

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

Abu-Ali Abdur'Rahman)	
Petitioner)	
)	
v)	DAVIDSON COUNTY CRIMINAL
)	No. M1988-00026-SC-DPE-PD
)	
State of Tennessee)	
Respondent)	Filed February 28, 2003

**PETITION TO REINSTATE PETITIONER'S T.R.A.P. 11 APPEAL
AND/OR TO RECALL THE MANDATE OF THE DIRECT APPEAL
AND/OR TO EXERCISE ITS INHERENT AUTHORITY**

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I Introduction

On the eve of his impending execution and under otherwise extraordinary and unique circumstances that this Court will likely never confront again, Petitioner asks this Court to review a body of evidence about this case and this Petitioner that was developed during collateral review. Petitioner has meritorious claims that have never been completely addressed by any court. This Court has never addressed any of Petitioner's claims raised in the state post-conviction proceedings. Counterintuitive though it may be in this late stage in the litigation, which has gone on for years, the fact is that this Petitioner has never had his case heard. Given the existing record, it is clear, and even undisputed, that the trial was not fair, was a perversion of the truth, and produced an unreliable result.

Petitioner asks this court to consider and address, for the first time, the issues of prosecutorial

misconduct, ineffective assistance of counsel, and failure of judicial process that are presented by this extraordinary record in this extraordinary case. The record evidence presented in support of Petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel is essentially undisputed by the state and is primarily based on immutable, documentary evidence and the admissions of the prosecutor and defense attorney. The failure of judicial process in the review of these errors that are demonstrated by this body of evidence is summarized, hereinafter. Faced with this body of evidence, the state has never even contended that Petitioner has received a fair trial or that the result of the trial was reliable.

Petitioner asks this Court to conduct this review pursuant to its inherent supervisory authority over the practice of law, the judiciary, and the administration of justice in this state. See, Tenn. Const. Art. II §§ 1 and 2, Art. VI § 1 and 2; Tenn. S. Ct. R. 11; and T.C.A. § 16-3-504.

Petitioner also seeks this review due to the failures of the trial defense counsel¹, in violation of Petitioner's right to counsel pursuant to the 6th Amendment of the United States Constitution and Art I § 9 of the Tennessee Constitution, and the withholding of evidence by and the misrepresentations of the prosecutor² in violation of the due process clause of the 8th and 14th

¹A member of this Court has already recognized:

[N]one of the judges who have reviewed this case, even those on the Sixth Circuit Court of Appeals, has seriously disputed that Abdur'Rahman's trial counsel was woefully incompetent and demonstrably ineffective in representing Abdur'Rahman.

Abdur'Rahman v State, Tenn. Sup. Ct. No. M1988-00026-SC-DPE-PD, April 5, 2002, J. Birch dissenting opinion.

²See, e.g., Amicus Curiae Brief filed by former Tennessee prosecutors, filed in support of a Certiorari Petition granted by the United States Supreme Court in Abdur'Rahman v Bell, Sup. Ct. No. 01-9094, Appendix C (describes the conduct in this case of prosecutor John Zimmermann that cause the concern of former Tennessee prosecutors who concluded that Zimmermann's misconduct

Amendments to the United States Constitution and Article I § 8 of the Tennessee Constitution.³

These failures by the attorneys on both sides of this litigation in this case amounted to a fraud on the court, and caused a failure of the adversarial system in this case. The failures and fraud of counsel at trial prevented adequate and sufficient review of the case by this Court on direct appeal from trial.

Lastly, Petitioner seeks this review due to the failure of process by the state courts in the post-conviction review of this case, the illegal and arbitrary action of inferior courts, which have prevented Petitioner an opportunity to present facts in support of his claims, have failed to rule on his presented claims, and have ignored evidence and legal precedent in the review of his claims in violation of the 8th and 14th Amendments to the United States Constitution and Article I § 8 of the Tennessee Constitution.

Petitioner relies on the voluminous evidentiary record (testimony and exhibits) presented in the federal district Court proceeding, which has been filed in this Court in a previous submission in this case and the complex history of this case, which has left Petitioner with *no* review by any court of some of the most egregious errors committed in the trial of this case. Since the body of evidence that was developed during collateral review is already a matter of court record supported by exhibits and tested by cross-examination of witnesses and rebuttal proof by the parties in courts of competent jurisdiction in this case, Petitioner does not seek to introduce at the trial court level any additional

should be reviewed by a competent court)

³A member of this Court has already recognized:

I continue to be troubled by allegations of prosecutorial misconduct that have surfaced to plague this case.

Abdur'Rahman v State, Tenn. Sup. Ct. No. M1988-00026-SC-DPE-PD, April 5, 2002, J. Birch dissenting opinion.

evidence. Additionally Petitioner is attaching hereto the following appendices:

Appendix A: Summary of the Case

Appendix B: Collection of Certain Exhibits from the Evidentiary Record (which are cited in the Summary of the Case)

Appendix C: Former Prosecutor's *Amicus Curiae* Brief filed in the United States Supreme Court in this Case.

Appendix D: Evidence Indicating that Petitioner was not the Assailant

Appendix E: Additional information about the Prosecutor in this Case

Appendix F: List of Tennessee Ineffective Assistance of Counsel Cases

II Background Summary

The prosecutor in this case has been publicly censured twice by the Board of Professional Responsibility and privately sanctioned at least one other time due to his misconduct in the prosecution of criminal cases. See, Appendix D. Tennessee courts have also reprimanded the prosecutor for misconduct on a number in a number of other cases. Id.

The trial defense attorney has been forced to surrender his law license because of his own numerous disciplinary problems. Also, defense counsel was acting under a conflict of interest because he accepted a fee from an uncharged accessory before and after the fact, whose interests were clearly inconsistent with that of Petitioner. This accessory directed Petitioner's activities in this incident, the evidence of which was not developed for the jury. Defense counsel was paid a retainer by this accessory in conflict with Petitioner, but never began preparation of the case in defense, as he testified, because he never received the balance of his fee.

As explained in the Summary of the Case, Appendix A, and accompanying exhibits, Appendix B, while the trial defense attorney did *absolutely nothing* to prepare Petitioner's case for

trial, the prosecutor took advantage of the situation and engaged in a consistent pattern of fraud, deception, and suppression of evidence. Consequently, the jury was misled about every aspect of this case, including: the altruistic motives that caused petitioner to be involved in the offense; (2) the likelihood that Petitioner was not the actual assailant, see, Appendix D; (3) the involvement of others in the commission of the crime who were never charged; (4) the truth about the deal that the prosecutor struck with the co-defendant Devalle Miller in return for his uncorroborated testimony that Petitioner was the assailant; (5) the “abundant” and “compelling” (in Judge Campbell’s words) mitigation evidence that was never presented to the jury concerning Petitioner’s history of extreme physical and sexual abuse, neglect and deprivation, and mental illness; (6) Petitioner’s history of good character despite his mental illnesses; and, (7) mitigating proof of Petitioner’s role underlying a 1972 murder conviction upon which the prosecution relied as an aggravating circumstance. Thus, virtually every major aspect of the case was distorted to Petitioner’s prejudice at trial due to the combined effects of the misconduct of the prosecutor and the complete failings of the defense attorney.

During federal habeas corpus review, the federal district court reviewed the complete body of available evidence, including an abundance of evidence that Petitioner was not allowed to present on state post-conviction. In a very strong decision, the district court unequivocally set the death sentence aside, describing the evidence of prejudice due to defense counsel’s failures as “abundant,” “very impress[ive],” “vivid,” “significant,” “extremely credible,” “compelling,” and “overwhelming.” See, Abdur’Rahman v Bell, 999 F.Supp. 1073, 1091-1102 (M. D. Tenn. 1998) (discussion regarding ineffective assistance of counsel at sentencing). The district court, however, never addressed the bulk of the issues concerning prosecutorial misconduct. See, id., at 1082, n. 8

(the claims of prosecutorial misconduct deemed by the Court to be defaulted). Addressing different portions of the preserved claims, but never all of the preserved claims, several judges have ruled in

P e t i t i o n e r ' s f a v o r . ⁴ E v e r y

⁴(1) From the federal district court, regarding the failures of defense counsel at sentencing stage:

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.

999 F. Supp. at 1101.

This conclusion [to set the death sentence aside] 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 [in state post-conviction], 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.

999 F.Supp. 1101-1102

(2) From the Sixth Circuit Court of Appeals, regarding the failures of defense counsel at the sentencing stage:

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. . . . 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.' [Citation omitted] 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.' [Citation

state and federal court that has collaterally reviewed this case has recognized that the performance of trial defense counsel did not meet the constitutional standard of care.⁵

III. The withholding, misrepresentations, and failures of the prosecutor and defense counsel.

Below is a brief summary of some of the most prominent failures of fraud, deception, omissions, and failures committed by the prosecutor and defense counsel in this case, a more complete version of which is set out in the Appendices A and B:

A. The prosecutor

omitted.]

226 F.3d 696, 723-724 (6th Cir. 2000) Judge Cole, dissenting.

(3) From the United States Supreme Court, regarding the misconduct of the prosecutor:

In the District Court petitioner filed a comprehensive memorandum supporting his (3) 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 curiae 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

123 S.Ct. 594, 598 (2002) Justice Stevens, dissenting.

⁵Since Furman v Georgia was decided in 1972, in 19 out of the 20 Tennessee capital cases, in which a state or federal court has found the performance of trial defense counsel to have been constitutionally deficient pursuant to Strickland v Washington, the courts have concluded that the defendant was prejudiced, pursuant to Strickland v Washington, sufficient for either the conviction or sentence to be set aside. The one case out of 20, in which the sentence of death has not been set aside, is this case, in which *every* state and federal court that has collaterally reviewed the case has agreed that the performance of trial defense counsel was constitutionally inadequate. See, List of Tennessee Ineffective Assistance of Counsel Cases, Appendix F.

1. Instances of prosecutorial misconduct that have been addressed by this Court.

- In the direct appeal, this Court found that the prosecutor engaged in misconduct by improperly handing information to the jury which the trial judge had previously declared to be inadmissible. This Court said that the prosecutor's action "bordered on deception." [cite]. Relief was not granted on this claim, however, because this Court did not review the entire case as it was subsequently developed and presented to the federal district court.

2. Instances of prosecutorial misconduct that have never been addressed by this Court.

- The prosecutor had in his possession a TBI lab report, testing for blood on Mr. Abdur'Rahman's clothes, that, according to the prosecutor's own opinion as reflected by notes in his own file, strongly indicated that Mr. Abdur'Rahman was not the assailant and, consequently, that Devalle Miller was the assailant. Devalle Miller was the prosecutor's key witness and the only source of information that Mr. Abdur'Rahman was the assailant. Trial defense counsel requested copies of all exculpatory evidence and all lab reports, and though the prosecutor responded to the discovery request and produced an inconsequential soil test lab report, it did not give to trial defense counsel the extremely exculpatory blood lab report. The federal district court found that this was not error by the prosecutor, because it concluded that trial defense counsel could have retrieved the blood lab report from prior defense counsel, which he did not do. Although it was presented to the district court as an ineffective assistance of counsel claim, it was never addressed by that court as such. The prosecutor also withheld this blood lab report evidence from the jury.
- The federal district court found that the prosecutor committed a Brady violation by suppressing the transcript of Mr. Abdur'Rahman's prior 1972 murder trial where Mr. Abdur'Rahman presented an insanity defense supported by psychiatric testimony. The federal district court, however, stated that this violation "standing alone" did not merit relief. The federal district court never addressed this violation in the context of all of the other instances of prosecutorial misconduct that occurred in the case.
- The prosecutor made a fraudulent representation to the trial court before the trial when he filed a motion in limine, seeking to exclude any mental health evidence, where he said that there was "no evidence" that Mr. Abdur'Rahman suffers from any "mental disease, defect, emotional disturbance or even a personality disorder." This statement the prosecutor knew was false in light of the information in his file which he suppressed. This information included the 1972 trial transcript (mentioned above), the 1972 judgment in which the judge recommended that Mr. Abdur'Rahman receive psychiatric treatment, police reports describing Mr. Abdur'Rahman headbanging and other bizarre behavior at the time of his arrest that required his placement in a padded cell for 2 days, and the prosecutor's own assessment of Mr. Abdur'Rahman's "weird" mental condition, as reflected in the prosecutor's own notes.

- .* The prosecutor made a fraudulent representation to the trial court before the trial when he filed a statement “Regarding Promises to State’s Witnesses,” in which he said that in consideration for co-defendant Devalle Miller’s testimony against Mr. Abdur’Rahman, the only promise the prosecutor made to Miller is that the “State of Tennessee would not seek the death penalty against Mr. Miller.” This statement went on to say, “No other promises, inducements, agreements, or otherwise have been made or shall be made to Mr. Miller in exchange for his truthful testimony or as any reward or consideration for making a pre-trial statement to the police.” In fact, as revealed in Mr. Miller’s separate sentencing hearing 5 months after Mr. Abdur’Rahman’s trial, the prosecutor promised to accept a guilty plea to reduced charges that carried a maximum sentence of ___ years with parole eligibility in 7½ years.
- Before trial, the prosecutor made a number of fraudulent representations to MTMHI in connection with their pre-trial mental evaluation of Mr. Abdur’Rahman. Among other things, the prosecutor represented that in the prior 1972 case, “There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.” This statement is directly contradicted by the transcript of that trial, which the prosecutor obtained and suppressed, and by the prosecutor’s previous letter to Mr. Abdur’Rahman’s federal parole officer, in which the prosecutor said, “I am advised by Federal Court officials where the defendant was convicted ... that the defendant attempted to raise the insanity defense.”
- The prosecutor made a fraudulent representation to trial defense counsel, during a recess in the trial, that he could present testimony that the prior murder involved a “drug turf war” in prison, when the prosecutor had no such testimony to present and when the prosecutor had been told, in writing, that the prior murder was a response by Mr. Abdur’Rahman to having been beaten for refusing to return sexual favors to other inmates. Again, while the prosecutor was making this misrepresentation, he was also suppressing the evidence that contradicted his statements.
- The prosecutor made a number of fraudulent representations to the jury in closing argument, including the representations that Mr. Abdur’Rahman was not part of a religious cause known as the SGM (which the prosecutor characterized as “bunk”) and that there was no evidence that Mr. Abdur’Rahman ever suffered from “extreme emotional disturbance” These statements were contradicted by information the prosecutor had obtained from various sources, but which he suppressed from the defense and the court.

This same prosecutor who was publicly censured by the Tennessee Board of Professional Responsibility in May, 2002, for suppressing exculpatory evidence in another first degree murder case, the conviction for which was reversed due to his misconduct. The Board stated in its public

censure, “Respondent’s misconduct is aggravated by the fact that he is experienced in the practice of law. It is also aggravated by the fact that Respondent received prior discipline. Respondent was privately reprimanded in 1989 and was publicly censured in 1994. Respondent violated DR1-102(A)(1) and (5), DR7-103(B), and DR7-106(A) and (C)(5). John C. Zimmermann is censured for these violations.” This same prosecutor has been reprimanded by courts in other cases, as well.

B. The defense counsel

1. Instances of the failures of defense counsel that have never been addressed by this Court.

- Defense counsel accepted his fee from an accessory before and after the fact who directed Mr. Abdur’Rahman and Devalle Miller in the home invasion of the victim.
- Defense counsel received a retainer, but not the balance of the stated fee, and, by his own admission, did not begin investigation or preparation on the case, waiting for the balance of the fee which never came.
- Defense counsel went to trial having conducted no investigation and with no idea of the abundant evidence that was available in support of defenses for Mr. Abdur’Rahman at both the guilt and sentencing stage. At the guilt stage, strong evidence existed that Abdur’Rahman was not the assailant and was sufficiently mentally impaired to be insane at the time of the offense. At the sentencing stage, available evidence was extant, but unrepresented to the jury: (1) of lingering doubt that Abdur’Rahman was not the assailant; (2) that he was involved in the incident that led to Patrick Daniels’s death for altruistic, vigilante motives under the direction of the Southeastern Gospel Ministry (3) that he grew up in a family of the most extreme dysfunction in which he suffered physical, sexual, and mental abuse and neglect; (4) that, in part as a consequence of his experience as a child, he suffered serious, debilitating mental illness; (5) that despite his mental illness, he was regarded by those who knew him as a caring man of good character, who had a genuine commitment to the needs of others, particularly the young and the dispossessed; (6) that Abdur’Rahman’s actions that led to his 1972 murder conviction resulted from an incident in which he was attempting to protect himself from homosexual rape while in prison.
- At trial in the guilt stage, defense counsel gave a very brief opening statement that contained no theory of defense, called no witnesses for the defense, presented no evidence, and presented no defense at all.
- At trial in the sentencing stage, defense counsel gave another very brief opening statement that contained no theory of defense and promised to call witnesses who never testified, called

two witnesses to testify, Mr. Abdur'Rahman and his wife, whose testimony, according to the federal District Court and the Sixth Circuit Court of Appeals, amounted to no mitigating evidence at all.

Subsequent to the trial, defense counsel was forced by the Board of Professional Responsibility to surrender his law license as a result of numerous client complaints.

The above summary mentions only a brief account of some of the most prominent failures of defense counsel, a more complete version of which is set out in the Abdur'Rahman Case Summary, Appendices A and B.

IV The failures of state and federal collateral review

Despite the likely common impression, perhaps even this Court's impression, that Petitioner's claims have been carefully and repeatedly addressed in the lengthy review process in state and federal court, *no* court has addressed all of Petitioner's claims, *no* court has addressed the bulk of his prosecutorial misconduct claims, and this Court has addressed *none* of his claims that arise out of the collaterally discovered body of evidence. The federal courts did not review the bulk of the prosecutorial misconduct claims, concluding that the claims were defaulted, though it is now clear that the court was erroneous in this conclusion because the claims had sufficiently been raised and preserved for federal review.

The complete factual record in support of claims was introduced in federal district court, but not in state post-conviction court; because, Petitioner was not given sufficient resources or a meaningful opportunity to introduce evidence in support of his claims in state post-conviction.⁶

⁶The federal district conducted an eight-day evidentiary hearing which included the testimony of 16 live witnesses, the testimony of 7 witnesses by deposition, and the prior 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.

Thus, Petitioner was not given an opportunity to demonstrate the prejudice to him created by defense counsel's failures to rebut the prosecutor's false prosecution and to present Petitioner's guilt stage and sentencing stage defenses. Furthermore, the trial post-conviction court did not address the instances of prosecutorial misconduct at all – it simply ignored them -- though they were presented by Petitioner to that court. Both the trial and appellate post-conviction courts either failed to adequately address his claims or failed to address his claims at all. The merits of none of the claims of prosecutorial misconduct or ineffective assistance of counsel in this case were addressed by this Court on state post-conviction or any other time.

A. Inadequate state post-conviction review:

During post-conviction review at the trial level, the trial court refused Petitioner's counsel the authorization of needed resources, refused Petitioner the resources to bring in necessary witnesses to testify, forced post-conviction counsel to be limited to the presentation of a fraction of the evidence available to be presented on behalf of Petitioner, and even totally failed to simply address the numerous claims of prosecutorial misconduct raised by Petitioner.

The post-conviction trial court also had presided over the original trial. Before and during the trial, *no resources at all* for investigation or other forensic resources had been provided by defense counsel or the court.⁷ During post-conviction review, after repeated requests by Petitioner's

⁷Mr. 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 order to prepare an accurate life history of their client for use by defense counsel at trial in the formulation of a sentencing stage defense, it would have been necessary for defense counsel to investigate his client's life and comprehend it sufficiently to articulate it to a jury. This investigation should have gone back in the client's history and even into his family history, pre-dating his birth. It should have

post-conviction counsel, the post-conviction trial court, authorized to the defense only \$2,000 for investigation and less than \$7,000 for psychological and forensic services, would not allow funds necessary to call out of state witnesses, although virtually all of Abdur'Rahman's contacts were out of state, and would not even allow telephonic depositions of out of state witnesses.⁸

At the appellate level, a panel consisting of only two judges issued a very cursory opinion, less than four pages in length without any meaningful analysis of any of the issues raised by Petitioner, that was drafted by a specially appointed civil trial court judge. See, Jones v State, No. 01 Co1-9402-CR-00079, available at 1995 WL 75427 (Tenn. Crim. App. 1995).

Not during state post-conviction review, nor any other time, has this Court addressed the

gone to institutions with which Petitioner had previous contact, and to the individuals who had 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 would have had to conduct this investigation of his client's life history. Trial counsel conducted no investigation. He was totally ignorant of Mr. Abdur'Rahman's substantial defenses at guilt, including evidence that he was likely not he assailant, and at sentencing. Given this failure of defense counsel to prepare for trial, in order for post-conviction counsel to demonstrate the prejudice to Mr. Abdur'Rahman created by this failure of trial defense counsel, it would have been necessary for post-conviction counsel to conduct the investigation and prepare the defenses in the post-conviction proceedings that trial defense counsel had failed to conduct and prepare for the trial. See, id: Abdur'Rahman Case Summary, Appendix A at 28-29.

⁸The trial court sarcastically chided Petitioner's counsel upon the repeated submission of a request for funds:

The motion has been considered and is denied. The filing of a post-conviction petition is a case in which the petitioner has received the death penalty is not carte blanche authorization for the State to open its checkbook and give petitioner's appointed counsel unlimited funds.

Order, entered April 28, 1993 in Jones v State, Davidson County No. 87-W-417. This characterization is shocking given the background of the total absence of resources for the defense at trial and the almost total absence of resources during the post-conviction proceedings.

claims of ineffective assistance of counsel or the claims of prosecutorial misconduct that completely distorted the outcome of this trial. A T.R.A.P. 11 application made to this Court during post-conviction review was denied without addressing the merits of the claims presented.

Commenting on the state post-conviction review process in this case, Justice Birch has previously stated:

[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 primarily two paragraphs devoted to discussion of the ineffectiveness of trial counsel. See Jones v State, No. 01 Co1-9402-CR-00079, available at 1995 WL 75427 (Tenn. Crim. App. 1995) (holding that trial counsel was ineffective, but deciding that Abdur'Rahman was not prejudiced as a result). Unfortunately, this Court refused to grant permission to appeal that decision.

Abdur'Rahman v State, Tenn. Sup. Ct. No. M1988-00026-SC-DPE-PD, April 5, 2002, J. Birch dissenting opinion.

B. Inadequate federal post-conviction review:

In response to a federal habeas corpus petition, the federal district court allowed Petitioner an opportunity, unlike the state post-conviction court, to present the evidence of the prejudice created by trial defense counsel's failures and did address those claims. In a very strong, unequivocal opinion, describing the evidence in the expansive record and the court's credibility determinations, thereof, the district court set the sentence of death aside on that basis. See, Abdur'Rahman v Bell, 999 F.Supp. 1073 (M.D.Tenn. 1998).

The state raised only procedural issues on appeal to the Sixth Circuit Court of Appeals and did not even contest the merits of the district court's ruling. With a strong dissent and three very

different separate opinions being filed, see, Abdur'Rahman v Bell, 226 F.3d 696 (6th Cir. 2000), the two judge majority of a three judge panel of the Sixth Circuit Court of Appeals agreed with Petitioner on the procedural issues raised by the state, but *sua sponte* reversed the merits of the district court's decision and reinstated the death sentence. In the process of making *sua sponte* reinstating the sentence of death, the panel majority did not give notice to the parties or give them an opportunity to brief or argue the merits of the district court's ruling, and did not discuss the substance of the expansive district court record. Instead, the panel majority relied on the relatively paltry state court factual record. In this regard, Justice Birch has previously recognized:

[I]ronically, 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." See Abdur'Rahman v Bell, 226 F.3d, 700-01 (6th Cir. 2000). Hence, the cursory review [at the state post-conviction level] essentially barred Abdur'Rahman from receiving appropriate consideration at the federal level. Such a result is, in my view, unacceptable. . . . Our duty clearly calls for us to relentlessly pursue a just result.

Abdur'Rahman v State, Tenn. Sup. Ct. No. M1988-00026-SC-DPE-PD, April 5, 2002, J. Birch dissenting opinion. Furthermore, the failure of the state court's to adequately address the prosecutorial misconduct claims should be of particular interest to this Court, because the federal court erroneously applied state procedural law, inconsistent to the clear mandate of Tenn. Sup. Ct. R. 39, and also did not address the claims. It bears repeating: The bulk of the claims arising out of the egregious misconduct of the prosecutor in this case have not been substantively addressed by any court, state or federal.

The refusal by the district court to review the bulk of these prosecutorial misconduct claims was based on that court's conclusion that the bulk of the claims had not been exhausted and, thus,

defaulted, because the claims had not been raised on a discretionary T.R.A.P. 11 appeal to this Court. The prosecutorial misconduct claims had been raised to the state post-conviction trial court and the Court of Criminal Appeals. This Court has since made clear that Rule 11 is not, and since 1967 has not, been available for the purpose of federal exhaustion. See, Tenn. Sup. Ct. R. 39, promulgated June 28, 2001. The district court, therefore, was mistaken – the claims of prosecutorial misconduct were not defaulted -- a mistake the federal courts have refused to correct notwithstanding that Petitioner’s post-judgment F.R.C.P. 60(b) motion that was filed in the federal district court in an attempt to persuade that court to cure its error. See, Abdur’Rahman v Bell, 123 S.Ct. 594 (2002).

V. The authority of this Court

The judiciary in this state is “an independent coordinate department of government, and within its prescribed limits there is no power that can control it,” Miller v Conlee, 37 Tenn. 432 (1858); see, also, Tennessee Constitution, Art. II, §§ 1 and 2. The judiciary “say[s] what is the law.” Watson v Hoge, 15 Tenn. 344 (1835). “[T]he courts must be trusted with complete authority, consistent with the constitutional rights and privileges of all citizens.” Ex Parte Chattanooga Bar Ass’n, 330 S.W.2d 337 (Tenn. 1959).

As the supreme judicial power of this state, “[t]he Tennessee Supreme Court is the repository of the inherent power of the judiciary in this State” Van Tran v State, 6 S.W.3d 257 (Tenn. 1999). T.C.A. § 16-3-504 provides that this Court has “full, plenary, and discretionary power.” Accordingly, this Court is the repository of the “inherent, supervisory authority,” Van Tran, supra, 6 S.W.3d at 265, over “the administration of justice” in this state. See, e.g., State v Fleming, 26 Tenn. 152 (1846); Justices of Cannon County v Hoodenpyle, 26 Tenn. 145 (1846); Tenn. Const. Art.

VI § 1. “[T]he Tennessee Supreme Court shall have the power: . . . (1)(4) To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.” Tenn. Sup. Ct. R. 11. The instant case is one in which the administration of the state criminal justice system – the trial and the collateral review process -- simply broke down. This is particularly unacceptable in this case because this Petitioner’s life is at stake and he is on the verge of an execution.

It is, therefore, within the province of this Court in the appropriate situation to go so far as to “to terminate a prosecution in the exercise of sound judicial discretion,” State v Witt, 572 S.W.2d 913, 917 (Tenn., 1978). This case concerns the misconduct of the lawyers on both sides of the litigation, therefore, it is significant that the Tennessee Supreme Court has the authority “to exercise original jurisdiction over matters concerning the unauthorized practice of law within this state.” In re Burson, 909 S.W.2d 768, 774 (Tenn. 1995); and to “promulgate its own rules and regulate and discipline attorneys in this state,” Clinard v Blackwood, 46 S.W.3d 177, 182 (Tenn. 2001). The trial attorneys in this case on both sides of the adversarial fence -- the prosecutor and defense counsel -- utterly failed to fairly and truthfully present this case to the trier of fact. The prosecutor withheld critical exculpatory evidence and misrepresented the facts regarding virtually every major aspect of the case to Petitioner’s psychological evaluators, his defense counsel, the trial court, and the jury. Defense counsel, who had a conflict of interest for accepting his fee from an accessory to the commission of the offense, did *nothing* to prepare and, consequently, did not rebut the prosecutor’s false prosecution and did not present any of Petitioner’s compelling defenses available at both the guilt and sentencing stages of this trial. Petitioner is not asking this Court to “terminate the prosecution.” Rather, he is only asking this Court to ensure that he has a fair trial when his life is

at stake.

Due process considerations demand that petitioners have an opportunity to have their claims heard in a meaningful time and manner. See Workman v State, 41 S.W.3d 100, 103 (Tenn. 2001). This Court has recognized that “the importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities.” Van Tran v State, 66 S.W.3d 790, 799 (Tenn. 2001). In Burford v State, 845 S.W.2d 204 (Tenn. 1992), this Court stated:

[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.

845 S.W.2d at 208. See, also, Workman v State, 41 S.W.3d 100, 102. Despite the best intentions of all and any appearance to the contrary, the state and federal post-conviction review process in this case has at this point failed to allow Petitioner an opportunity to present his claims “at a meaningful time and in a meaningful manner,” id.

Under extraordinary circumstances, such as these in this case, it would be entirely proper for this court to exercise its “inherent, supervisory authority” and its “full, plenary, and discretionary power” in order to conduct the review necessary to cure the injustices in this case. Since this Court has the authority to act in this case, it has the authority to stay the proceedings and recall the mandate, if necessary to accomplish to review the case. “The power to stay a mandate includes the power to recall a mandate.” T.R.A.P. 42. Furthermore, T.R.A.P. 14(a) authorizes this Court to “consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court.” The record in this case is now complete, i.e. the body of testimonial and documentary proof having been presented in the federal district court. In

Petitioner's view, no further proof is necessary for the review to be conducted, unless this Court deems otherwise. The available, complete record satisfies the caveat in Rule 14(a) that "consideration generally will extend only to those facts, capable of ready demonstration."

The Tennessee Court of Criminal Appeals has recently made clear that recalling the mandate is the proper remedy when new facts have arisen after the entry of the mandate but were not considered by the appellate court. See, State v Williams, 52 S.W.2d 1098, 122 (Tenn. Cr. App. 2001). This Court has emphasized that when new facts come to light after judgment but were not presented to the appellate court where the district attorney withheld evidence and the facts thus were not presented due to the fault of the criminal defendant or his counsel, this Court must properly consider those facts and either grant relief or remand for further proceedings. See, State v Branham, 855 S.W.2d 563, 571-572 (Tenn. 1993) (where district attorney failed to disclose Brady material to defense until after trial, Tennessee Supreme Court ordered remand for consideration of post-judgment facts). See, also, Pruett v State, 501 S.W.2d 807, 809 (Tenn. 1990) (where facts not developed at trial due to no fault of criminal defendant, remanding for consideration of post-judgment facts); Union Export Company v N.I.B. Intermarket, 786 S.W.2d 628 (Tenn. 1990) (Tennessee Supreme Court reconsidered original judgment on appeal where that Court "not aware" of facts highly relevant to judgment); Baker v ProMark Productswest, Inc., 692 S.W.2d 844 (Tenn. 1985). Especially in capital cases, and even more especially when an execution is impending, this Court has made clear that when facts arise which were not reasonably available previously, the defendant is entitled to a remedy as a matter of due process. See, e.g., Workman v State, 41 S.W.3d 100 (Tenn. 2001). In this case, the facts have been available since state post-conviction review; but, through no fault of Petitioner, the facts have not been considered and addressed on review by this

Court.

This Petitioner “raises serious claims but would be unfairly deprived of an opportunity to be heard because of procedural technicalities[; thus] due process requires [this Court] to weigh the defendant’s interests in attacking constitutional violations against the State’s interest in enforcing procedural barriers.” Burford, supra, 845 S.W.2d at 208-209; quoted with approval in Abdur’Rahman v State, Tenn. Sup. Ct. No. M1988-00026-SC-DPE-PD, April 5, 2002, J. Birch, dissenting opinion. Petitioner’s interest -- his life -- far outweigh the state’s interest to kill him. The state has no interest in depriving a man, whose life is at stake, from enjoying the benefits of due process and, at least, having his day in court.

Under the circumstances presented by this case, therefore, this Court may recall the mandate of the direct appeal and/or reinstate the Rule 11 appeal on state post-conviction, pursuant to the authority of Tenn. Const. Art. II §§ 1 and 2, Art. VI § 1 and 2; Tenn. S. Ct. R. 11; and T.C.A. § 16-3-504; T.R.A.P. 14(a) and 42(d); and the right to due process under the 6th, 8th, and 14th Amendments to the United States Constitution and Article I § 8, and 9 of the Tennessee Constitution.

VI. Conclusion

The circumstances of this case compel this Court’s intervention, given: (1) that the existing record and claims of prosecutorial misconduct and ineffective assistance of counsel have never been addressed by this Court; (2) this Court’s ultimate and unabated authority to supervise and administer justice in this state; (3) the fraud on the court and the injustice perpetrated by the prosecutor and defense counsel in the trial of this case, which distorted the appellate record reviewed by this Court on direct appeal from trial; (4) the failures of process and review on state and federal post-conviction to correct this fraud and injustice; (5) the availability of a complete record that is essentially

undisputed, based primarily on documentary evidence and the admissions of the prosecutor and defense attorney, and that was presented under oath and tested by cross-examination and the opportunity for rebuttal evidence; (6) and the stakes in this case, a man's life, which is immediately at risk of being taken.

It is within this Court's authority and appropriate in this case for this Court to recall the mandate of the direct appeal, and/or renew this Petitioner's opportunity to seek discretionary review of his Rule 11 appeal on state post-conviction. Such a review would allow a substantive review the merits of Petitioner's claims – at least one time – and upon a fair review prevent him from losing his life as the result of a wall of procedural barriers behind which the attorney general has successfully hidden thus far throughout the post-conviction litigation of this case. Since the compelling facts and documentary evidence in support of these claims have been presented and are preserved in the federal court record and since no supplementation or expansion of this record is necessary, it is the obligation of this Court, Petitioner submits, to ensure that the first time review of compelling constitutional claims take precedent over procedural technicalities.

Petitioner is on the verge of having his life taken by this state without a fair review of his case; and, in substantial part, without any review of his case at all. This eventuality would violate our collective sense of fundamental fairness and would inflict a shock upon the collective conscience. At this late stage, Petitioner fears that this Court is reluctant to give this matter the attention that it requires and deserves. But, by any standard, Petitioner's request is reasonable. He only asks that he be provided an opportunity, based on a record already made, to have all of his claims fairly addressed by a competent tribunal -- at least once. At this point, this Court is apparently his last resort.

