barrett received the first $5,000 of his required retainer fee in November or December, 1986. This payment came from Allen Boyd through Gail Hughes. According to Barrett's own account, he was still waiting to receive the balance of $10,000 before starting any work on the case. (H.T. 421-2). However, he never did receive the balance, and he never started working on the case.

Because Barrett's original $5,000 fee payment, and the prospect of receiving an additional $10,000 before starting work on the case, came from Allen Boyd, an accessory to the crime, Barrett had a conflict of interest. Interestingly, Barrett never did investigate Allen Boyd or the SGM.

On December 17, 1986, Barrett dictated another memo to his secretary Gwen, saying: "Please call Gale Hughes … She still owes $10,000.00 on the matter involving James Lee Jones. She has paid $5,000.00. I need to start doing a lot of work on Mr. James Lee Jones case next week. Please find out if it is going to be possible for her to bring in the additional $10,000.00 prior to the start of the year since there is a lot of work to be done on this murder case and I need to know what the status of it is." (Ex. 20).

Again on February 3, 1987, Barrett dictated another memo to his secretary Gwen, saying:

> "Please call Gail Hughes … and tell her that I want to start work on the case involving James Jones but she has only paid $5,000.00 and we need to have the additional money

> paid. I would like to meet with her next week." At the bottom of this memo, Gwen wrote: "I spoke w/ Gail and told her you were getting involved in James case & that she needed to get additional $ in here – She said she would call her *'funding source'* today. I went ahead and set her up to come in Tues."

(Ex. 21) (emphasis added).

In February, 1987, Mr. Abdur'Rahman was moved to MTMHI for a thirty day evaluation. MTMHI invited the attorneys of record in the case to furnish any information that might be relevant to the evaluation. At this time, Mr. Abdur'Rahman was not being actively represented by any attorney, and so no information was furnished to MTMHI on his behalf by his counsel.

The prosecutor, on the other hand, had no qualms about "assisting" the MTMHI evaluators. The letter he sent to MTMHI on February 10, 1987, is filled with misrepresentations and outright fabrications, as follows (Ex. 22 – 25):

> (i) "There appears to be no evidence from the records submitted to us in that [prior murder] proceeding that the defendant relied upon an insanity defense at trial." (Ex. 24).

This is false**.** Mr. Abdur'Rahman did rely upon an insanity defense at prior trial that was supported by psychiatric testimony. At some point the prosecutor obtained the transcript of this trial which contained the psychiatric testimony on insanity, a transcript which the prosecution never turned over to the defense. [This transcript was introduced into evidence at the federal habeas hearing, and the district court found that the prosecutor committed a Brady violation by withholding it from the defense – a violation which, "standing alone," was found not to be prejudicial.] This statement in the prosecution's letter to MTMHI also contradicted the statement in the prosecutor's September 23, 1986, letter to Lewis Trammell. (Ex. 11 – 13, discussed above).

> (ii) "He (Mr. Abdur'Rahman) was not associated with particular religious organization." (Ex. 24).

This statement is false. Mr. Abdur'Rahman was associated with the Southeastern Gospel Ministry (SGM), which was motivated to rid the community of drug dealers and other criminal elements. This fact was previously recognized by the prosecutor in his September 23, 1986, letter to Lewis Trammell. (Ex. 12, discussed above).

(iii) "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor." (Ex. 24).

This statement is false. There is no evidence that this was a theory of the police, and there is no other evidence supporting this claim. In fact, Mr. Abdur'Rahman has never dealt drugs.

(iv) "The victim in this case distributed Marijuana from his home but did not distribute Cocaine." (Ex. 24).

This statement is false. The prosecutor's own internal memo of the interview with the victim's brother demonstrates that the prosecution knew that the victim in fact did sell cocaine. (Ex. 14, discussed above). Additionally, the items taken by the police from the victim's apartment included "white powder" that apparently was never tested and a "hypo-syringe" that also was never tested. Further, the autopsy report found cocaine in the victim's urine.

(v) "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (Ex. 25).

This statement is false. There is no evidence in any of the prosecutor's or the police files or in any of Mr. Abdur'Rahman's prior records that would support this statement. This was a blatant fabrication.

(vi) "Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree." (Ex. 25).

This statement is false. This is another example of the prosecutor's imagination. There are no court records anywhere indicating that Mr. Abdur'Rahman was ever the leader of a gang attempting to gain control in the prison. Indeed, as evidenced by the trial transcript in the prosecutor's file, as well as the letter the prosecutor received from David Lowe (Ex. 33 – 34) and the prison records themselves, Mr. Abdur'Rahman's earlier murder conviction arose out of and was a response to repeated rapes in prison. It is also significant to note that in the prior conviction, the trial judge noted on the judgment his recommendation that Mr. Abdur'Rahman be placed where he could receive psychiatric treatment, which unfortunately never occurred.

> (vii) "Therefore, it appears from the evidence that the defendant was the leader in the commission of this crime and that it was precipitated as a result of the defendant's desire to become a leader in drug activity in Nashville more rapidly than he could have otherwise." (Ex. 25).

This statement is false. No evidence has ever been produced to support this statement.

Meanwhile, Barrett was still wondering if he would ever receive the balance of his fee. On February 23, 1987, he dictated another memo to his secretary Gwen, saying: "Please call Gayle [sic] Hughes … and tell her that I am really confused about the situation. I have got the initial money that she has paid and I am willing to represent James Lee Jones, but she has got to come in and meet with me so we can talk about the case and see where we stand." Gwen wrote on the memo that she set up an appointment with Gayle [sic] Hughes. (Ex. 26).

On March 19, 1987, Barrett and McAlpin submitted an order providing for Barrett's official appearance in the case in place of McAlpin. (Ex. 27). In fact, McAlpin had performed no work on the case since the previous October, and no one had represented Mr. Abdur'Rahman in the meantime, including the period of MTMHI's evaluation.

On March 24, 1987, less than four months before trial, Barrett wrote to the prosecutor with a discovery request asking for, among other things, "any lab reports that may be available."

(Ex. 28 - 29). Barrett never asked Mr. McAlpin for his file, and he never looked at the court file, both of which contained the blood lab report.

While Barrett was doing nothing on the case, the prosecutor continued to vigorously pursue his death case against Mr. Abdur'Rahman. The prosecutor sought more information on Mr. Abdur'Rahman's prior murder conviction. (Exs. 30 – 32). On April 15, 1987, Mr. David Lowe, the person who prosecuted the earlier (1972) murder case against Mr. Abdur'Rahman, wrote a letter to Zimmermann, the prosecutor in this case, explaining something about the prior murder case. Mr. Lowe said, among other things, "Frankly, at one point, I had concluded that everybody involved was a homosexual." "Institutional records indicate that Jones may have been beaten by these two inmates when he refused to return sexual favors." (Ex. 33 – 34). Unfortunately, the prosecutor never disclosed to the defense any of this information from Mr. Lowe and the prior court records. During the 1987 trial in this case, the prosecutor misrepresented to defense counsel that the prior murder involved a "drug turf war." This was completely false and was unsupported by any evidence or other information, even though the prosecutor had known for months that this theory was false. Defense counsel relied upon these misrepresentations by the prosecutor and therefore at trial never explained to the jury the exculpatory circumstances of the prior homicide.

Through April, 1987, by his own admission Barrett had not started working on the case. On April 20, 1987, Barrett dictated a memo to Sumter Camp, a young associate in his office, saying: "Please see me on the case of James Lee Jones in fifth Circuit Court. I would like for you to help me try this death penalty case." (Ex. 35). A handwritten notation on this memo recorded the fact that the capital murder trial in this case was set to begin on July 6, 1987, just 2½ months away.

When the prosecutor decided that he needed to obtain co-defendant testimony, he found a way to ensure the arrest of Devalle Miller in his home town in Pennsylvania, more than a year after Miller had fled the state. The prosecutor interviewed Miller for three hours on April 23, 1987, which was the day Miller arrived in Tennessee before he had the benefit of advice of counsel. In the transcribed portion of this interview, Miller's description of Mr. Abdur'Rahman raised a suspicion in the prosecutor's mind, which he noted in the margin of the transcript, as to whether Mr. Abdur'Rahman might have an insanity defense or a mitigation defense at sentencing. (Ex. 36). The prosecutor failed to disclose this transcript to the defense before trial.

Sumter Camp did not respond to Barrett's April 20 memo. So, on May 11, 1987, less than 2 months before trial, Barrett dictated another memo to "Sumter," saying: "Please see me on a case named James Lee Jones. This is a case that I do need you to assist me on in trying."

The court had set a pre-trial motion deadline of May 29, 1987. Barrett missed that deadline. On June 1, 1987, Barrett wrote a letter of apology to the judge. (Ex. 38 - 39). He said, "Somehow I had failed to note this date on my calendar, although there is no question of the fact that the pre-trial motions were to be filed on that date." Barrett asked for additional time, because he had not even begun work on preparing any pretrial motions. At this point, trial was about one month away.

In response to Barrett's prior discovery request for lab reports, the prosecutor filed a supplemental response on June 4, 1987, to which he attached an inconsequential lab report concerning soil testing. (Ex. 40 – 41). However, at this time the prosecution did not deliver the T.B.I. Lab blood report to the defense, which would have been of substantial exculpatory value to the defense. Although the blood report had been furnished to McAlpin, the prior defense counsel, and had been filed with the court, Barrett never bothered to look at either McAlpin's

file or the court file. Consequently, Barrett was totally unaware of the blood evidence in the case.

We see Barrett's first activity on the case on June 10, 1987, less than a month before trial, when he wrote a letter to Ed, a staff person in his office, asking for the MTMHI file on Mr. Abdur'Rahman. The memo said: "Ed: Please get Mr. Jones to sign a release for his medical records and then get copies of the psychological evaluation performed at Middle Tennessee Mental Health Institute. If you call Middle Tennessee Mental Health Institute ahead of time, the [sic] will be happy to pull those pertinent sections from the record, copy them, and have them ready for you when you get there. THESE RECORDS MUST BE GOTTEN A.S.A.P." (Ex. 42) (emphasis original).

On June 15, 1987, less than three weeks before trial, Barrett obtained a court order for the MTMHI records. (Ex. 43). The MTMHI file was not obtained until after this order was entered.

Mr. Barrett's file notes reveal that he did not interview a single witness in the case, and he never viewed the crime scene or any of the physical evidence in the case. He also never sought copies of any of the extensive institutional records from Mr. Abdur'Rahman's past which contain ample evidence of mental illness and the physical, sexual and emotional abuses Mr. Abdur'Rahman suffered at the hands of his parents from early childhood and from the rapes inflicted upon him by other inmates in the federal prison system. Mr. Barrett's file notes also indicate that the first time he ever interviewed Mr. Abdur'Rahman, his client, was on July 1, 1987, just five days before trial.

On July 1, 1987, just five (5) days before trial, Barrett interviewed his client for the first time. On that same day, Barrett wrote the prosecutor a letter giving notice of possible mental state defenses in the case. (Ex. 44 - 45). Unfortunately, however, because Barrett had conducted

absolutely no investigation and had never hired any investigative or expert assistance in the case, he was in no position to develop or present any kind of mental state defenses at either the guilt or sentencing stages of the trial, even though strong mental state defenses were available at both stages.

On that same day, July 1, 1987, Barrett wrote a memo to Ed, saying:

> "I need the psychiatric file back on James Lee Jones. You were xeroxing part of it to take to Jones. *It now appears that we are possibly going to go to trial* since the State will not let him enter a plea of guilty and I need the psychiatric file back as soon as possible. Also, I think you have some notes about James Lee Jones past history – we need to start getting all of that together. Also, I think it is fair to say that probably between now and Monday, including part of this weekend, that you and Sumter and I are going to have to spend a lot of time getting ready for this death penalty case since we have a lot of work to do on the case and from Thursday through Sunday we are going to turn this into the James Lee Jones Battleground Headquarters. We are going to have to amount [sic] an offensive against the Judge and the District Attorney'' Office. *We will get coordinated in the next day or so*."

(Ex. 46) (emphasis added). As of July 1, 1987, Barrett had not yet reviewed the MTMHI file and had done nothing to prepare for the capital murder trial that was set to begin in just five (5) days.

In response to Barrett's July 1 letter, the prosecution filed a Motion in Limine asking the court to exclude any evidence or argument about Mr. Abdur'Rahman's mental state. (Ex. 47). This Motion alleged that there was no evidence that Mr. Abdur'Rahman suffers from any "mental disease, defect, emotional disturbance or even a personality disorder." Contrary to this allegation, however, the prosecution had full knowledge, contained in his own files, of:

- The transcript of Mr. Abdur'Rahman's 1972 trial in which there was psychiatric testimony that Mr. Abdur'Rahman is mentally ill and was insane at the time of that offense.
- The 1972 judgment in which the judge recommended that Mr. Abdur'Rahman be placed where he could receive psychiatric treatment.
- The transcript of the prosecutor's first interview of co-defendant Miller where the

prosecutor raised the question of Mr. Abdur'Rahman's insanity or mitigation on mental health grounds. (See Ex. 36, discussed above).

- The police reports about Mr. Abdur'Rahman's head banging at the time of arrest and the need to place him in a padded cell for more than two days. (See, e.g., Ex. 9 and 10, discussed above).

- The prosecutor's own assessment of Mr. Abdur'Rahman as "just plain weird. He has a long history of institutionalization in the prisons and at every juncture seems to be shrunk two or three different ways but in all cases he's been found competent to stand trial and sane at the time he committed these offenses." (Ex. 7).

None of this information was ever turned over by the prosecution to the defense or the court. The allegations contained in the prosecutor's Motion in Limine were misrepresentations made directly to the trial court.

Before the trial, Mr. Camp realized that the defense was completely unprepared, and he urged Barrett to move for a continuance of the trial. The defense had not previously sought a continuance, even though it is standard for the defense to take more time to prepare for a case of this sort. For unexplained reasons, however, Barrett ignored Mr. Camp's advice. Mr. Camp also prepared papers to have Mr. Abdur'Rahman declared indigent so that they could obtain state-funded investigative, psychological and other forensic expert assistance, and Mr. Camp urged Barrett to file those papers. Barrett responded to Mr. Camp's urgings with silence. Mr. Camp has testified that he never understood Barrett's failure to seek a continuance of the trial or authorization by the court of resources to prepare the case for trial. (H.T. 700-2).

Jury selection in the trial began on Monday, July 6, 1987.

On Thursday, July 9, 1987, the fourth day of jury selection, Barrett dictated a memo to his secretary Gwen, saying:

> "Please call Gail Hughes at the Nashville Urban League, …, and tell her that the odds are 99 out of 100 that James Jones is going to be sentenced to death next week. Tell her that I would like for her and some other people from the Nashville Urban League to consider

> testifying in James Jones behalf and that Mr. Swinger from my office will be available this weekend or tomorrow to interview her about what she can do as far as helping James Lee Jones."

(Ex. 48). In fact, neither Barrett nor anyone else from his office ever talked to any of Mr. Abdur'Rahman's family members or any other potential witnesses for Mr. Abdur'Rahman.

Friday, July 10, 1987, was the final day of jury selection. Barrett chose not to attend the trial that day, leaving the final and most important day of jury selection to Mr. Camp, who was young and inexperienced. Mr. Camp was not aware until that morning that he would be required to handle the conclusion of jury selection on his own. (H.T. 744-5).

Meanwhile, the prosecutor worked long hours preparing Miller to testify. Because the prosecutor knew that he "needed an eyewitness to the assault," he had "recommended … that a deal be struck with Miller." (Ex 7. Also, H.T. 912, 932]. Miller had been charged with first-degree murder, assault with intent to kill, and robbery, carrying a potential death sentence or three consecutive life sentences and a minimum ninety-year term without parole. The prosecutor struck a deal with Miller in exchange for Miller's testimony. In a formal pleading filed *before* the trial, the prosecutor described his promise to Miller as being only that the state "would not seek the death penalty against Mr. Miller" and that "[n]o other promises, inducements, agreements, or otherwise have been made or shall be made to Mr. Miller." (Ex. 42A).

On four (4) different evenings during the week of jury selection, the prosecutor met with co-defendant Miller, on the average of more than three (3) hours per meeting, for a total of thirteen (13) hours, to coach Miller in his testimony. (See Alderman Affidavit, Ex. 48A-48 B). During these interviews, Miller's statements changed in significant ways. Among other things, Miller changed his story to say that Mr. Abdur'Rahman had indicated a motive to kill, which was inconsistent with Miller's prior statements. (Id.). According to Miller's defense lawyer,

and by the prosecutor's own admission, this was an excessive amount of time to spend preparing Miller's testimony in order to legitimately prepare him to testify.

Miller furnished the testimony the prosecutor felt he needed to get a death sentence against Mr. Abdur'Rahman. *After* the trial, the prosecutor described his deal with Miller in terms that were different from the pre-trial disclosure of the deal. Under the actual plea bargain, Miller was permitted to plead to only two offenses, "Second-Degree Murder and Armed Robbery," and would receive "concurrent sentences" with parole eligibility in seven and a half years. (Ex. 42B-C. Also, H.T. 1040-43, 1050). (As it turned out, Miller was released on parole when he first became eligible for release pursuant to this plea agreement.)

The guilt phase of the trial began on Monday, July 13, 1987. Because Barrett had done absolutely no work on the case, he had no theory of defense. His opening statement to the jury was only three (3) short paragraphs, taking up only one page of trial transcript. (Ex. 49 – 50). The opening statement said nothing useful about the case. Barrett had no theory of defense. He called no witnesses and presented no evidence whatsoever.

On Tuesday, July 14, 1987, the jury returned a guilty verdict. The sentencing hearing was set to begin the following morning, Wednesday, July 15, 1987.

On July 15, 1987, Barrett served a letter on the prosecutor claiming that the prosecutor had knowledge of the organization that was involved in the crime (the SGM) and threatening to call the prosecutor as a witness at the sentencing hearing. (Ex. 51). It had become clear to Barrett that the prosecutor had knowledge of the SGM and its involvement in the crime. Among other things, the prosecutor sought to seal the jury list because of the potential threats from the SGM. It turns out that the co-defendant Devalle Miller had explained to the prosecution the SGM's involvement in the crime. The prosecution, however, never turned this information over

to the defense or the court. The prosecution also never charged members of the SGM who were accomplices to the commission of this offense.

Barrett's July 15 letter prompted a hearing before the judge. (Ex. 52 – 55). Naturally, Barrett was not in a position to call the prosecutor as a witness in the case. Because Barrett had performed absolutely no investigation in the case, or because Allen Boyd and the SGM was the source of his fee, Barrett did not credibly present to the court any information about the SGM's involvement in the crime. As Neal McAlpin has explained, bringing the SGM into the case would have diminished the prosecutor's case against Mr. Abdur'Rahman. (H.T. 179-228).

The defense was unprepared to present to the jury the available and compelling mitigation evidence at sentencing to spare Mr. Abdur'Rahman's life. The opening statement for the defense at the sentencing hearing was as brief as the opening statement at the guilt phase of the trial. (Ex. 56 – 58). Significantly, in this opening statement, the defense represented to the jury, "You will hear the testimony of several of their friends and acquaintances, people who knew James at work, the minister who married them, I believe, and other testimony about James Jones as a man and as a human being." (Ex. 58). Contrary to this representation, the defense did not call any of these mitigation witnesses at the sentencing hearing, because Barrett had never talked to any potential witnesses and had performed absolutely no preparation for the case. Consequently, the jury was left with nothing from the defense upon which to weigh their decision between life or death.

At the sentencing hearing, the prosecutor continued his dishonesty. The prosecutor warned Barrett against delving into the circumstances surrounding the earlier 1972 murder, falsely suggesting again that the 1972 murder involved a "drug turf war." During a trial recess in the court hallway, the prosecutor introduced Barrett to an F.B.I. agent and told Barrett that this

agent would testify in support of the prosecutor's fabricated theory. In fact, the prosecutor well knew that the F.B.I. agent could not offer the false testimony the prosecutor claimed. (See, e.g., the Lowe letter, Ex. 33 – 34; see, also, the discussion at Ex. 69 – 72). This dishonest ploy worked, as evidenced by the prosecutor's post-trial letter dated July 20, 1987, to the F.B.I. agent, and as evidenced by the defense counsel's failure to inform the jury of the true circumstances of the 1972 conviction. (Ex. 59).

The prosecutor further described this ploy in the state post-conviction hearing as follows:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. *But it was basically a tactic* that I've learned that in cases like this if you have evidence that is a little bit questionable, that could raise an appellate issue if it's introduced –"

(P.C., Vol. III, 170) (emphasis added).

The complete failure of defense counsel before and during trial enabled the prosecution to get away with this kind of deception and then to paint for the jury a false and misleading picture of Mr. Abdur'Rahman and the circumstances surrounding the offense. Thus, for example, the prosecutor made the unchallenged argument to the jury that Mr. Abdur'Rahman was the "sticker" and was wearing the long dark wool coat at the time (which the prosecutor characterized as a "gangster coat"), even though the prosecutor knew that the coat did not have any blood stains, a fact that he would not have been able to explain.

The prosecutor also made the following arguments to the jury which were simply false:

> "And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to the defendant]

(T. 1706). The prosecutor, however, was well aware that the SGM, and not Mr. Abdur'Rahman, had directed the sequence of events that resulted in the killing in this case.

> "[H]e [Mr. Abdur'Rahman] knows that that story about being a religious cause will be rejected by you as bunk."

(T.1982-3). In fact, the prosecutor was well aware of the fact that the offense was committed in connection with a vigilante mission under the direction of the principals of the SGM, and that the SGM was a religious group.

> "[I]t showed the depraved mind the defendant really has. Not a sick mind. Not so sick of a mind that he is mentally ill, just depraved – just depraved."
>
> "That's because, ladies and gentlemen, you're looking at a depraved man, not someone suffering from severe extreme emotional disturbance."
>
> "Now, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about extreme emotional disturbance or whatever? There is none of that here today."

(T. 1981-2). In fact, the prosecutor possessed considerable evidence of Mr. Abdur'Rahman's mental illness which he never turned over to the defense or the court.

> "Whoever did that, ladies and gentlemen, enjoyed it, had to have."
>
> "Is there any reason, is there any justification why he look the life of Patrick Daniels? Is there any? None, except pure pleasure."
>
> "Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except pure pleasure."
>
> "Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. And when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – at his enjoyment – and that's depraved."

(T. 1679, 1711, 1942, 1984-5).

None of these statements accurately portrays the real person of Mr. Abdur'Rahman. The prosecutor painted a picture of the defendant as a person with no emotional or psychological problems, whose motivation was only to steal drugs, who came from Chicago wearing a "gangster coat," and who killed for pure pleasure. This was a completely false account, as the

prosecutor was well aware. If defense counsel had done his job, and/or if the prosecutor had been forthright and honest, this kind of picture never would have been presented to the jury.

Finally, on August 26, 1987, more than a month after Mr. Abdur'Rahman was condemned to death, Barrett began to recognize that Mr. Abdur'Rahman had mental health problems and that they should obtain a psychiatric evaluation. (Ex. 60). This, however, was never done and, in any event, it was too late for Barrett to do anything to reverse the disastrous result in this case.

Mr. Abdur'Rahman knew that his trial was not fair. While a motion for a new trial was pending, Mr. Abdur'Rahman repeatedly requested Barrett to send him a copy of the trial transcript. Barrett was unresponsive to these requests. As a last resort, Mr. Abdur'Rahman filed a pro se motion with the court asking for the transcript. The clerk of the court sent a copy of this motion to Barrett with a note, "Lionel, unless otherwise requested this matter will not be set." Barrett turned this over to Sumter Camp with Barrett's handwritten note: "To S.C. respond to this dumb mother-fucker. L." (Ex. 61).

Barrett decided to withdraw from the case for purposes of the appeal, and finally filed a motion that Mr. Abdur'Rahman be declared indigent "for appellate purposes." (Ex. 62).

State Post-Conviction Review

On direct appeal, after the relationship between trial counsel and Mr. Abdur'Rahman had deteriorated beyond recovery, the trial court forced Mr. Richard Dinkins, an unwilling attorney, to represent Abdur'Rahman on appeal. Mr. Dinkins objected to the appointment, explaining to the trial court that, because he was a civil attorney, he had no experience litigating death penalty cases and considered himself unqualified to do so. He also explained that working on this case, at a compensation rate that would not even cover his overhead at a time when one of his law

partners was ill, would cause severe financial hardship to him and his law firm. The trial court overruled Mr. Dinkins' objection. After the appeal was completed, the trial court again forced Mr. Dinkins to remain on the case in post-conviction. In addition to the same objections that he had earlier expressed, Mr. Dinkins resisted the appointment also because it created a conflict of interest: as post-conviction counsel, he would be under a duty to evaluate whether he offered ineffective assistance of counsel as Mr. Abdur'Rahman's attorney in the direct appeal. (H.T. 866-76).

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. (Id.).

During the entire state post-conviction process, the trial court authorized only $2,000 for investigation and $6,317.50 for psychiatric services. (Ex. 62, 63). This paltry sum constituted the entire amount that was ever 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, from which he never expended a penny

for the substantial costs required of this kind of capital case for investigation and forensic expertise. By his own admission, trial defense counsel 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 the 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 $2,000 made available in the post-conviction proceeding for investigation was grossly inadequate for the job.

The post-conviction trial court refused to authorize any funds for the defense to bring out-of-state witnesses to the evidentiary hearing, and even refused the defense an opportunity to take depositions of out-of-state witnesses. The court even refused to authorize telephonic depositions. Thus, for only one example, Mr. Abdur'Rahman was precluded by the court from calling to the stand (either in court, or by telephonic deposition) his brother, Mark Jones, who had not been contacted by the original trial counsel and who therefore previously had never been asked to testify. Mark Jones was a key witness to the unpresented mitigation proof. (P.C. Vol. II, 3-5, 102). Mark Jones has since committed suicide.

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. When the instant offense occurred in Nashville in 1986, Mr. Abdur'Rahman, who was born in 1950, had barely been in this state for one year of his life. In a capital case, unlike any non-capital case, a defendant's life is not only at stake, it is on trial. In order to prepare an accurate life history for use in formulating a sentencing stage

defense, it is necessary for defense counsel to investigate his client's life and comprehend it sufficiently to articulate it to a jury. This investigation will go back in the client's history and even into his family history, pre-dating his birth. It will go to institutions with which he has had contact, and the individuals who have been significant in his life. In order for defense counsel to be able to comprehend Mr. Abdur'Rahman's mental state sufficiently to present the mental state defenses that he had available in the guilt and sentencing stages of his trial, defense counsel had to conduct this investigation of his client's life history. *None* of this was done in Mr. Abdur'Rahman's case. *No* funds were expended by the defense for investigative, psychological, or other forensic expertise.

Similarly, in order for post-conviction counsel to demonstrate the prejudice to Mr. Abdur'Rahman created by this failure of trial defense counsel, it was necessary for them to conduct the investigation and prepare the defenses in the post-conviction proceedings that trial defense counsel had failed to do for the trial. Because no work had been done on the case by trial counsel, post-conviction counsel had to start this work from scratch. However, the post-conviction trial court -- the same judge who presided over the trial in which defense counsel totally failed to present abundant available defenses -- refused to provide to post-conviction counsel any meaningful resources, and therefore the opportunity, to prepare and present the case for Mr. Abdur'Rahman that was never prepared by the trial defense counsel.

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. Neither of these appellate judges had ever addressed a record in a capital case. In a most cursory opinion, less than four pages in length, authored by the specially appointed trial-level judge, the appellate court dispatched Mr. Abdur'Rahman's claims

without significant or meaningful discussion or analysis. See, Jones v. State, 1995 WL 75427 (Tenn.Crim.App. 1995). Justice Birch recently described the appellate review at the post-conviction stage as follows:

> [I]t has become increasingly clear to me that our appellate review failed at the post-conviction stage. The Tennessee Court of Criminal Appeals's review of Abdur'Rahman's ineffective assistance of counsel claim can only be described as cursory. The case was reviewed by only two judges rather than the usual three, and one of those two judges was a Special Judge whose experience was predominantly civil. The opinion rendered by that court was barely three pages long, with merely two paragraphs devoted to discussion of the ineffectiveness of trial counsel.

Abdur'Rahman v. State, No. M1988-00026-SC-DPE-PD (Birch, J., dissent, 4/5/2002).

The Rule 11 Application for Permission to Appeal filed with the Tennessee Supreme Court on post-conviction was denied without any discussion of the issues. The Tennessee Supreme Court has *never* addressed the record of the total abdication of defense counsel in this case. The Tennessee Supreme Court has *never* addressed the prosecutor's misrepresentations and deceptions to MTMHI during their pre-trial evaluation of Mr. Abdur'Rahman; to defense trial counsel; to the trial court; and to the jury. As summarized above, these misrepresentations and deceptions went to the blood evidence, Mr. Abdur'Rahman's relative involvement in the commission of the crime, his relationship to other participants in the crime, Mr. Abdur'Rahman's altruistic albeit misguided motives, the nature and history of Mr. Abdur'Rahman's impaired mental state, and his good character. None of this abundant evidence of injustice has ever been addressed by the Tennessee Supreme Court.

The state post-conviction review process has clearly and tragically failed to provide in this case an adequate safeguard against injustice and unfairness.

Federal Habeas Review

In the federal habeas proceedings, Mr. Abdur'Rahman's prosecutorial misconduct claims

were dismissed on procedural default grounds, because those claims were not raised in a discretionary application for permission to appeal the state post-conviction case to the Tennessee Supreme Court. Consequently, Mr. Abdur'Rahman's prosecutorial misconduct claims have never been given a fair hearing in state or federal court.

The federal district court, however, did consider Mr. Abdur'Rahman's ineffective assistance of counsel claims. In February, 1998, the federal district court conducted an eight-day evidentiary hearing which included the testimony of 16 live witnesses, the testimony of 7 witnesses by deposition, and the prior state post-conviction testimony of 2 witnesses (a total of 25 witnesses); and more than 165 exhibits, some of which were voluminous. By contrast, only 9 witnesses testified in the state post-conviction hearing.

The federal district court found that "compelling" and "abundant" evidence should have been presented to the jury, and if it had, there is "more than a reasonable likelihood" the result in this case would have been different. Accordingly, the federal district court set aside Mr. Abdur'Rahman's death sentence on grounds of ineffective assistance of counsel.

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).

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. The federal district court specifically noted a number of the failings of trial defense counsel, including but not limited to the following:

- 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.
- Trial counsel 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 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 Barrett conducted absolutely no investigation, he 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 unpresented guilt and sentencing stage defenses included the fact that, in all likelihood, Mr. Abdur'Rahman was not the assailant, as indicated by the unpresented forensic blood evidence. The only evidence presented in the trial identifying Mr. Abdur'Rahman as the assailant was the uncorroborated bargained-for 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.

Moreover, Mr. Abdur'Rahman had insanity and diminished capacity defenses that his trial counsel never recognized or explored. The unrebutted 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, Borderline Personality Disorder, and Disassociative Disorder. As all of the mental health experts have testified, persons with these disorders can dissociate or become psychotic when under stress. In Mr. Abdur'Rahman's case, these mental illnesses resulted from or were exacerbated by the extreme and repeated physical, sexual and emotional trauma he experienced from early childhood, when he suffered unimaginable abuse at the hands of his parents, through early adulthood, when he was repeatedly raped in prison. Episodes of dissociation or "blackouts' have been documented in his institutional records.

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. 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 never heard any of the evidence concerning: Mr. Abdur'Rahman's good character; his good behavior and perfect work history while he was in the free world; his extensively documented history of the extreme physical, sexual and emotional abuse he suffered during most of his life; or his well documented history of mental illness.

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 evidentiary hearing. At the conclusion of the hearing, the federal court described the available but unpresented 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 fiancé.
>
> 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 fiancé, 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).

Federal Habeas Proceedings -- Appeals

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. The *only* argument the state made on

appeal was that the district court should have ignored the "compelling," "overwhelming" and "abundant" evidence that was presented in the district court hearing – evidence that should have been presented in Mr. Abdur'Rahman's capital murder trial. Throughout the federal habeas appellate 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 consistently, 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 in a conclusory manner 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 judge who heard the proof first-hand -- that was never raised by the state in the appeal, and that accordingly was never addressed by the parties in either their briefs to the Sixth Circuit or in oral argument*. 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 (emphasis added).

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.

It must be emphasized here that the Sixth Circuit majority opinion rested on the incomplete record created in the state court in the truncated state post-conviction hearing, where Mr. Abdur'Rahman's attorneys were given virtually no resources to investigate or prepare the case. The unfortunate irony of this situation was recently pointed out by Justice Birch:

> And ironically, when the Sixth Circuit Court of Appeals overturned the United States District Court's lengthy, detailed holding that Abdur'Rahman was "seriously prejudiced" by his trial counsel's "utterly ineffective" performance, its fundamental rationale was that the findings of the state post-conviction court, as upheld by the Court of Criminal Appeals, must be "presumed correct"…. Hence, the cursory review [by the Tennessee Court of Criminal Appeals] essentially barred Abdur'Rahman from receiving appropriate consideration at the federal level. Such a result is, in my view, unacceptable.

Abdur'Rahman v. State, No. M1988-00026-SC-DPE-PD (Birch, J., dissent, 4/5/2002).

Federal Rule 60 Motion

As previously mentioned, the district court dismissed the bulk of Mr. Abdur'Rahman's prosecutorial misconduct claims on "procedural default" grounds. The district court held that those claims were defaulted, and therefore could not be raised in federal court, when Mr. Abdur'Rahman's state court attorneys failed to raise those claims in their Rule 11 application to the Tennessee Supreme Court for permission to appeal the state post-conviction case (pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure). The Tennessee Supreme Court had summarily denied that application.

To date, therefore, 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.

While Mr. Abdur'Rahman's case was pending before the Sixth Circuit, there were two significant developments in the law. First, in O'Sullivan v. Boerckel, 526 U.S. 838 (1999), the United States Supreme Court resolved a conflict among the Circuits and ruled that, as a general rule, claims are procedurally defaulted for federal habeas purposes if those claims were not raised or "exhausted" in applications for discretionary appeal in the prior state court proceedings. The Supreme Court also carved out an exception to that general rule, however, by stating that

there might not be a procedural default if the state courts declared that for federal exhaustion purposes it would not be necessary to raise claims in applications for discretionary review. Expressly in response to this statement in O'Sullivan, the Tennessee Supreme Court promulgated Tenn.S.Ct.Rule 39 (June 28, 2001), which explicitly states that since 1967 the law in Tennessee has always been that "a litigant shall not be required to … file an application for permission to appeal … in order to be deemed to have exhausted all available state remedies respecting a claim of error."

In light of these developments, Mr. Abdur'Rahman filed with the federal district court a motion under Rule 60 of the Federal Rules of Civil Procedure requesting the Court to reconsider its prior dismissal of the bulk of the prosecutorial misconduct claims in this case. In his motion, Mr. Abdur'Rahman said that the record supporting those claims was already established in the prior federal court evidentiary hearing. The district court determined that this motion should be treated as a "second or successive" habeas petition, within the meaning of the federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and that it therefore lacked jurisdiction to consider the motion. The district court transferred the motion to the Sixth Circuit, which also held that the motion should be treated as an impermissible "second or successive" habeas petition and therefore could not be addressed on the merits.

Mr. Abdur'Rahman filed with the U.S. Supreme Court a petition for writ of certiorari, requesting the Supreme Court to review the issue of whether the Rule 60 motion should be treated as an impermissible "second or successive" habeas petition. On April 8, 2002, just thirty-six hours before Mr. Abdur'Rahman's scheduled execution date, the Supreme Court stayed the execution, and on April 22, 2002, the Supreme Court granted the petition for

certiorari. The parties briefed the issue and appeared before the Supreme Court on November 6, 2002, in oral argument on the issue.

On December 10, 2002, the Supreme Court dismissed the writ of certiorari as improvidently granted, without explanation. Justice Stevens wrote a dissenting opinion. Justice Stevens said, "The Court's decision to dismiss the writ of certiorari as improvidently granted presumably is motivated, at least in part, by the view that the jurisdictional issues presented by this case do not admit of an easy resolution." Justice Stevens pointed out that:

> In the District Court petitioner filed a comprehensive memorandum supporting his submission that his Rule 60(b) motion should be granted. He has argued that the evidence already presented to the court proves that the prosecutor was guilty of serious misconduct; that affidavits executed by eight members of the jury that sentenced him to death establish that they would have not voted in favor of the death penalty if they had known the facts that the prosecutor improperly withheld or concealed from them; and that it is inequitable to allow an erroneous procedural ruling to deprive him of a ruling on the merits. In this Court, a brief filed by former prosecutors as *amici curae* urges us to address the misconduct, stressing the importance of condemning the conduct disclosed by the record. Arguably it would be appropriate for us to do so….

The Supreme Court, however, dismissed the writ of certiorari without reaching the merits of the Rule 60 issue or of any of the underlying prosecutorial misconduct claims.

Again, throughout the federal court proceedings, the prosecution's only consistently held position has been that Mr. Abdur'Rahman's case should not be reviewed by the federal courts. The state has successfully availed itself of procedural technicalities, including strict "waiver" rules (which, according to T.S.Ct.R. 39 should not have been applied), to block Mr. Abdur'Rahman out of federal court. Accordingly, to date no court has reviewed the entire case – all of Mr. Abdur'Rahman's claims in light of the entire evidentiary record.

Conclusion

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 federal habeas merely because of an incorrectly applied procedural default rule in the prior state post-conviction proceedings. Thus, while the prosecution's failure to raise claims on appeal in the federal proceedings has been ignored, Mr. Abdur'Rahman's failure to raise claims in a state application for discretionary appeal has been incorrectly treated as a fatal procedural default. This is the ultimate "whipsaw." The courts have created an uneven playing field – mistakenly applying "waiver" against Mr. Abdur'Rahman but ignoring waiver on the part of the prosecution. The irony here is especially cruel and unfair in light of the Tennessee Supreme Court's recent promulgation of Tenn.S.Ct.R. 39, which provides that a Rule 11 discretionary appeal has never been available for the purpose of federal exhaustion. The Tennessee Supreme Court's Rule 39 makes clear, therefore, that the district court erred by its refusal to hear the prosecutorial misconduct claims, but thus far Mr. Abdur'Rahman has been denied the judicial review of his case that he has always requested – a review that Mr. Abdur'Rahman should have had the right to obtain.

The prosecution cannot and has not claimed that Mr. Abdur'Rahman received a fair trial. Everyone now agrees that Mr. Abdur'Rahman's trial counsel failed to perform. The prosecution cannot effectively rebut Mr. Abdur'Rahman's claims of prosecutorial misconduct – those claims are a matter of record, proven by the documentary evidence introduced in the 1998 federal district court hearing. Notwithstanding the evidentiary record created in the 1998 federal court hearing, there has never been a review of all these claims, in the light of the entire evidentiary

record, by any court. The only judge who actually heard the witnesses and reviewed the entire record, Judge Campbell, ruled that on the basis of the ineffective assistance of counsel claims alone, Mr. Abdur'Rahman's death sentence should be set aside.

In the face of these facts, and the lack of a complete judicial review of this case, how can the state justify an execution of Mr. Abdur'Rahman?

Dated: _____

Respectfully submitted,

_____
William P. Redick, Jr. (BPR #6376)
810 Broadway, Suite 401
Nashville, TN 37203

_____
Bradley A. MacLean (BPR # 9562)
STITES & HARBISON PLLC
SunTrust Center, Suite 1800
424 Church Street
Nashville, Tennessee 37219

Counsel for Mr. Abdur'Rahman