

**IN THE CRIMINAL COURT
OF DAVIDSON COUNTY, TENNESSEE**

ABU-ALI ABDUR'RAHMAN,)	
)	Post-Conviction No. _____
Petitioner)	(Trial Case No. 87-W-417)
)	DEATH PENALTY CASE
v.)	
)	Execution set April 10, 2002 at 1:00am
STATE OF TENNESSEE,)	
Respondent.)	

MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF

Comes the Petitioner, Abu-Ali Abdur' Rahman, and pursuant to those rights asserted herein under the Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 8, 9, and 16 of the Tennessee Constitution, and Tennessee law, including Tenn. Code Ann. § 40-30-217, and he respectfully files this motion to reopen his petition for post-conviction relief.

In this motion to reopen, Abu-Ali Abdur' Rahman is entitled to relief on various constitutional claims:

Claim 1 – The complete failure of counsel to present mitigating evidence at sentencing requires a new sentencing hearing under Article I §§ 9 & 16 of the Tennessee Constitution;

Claim 2– Mr. Abdur'Rahman was denied his right to jury trial and due process under Sixth and Fourteenth Amendments and Article I, § 9 and 16 of the Tennessee Constitution because aggravating circumstances were not charged in the indictment nor properly found by a jury beyond a reasonable doubt, See Ring v. Arizona, U.S. No. 01-488, *cert. granted*, 534 U.S. ____, 122 S.Ct. 865 (2002), and State v. Dellinger, No. E1997-00196-CCA-R3-DD (pending on direct appeal in Tennessee Supreme Court);

Claim 3– The prosecution withheld material exculpatory evidence in violation of due process, See Sample v. State, 2001 Tenn.Crim. App.Lexis 33 (2001), *application for permission to appeal granted*, July 9, 2001;

Claim 4– The jury weighed an unconstitutional “heinous, atrocious, or cruel” aggravating circumstance;

Claim 5– The jury received unconstitutional instructions on the meaning of

“reasonable doubt;” and

Claim 6 – Lethal injection is unconstitutional under Article I, § 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

Mr. Abdur’ Rahman is entitled to relief under Tenn. Code Ann. § 40-30-217(a)(1) and Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), because: (1) the various claims he presents in this motion involve rights which have not previously been recognized in Tennessee but are applicable to his case; and/or (2) under the Fourteenth Amendment due process balancing test of Burford v. State, 845 S.W.2d 204 (Tenn. 1992) and its progeny, it would violate due process to deny relief under the circumstances.

STATEMENT OF PRIOR PROCEEDINGS

Mr. Abdur’ Rahman was convicted of first-degree murder and sentenced to death in 1987 in Davidson County (Case No. 87-W-417). To date, he has pursued direct appeal, post-conviction, and federal habeas remedies. He files this motion to reopen seeking to reopen his post-conviction petition filed in this Court February 26, 1991.¹

¹ Mr. Abdur’Rahman has previously litigated claims of constitutional error challenging his conviction and death sentence. He did so on direct appeal (State v. Jones, 789 S.W.2d 545 (Tenn. 1990)); in post-conviction proceedings, including Jones v. State, 1995 Tenn.CrimApp.Lexis 140 (1995); and in federal court. Abdur’Rahman v. Bell, 999 F.Supp. 1073 (M.D.Tenn. 1998); Abdur’Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000). As to each claim raised in this motion to reopen, he explains why each such claim is properly subject to post-conviction review in this motion and why he is entitled to relief on such claims.

I. UNDER TENN. CODE ANN. §40-30-217 AND VAN TRAN V. STATE, 66 S.W.3d 790 (TENN. 2001), A PETITIONER IS ENTITLED TO REOPEN HIS POST-CONVICTION PETITION WHERE HE SEEKS RELIEF BASED ON A RULE OF LAW NOT PREVIOUSLY RECOGNIZED IN TENNESSEE BUT APPLICABLE TO HIS CASE

Under Tennessee Code Annotated. §40-30-217(a)(1), a motion to reopen a post-conviction proceeding may be filed if:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial

Id.

Importantly, the Tennessee Supreme Court has recently recognized that a court may grant a motion to reopen under Tennessee Code Annotated. 40-30-217(a)(1) even though a petitioner did not and could not assert a “final appellate ruling” with regard to the claims raised. In Van Tran v. State, 66 S.W.3d 790, 2001 Tenn.Lexis 820 (Tenn. 2001), the Court granted Mr. Van Tran’s application to appeal the lower court’s denial of a motion to reopen. Mr. Van Tran was asserting that because he was mentally retarded, his execution would violate the Tennessee Constitution. The Court agreed that the execution of the mentally retarded did in fact violate the Tennessee Constitution and held that their decision constituted a new rule of law warranting retroactive application. Van Tran, 66 S.W.3d at ____, 2001 Tenn.Lexis 820, p. *61.

Although Mr. Van Tran had not relied on a new rule of law that was retroactively applicable or new scientific evidence as required under Tenn.Code Ann. 40-30-217(a), the Court granted Mr. Van Tran’s motion to reopen based on the new rule of law *created in his own case*. The Court found that because “the unique circumstance of this case raises a constitutional issue that warrants review and that our holding – a new rule of constitutional law – warrants retroactive application, we believe fundamental fairness dictates that the petitioner have a meaningful opportunity to raise this issue.” Van Tran, 66 S.W.3d at ____, 2001 Tenn.Lexis 820, p. *62.

Just as in Van Tran, this Court should find that Mr. Abdur’Rahman’s claims have “obvious constitutional implications,” decide those claims on the merits, and hold that such decisions constitute a new rule of law in Tennessee warranting retroactive application. Thereafter, this Court should grant Mr. Abdur’Rahman’s motion to reopen, as “fundamental fairness dictates that he have

an opportunity to litigate his claim under the new constitutional rule of law” announced, and should provide Mr. Abdur’ Rahman with a meaningful opportunity to raise his issues in post-conviction proceedings. Van Tran, 66 S.W.3d at ____, 2001 Tenn.Lexis 820, p. *63.

Therefore, as will be demonstrated for each of the claims raised in his motion to reopen, Mr. Abdur’ Rahman is entitled to relief under Van Tran and Tennessee Code Annotated § 40-30-217(a)(1), because he is relying on rights not previously recognized as existing by the Tennessee courts, rights which are fully applicable here, and rights which cannot be denied to him as a matter of due process under Burford v. State, 845 S.W.2d 204 (Tenn. 1992) and its progeny, because his rights to life and liberty outweigh any state interest in this matter.²

II. THE MOTION TO REOPEN SHOULD BE GRANTED

Abu-Ali Abdur’Rahman is entitled to post-conviction relief under Tennessee Code Annotated § 40-30-217 on: (1) his claim that he was denied counsel at the sentencing stage through counsel’s failure to present mitigating evidence; (2) his claim under Ring v. Arizona, U.S. No. 01-488, *cert. granted*, 534 U.S. ____, 122 S.Ct. 865 (2002) and State v. Dellinger, No. E1997-00196-CCA-R3-DD (pending on direct appeal in Tennessee Supreme Court); (3) his claim under Sample v. State, 2001 Tenn.Crim.App.Lexis 33 (2001), *application for permission to appeal granted*, July 9, 2001; (4) his claim that the jury weighed an unconstitutional “heinousness” aggravating circumstance; (5) his

² As the Tennessee Court of Criminal Appeals explained under the Prior Post-Conviction Procedure Act: “[I]t is illogical to cast the veil of waiver over a petitioner’s failure to pursue a right in the courts of Tennessee during a period of time in which those same courts were denying that the right existed.” Lingerfelt v. State, 1991 WL 51407 at * 4 (Tenn.Cr.App. Apr. 11, 1991). It is for this reason that the Tennessee courts have consistently acknowledged that when a claim has yet to be recognized by the Tennessee courts, a petitioner may raise the claim once the claim is first acknowledged by the Tennessee courts, so long as the claim is raised within a reasonable time frame following the recognition of the right. See e.g., Barber v. State, 889 S.W.2d 185 (Tenn. 1994)(permitting post-conviction consideration of claim under State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)); Laney v. State, 826 S.W.2d 117, 118-119 (Tenn. 1992)(acknowledging right of petitioners to seek relief following expiration of statute of limitations where new rule of law in Tennessee applies retroactively).

Further, under the due process clause of the Fourteenth Amendment, every post-conviction petitioner is entitled to a reasonable opportunity to obtain relief from an unconstitutional conviction or sentence, based upon a valid claim of constitutional error. Caldwell v. State, 917 S.W.2d 662, 665 (Tenn. 1996); Sands v. State, 903 S.W.2d 297 (Tenn. 1995); Burford v. State, 845 S.W.2d 204 (Tenn. 1992); Michel v. Louisiana, 350 U.S. 91, 93 (1955). As a matter of due process under Burford, when a petitioner raises a valid late-arising claim following the expiration of the statute of limitations (for example, because it involves a not previously recognized ruling of law), the Tennessee courts must balance the petitioner’s liberty and life interests against the state’s interest in preventing litigation of stale and fraudulent claims. Caldwell v. State, 917 S.W.2d at 665; Sands v. State, 903 S.W.2d at 301. Here, because Mr. Abdur’Rahman’s very life is at stake, the petitioner’s interests significantly outweigh those of the state.

claim that the jury was misinstructed on the meaning of “reasonable doubt;” and (6) his claim that lethal injection is unconstitutional.

A. At The Capital Sentencing Proceeding, Abu-Ali Abdur’Rahman Was Denied His Right To Counsel Under Article I, §§ 9 & 16 Of The Tennessee Constitution Because Counsel Failed To Investigate And Present Mitigating Evidence

Because his attorney failed to investigate and present mitigating evidence at the sentencing phase of the trial, Abu-Ali Abdur’Rahman was denied his right to counsel and to be free from cruel and unusual punishment under Article I, §§ 9 and 16 of the Tennessee Constitution. Under Van Tran v. State, *supra*, Mr. Abdur’Rahman is entitled to reopen his petition because he is asking for retroactive application of a new rule of law which is to be established here, which may be articulated in one of two different ways:

(1) When a capital defendant’s attorneys fail to investigate and present any independent mitigating evidence to the sentencing jury and has unanimously found to have performed deficiently in investigating mitigating evidence, Article I, §§9 & 16 require relief if there is *any* possibility that a juror could have voted for life had the mitigating evidence been presented; and/or

(2) Under Article I, §§9 & 16 of the Tennessee Constitution, a death sentence must be overturned if there is *any* dispute among judges whether the defendant was prejudiced by counsel’s ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984).

Such rule(s) are mandated under the Tennessee Constitution, they are warranted by fundamental notions of justice and fairness, and they are retroactively applicable here. In the application of such rule(s) here, Mr. Abdur’Rahman is entitled to relief. Therefore, the motion to reopen should be granted. See Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001).

1. Every Judge To Review This Case Has Agreed That Mr. Abdur’Rahman’s Counsel Performed Deficiently In Failing To Investigate And Present Mitigating Evidence At Sentencing

If there is one thing that is clear in this case – a fact on which *all* reviewing state and federal judges have agreed – defense counsel for Mr. Abdur’ Rahman was woefully deficient in investigating mitigating evidence for the capital sentencing hearing.

In the state courts, Judge Kurtz clearly recognized this during initial post-conviction proceedings. He stated: “The investigation of petitioner’s background and mental health history was deficient.” Abdur’Rahman v. State, No. 87-W-417, In The Fifth Circuit Court For Davidson County, Aug. 26, 1993, p. 8. The Tennessee Court of Criminal Appeals unanimously agreed. Jones v. State, 1995 Tenn.CrimApp.Lexis 140 (1995), p. *5 (“We agree with the trial judge's finding that trial

counsel were ineffective in failing to further investigate the background of the accused under the circumstances.”).

In the federal courts, United States District Judge Todd Campbell also found that counsel was deficient investigating Mr. Abdur’ Rahman’s background and mental health. Abdur’ Rahman v. Bell, 999 F.Supp. 1073, 1095 (M.D.Tenn. 1998)(“[The defense attorneys’] performance in this case was clearly inadequate.”). The judges of the United States Court of Appeals agreed. Abdur’ Rahman v. Bell, 226 F.3d 696, 707 (6th Cir. 2000)(majority acknowledging Tennessee court’s findings that counsel performed deficiently); id. at 720 (Cole, J., concurring and dissenting)(“Counsel’s performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate.”).

2. Given Counsel’s Deficient Performance, Mr. Abdur’ Rahman Should Be Granted A New Sentencing Hearing Under Article I, §§ 9 & 16 Of The Tennessee Constitution

This case thus presents a unique situation in which *all* reviewing judges have found that counsel performed deficiently in failing to investigate and present mitigating evidence at the capital sentencing proceeding. The only question, therefore, is whether Mr. Abdur’Rahman should be granted relief given the universal agreement within the courts that his counsel failed in their duty to investigate and present mitigating evidence. He should.

a. All Reviewing Judges Agree That Mr. Abdur’Rahman’s Counsel Performed Deficiently At The Sentencing Proceeding

In this case, this question has been considered under the Sixth Amendment standards of *Strickland v. Washington*, 466 U.S. 668 (1984), in which judges have applied the *Strickland* “reasonable probability” test, which provides that a new sentencing hearing is required if there is a “reasonable probability” that Mr. Abdur’ Rahman would have received a life sentence had the mitigating evidence been presented to the jury. Their conclusions on the issue have varied, with some finding that Mr. Abdur’ Rahman is entitled to a new, fair sentencing hearing, while others have disagreed.

_____ Judge Cole has explained:

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.

Abdur’Rahman v. Bell, 226 F.3d at 719-723 (Cole, J., concurring and dissenting)

Judge Campbell has made clear his view that Mr. Abdur' Rahman is entitled to a new, fair sentencing proceeding:

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. . . .

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 [counsel] provided inadequate representation. Good lawyers can and do fail. Here, [counsel] utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.

Abdur' Rahman v. Bell, 999 F.Supp. at 1101. Other federal and state court judges, however, have believed that Mr. Abdur' Rahman ought not receive a new hearing in which the jury hears all of his mitigating evidence. Abdur' Rahman v. Bell, 226 F.3d at 707-709; Jones v. State, 1995 Tenn.CrimApp.Lexis 140 (1995).

Though the courts have to date decided the issue of Mr. Abdur'Rahman's entitlement to a new sentencing hearing under the Sixth Amendment to the United States Constitution and *Strickland*, the courts have yet to squarely confront the implications of Article I, §§ 9 & 16 which entitle Mr. Abdur' Rahman to greater protection than that Sixth Amendment and which, under the unique circumstances here, mandate the granting of a new sentencing hearing.

b. Mr. Abdur'Rahman Is Entitled To A New Sentencing Hearing Under Article I, §§ 9 & 16 of the Tennessee Constitution

Mr. Abdur' Rahman is entitled to a new sentencing hearing under Article I, §§ 9 & 16 of the Tennessee Constitution, because: (1) had counsel investigated Mr. Abdur' Rahman's mitigating evidence and presented it to the jury, there is a possibility that a reasonable juror "could have voted for life;" and (2) the death sentence ought not be carried out when there is *any* dispute whether a defendant received a fair sentencing hearing.

1) The Jury Did Not Hearing Voluminous Mitigating Evidence Which Supports The Imposition Of A Life Sentence

In sum, the jury sentenced Abu-Ali Abdur'Rahman to death without ever hearing extensive mitigating evidence of his deeply disturbed life and mental illness. In sum, the jury did not hear the following compelling mitigating evidence:

- (1) Abu-Ali received psychological treatment by age 12 when he was in Hawaii;
- (2) Abu-Ali received a psychological assessment at age 14 (in Washington

State) which found him to be deeply disturbed; (3) As a child, Abu-Ali was assessed and treated for mental disturbance at Western State Hospital in Tacoma, Washington; (4) Officials sought mental health help for Abu-Ali while he was in school in Philadelphia in 1965; (5) Abu-Ali was referred for special education while in school; (6) Abu-Ali was incarcerated at the Annandale Institute for Boys when he was 15, where he was subjected to terrible abuse and was placed on psychiatric watch and sent to the New Jersey State Hospital for a psychiatric evaluation; (8) Abu-Ali sought to enter the Army at age 18 but was found to have “questionable mental status” and engaged in “bizarre behavior; (9) Abu-Ali received psychiatric treatment at St. Elizabeth’s Hospital in Washington, D.C.; (10) In 1972, Abu-Ali was diagnosed by Dr. Masri as being mentally ill; (11) According to Abu-Ali’s sister and former fiancée, Abu-Ali suffered a terrible, abusive childhood, and struggled with mental illness; (12) According to Dr. Barry Nurcombe, M.D., Abu-Ali suffers post-traumatic stress disorder; (13) According to Dr. William Sadoff, M.D., Abu-Ali suffers extensive mental illness; and (14) Abu-Ali endured terrible sexual and physical abuse from his father and persons who abused and attacked him when he was incarcerated as a teenager.

See generally Abdur’Rahman v. Bell, 999 F.Supp. at 1097, 1097-1101 (describing in detail the “abundance of mitigation evidence available that was never used at trial.”) Given this “abundance of mitigation evidence” which the jury never heard because of counsel’s failure to investigate, Mr. Abdur’Rahman should be granted a new sentencing hearing.

3. The Tennessee Constitution Should Be Interpreted To Provide Greater Protection Than The Sixth Amendment

The Tennessee Supreme Court “may extend greater protection under the Tennessee Constitution than is provided by the United States Supreme Court’s interpretations of the federal constitution.” Van Tran v. State, 66 S.W.3d at ___; State v. Black, 815 S.W.2d 166, 189 (Tenn. 1991).

Here, Article I, §§ 9 & 16 of the Tennessee Constitution should be interpreted to provide greater protection than the Sixth Amendment standards of *Strickland*. As to capital defendants, the guarantees of Article I §§ 9 & 16 should be interpreted as providing more protection than the Sixth

Amendment, because: (1) the death sentence should never be carried out when, as all judges have agreed, a defendant has been denied presentation of mitigating evidence; and (2) the death sentence should never be carried out when there is *any* dispute in the courts whether the sentencing hearing was fair.

These principles should be adopted and applied here, because absent such principles under the Tennessee Constitution, there can be little confidence that any death sentence is being carried out because it is truly just. Given the fundamental right to life, such principles of Tennessee law are necessary to establish that no death sentence is ever carried out when there is any question about its validity.

a. Mr. Abdur'Rahman Should Be Granted A New Sentencing Hearing Because Had Counsel Investigated And Presented The Mitigating Evidence, There Is A Possibility That The Jury Would Have Given Life

Indisputably, there is a possibility that Mr. Abdur'Rahman would have received a life sentence had defense counsel investigated and presented the abundant mitigating evidence cited *supra*. Indeed, Judges Cole and Campbell have stated that there is not simply a "possibility" that life would have been the sentence, there is a reasonable probability that Mr. Abdur'Rahman would have avoided execution. Especially in light of the compelling nature of the evidence which the jury never heard, there is such a possibility. Even numerous jurors who sat in judgment agree that they would have voted for life had the mitigating evidence been presented. Attachment 3 (Affidavits of trial jurors). Accordingly, Mr. Abdur' Rahman should be granted relief under Article I, §§ 9 & 16 of the Tennessee Constitution.

b. Mr. Abdur'Rahman Should Be Granted A New Sentencing Hearing Because The Courts Are Divided On Whether His Sentencing Hearing Was Truly Fair

Further, as noted *supra*, all reviewing judges agree that counsel's performance at sentencing was deficient, but they are in dispute whether under the Sixth Amendment a new sentencing hearing is warranted. When such a difference of opinion exists in a capital case, the benefit of the doubt *must* be given to the capital defendant, just as any reasonable doubt must inure to the defendant's benefit, and just as relief should be granted when there is any "grave doubt" whether a defendant should be granted relief. See O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 995 (1995). This is required as a matter of fairness, given the stakes. No citizen of the State of Tennessee should be

deprived of his or her life if there is *any* dispute whether he or she has been provided a fair trial. If the people through their judge's can unanimously agree that the death sentence is appropriate, then perhaps the sentence should be carried out. Absent such unanimity, it should not. In fact, that is the rule for juries in capital sentencing – absent a unanimous death verdict, the benefit of the doubt goes to the defendant whose sentence must be life. See Tenn. Code Ann. §39-2-203(h)(1982).

In the absence of such a rule under the Tennessee Constitution, it would appear that a death sentence is simply “arbitrary” Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972) when honest judges can disagree about the fairness of a trial. It is arbitrary to say that a defendant should lose his life simply because one set of judges who have the final say disagree with other honest judges who don't have a final say. That is precisely the situation here. The Tennessee Constitution should prohibit the death sentence under such circumstances. Article I, §§ 9 & 16 should therefore be interpreted to preclude the imposition of the death sentence here.

4. The Motion To Reopen Should Be Granted

Because Mr. Abdur'Rahman requests application of a new requirement of the Tennessee Constitution, and such an interpretation enhances the fairness of the criminal process in capital cases, he is entitled under Tenn. Code Ann. §40-30-217 to have this Court establish the rule he requests, apply that rule in his case, and order that his death sentence be vacated and that he receive a new sentencing hearing. Van Tran v. State, *supra*. The motion to reopen should be granted.

B. Abu-Ali Abdur'Rahman Is Entitled To Relief On His Claim That He Was Unconstitutionally Sentenced To Death Based On Aggravating Circumstances Which Were Neither Charged By The Grand Jury Nor Properly Found By A Jury Beyond A Reasonable Doubt

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 120 S.Ct. at 2362-63. Apprendi specifically held that it was not applicable in capital cases and that Walton v. Arizona, 497 U.S. 639 (1990)(holding that a judge may determine the existence of statutory aggravators by a preponderance of the evidence and thereby sentence a defendant to death), was still good law.

On January 11, 2002, however, the United States Supreme Court granted certiorari in the case of Ring v. Arizona, U.S. No. 01-488, *cert. granted*, 534 U.S. ____ (2002). The issue before the Court

in Ring is whether Walton should be overruled in light of the Court's holding in Apprendi, viz. that it violates due process and a defendant's Sixth Amendment right to a jury trial "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," Apprendi, 530 U.S. at 490.

Ring undeniably has implications for Tennessee's capital sentencing scheme in Mr. Abdur' Rahman's case. Given the doubt that has been raised about the viability of Walton in both Apprendi and now in Ring, there is a significant possibility that the Ring Court will reverse the decision below in Walton and hold that Apprendi is applicable in capital cases. See Apprendi, 530 U.S. at 521 (Thomas, J., concurring) ("Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide – as, previously, it freely could and did, – that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Apprendi, 530 U.S. at 538 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.").

Moreover, the Tennessee Supreme Court is considering the same issue before the United States Supreme Court in Ring in the case of State v. Dellinger, No. E1997-00196-CCA-R3-DD (pending on direct appeal in Tennessee Supreme Court). In Dellinger, the Court is also considering whether the Tennessee Constitution requires that aggravating circumstances be found by the grand jury and afterward, found by a jury beyond a reasonable doubt.

As will be shown, Mr. Abdur'Rahman was unconstitutionally sentenced to death based on aggravating circumstances which were neither charged by the grand jury nor properly found by a jury beyond a reasonable doubt, in violation of Article I, Sections 8, 9, & 14 of the Tennessee Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. He is therefore entitled to reopen his post-conviction proceedings based on Ring, Dellinger, and their application of Apprendi.

- 1. Mr. Abdur'Rahman's Sentence Was Enhanced From Life To Death Based On Aggravating Circumstances Which Were Not Found By The Grand Jury Nor Charged In The Indictment**

On July 11, 1986, the grand jury charged Abu-Ali Abdur'Rahman with first-degree murder,

assault with intent to commit murder in the first degree, and armed robbery. Having been indicted on these charges, Mr. Abdur'Rahman was not yet eligible for the death penalty, but only for a maximum sentence of life imprisonment. Under Tennessee law, a defendant is not death-eligible until the jury makes a finding "of the existence of one or more of the statutory aggravating circumstances." Tenn. Code Ann. §39-2-203(i) (1982). These aggravating circumstances were not charged in the indictment, nor did the indictment in any way indicate whether the State intended to seek the death penalty for Mr. Abdur'Rahman.

In fact, it was not until May 20, 1987, just two months before trial, that the State filed a notice of its intent to seek the death penalty. It was in this notice that a prosecutor – not a grand jury – filed a notice of its intent to seek the death penalty. In that notice, the prosecution stated for the first time the aggravating circumstances they would seek to prove at sentencing – "(1) that Mr. Abdur'Rahman was previously convicted of one or more felonies which involved the use or threat of violence to the person, (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, and (3) that the murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempt to commit the first degree murder, robbery, and larceny." Mr. Abdur'Rahman's sentence was increased from life imprisonment to death only because of the jury's finding of statutory aggravating circumstances at sentencing.

Before a finding by the jury at sentencing of the existence of any aggravators, Mr. Abdur' Rahman was only eligible for a maximum punishment of life imprisonment. Therefore, Mr. Abdur' Rahman was unconstitutionally subjected to the death sentence. Any statutory aggravating circumstances used to increase his punishment beyond the statutory maximum penalty of life imprisonment were not properly found by a grand jury or charged in the indictment. Apprendi, 120 S.Ct. at 2352-53. As a result, Mr. Abdur' Rahman was sentenced in violation of Ring and Dellinger, and their application of Apprendi and is entitled to relief.

2. Mr. Abdur' Rahman's Sentence Was Enhanced From Life To Death Based On Aggravating Circumstances Which Were Not Properly Found By A Jury Beyond A Reasonable Doubt

Not only was Mr. Abdur' Rahman's sentence increased from life imprisonment to death by statutory aggravators that were not properly found by a grand jury and charged in the indictment, (as required by Apprendi, by Article I, Sections 8, 9, & 14 of the Tennessee Constitution, and by the

Sixth and Fourteenth Amendments to the United States Constitution), but Mr. Abdur' Rahman's jury also failed to make a *unanimous finding* of the existence of those statutory aggravators *beyond a reasonable doubt*. In fact, there is no evidence whatsoever that the jury made any such finding as to the aggravating circumstances in Mr. Abdur' Rahman's case.

In the sentencing phase of Mr. Abdur' Rahman's trial, the jury was instructed that in order to impose the death penalty they must "unanimously find that the State during the trial, and/or during the sentencing hearing has proven *beyond a reasonable doubt* one or more of the [above] specific statutory aggravating circumstances." Tr. 1990. See Tenn.Code Ann. §39-2-203(g)(1982)(emphasis added). Such a finding is specifically required to be recorded by the jury: "the jury shall: (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found." Tenn.Code Ann. §39-2-203(g)(1-2)(1982).

However, having been instructed that they must find any aggravating circumstances "beyond a reasonable doubt," the jury was then misinstructed regarding the meaning of "reasonable doubt." The court instructed the jury that only "moral certainty" of guilt was required to find the existence of an aggravating circumstance.

Reasonable doubt is that doubt engendered by investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your findings. Reasonable doubt does not mean a capricious, possible or imaginary doubt. Absolutely certainty is not demanded by the law to determine the certainty of your find [sic], but moral certainty is required as to every proposition of proof, requisite to determine the certainty of your findings, as to the aggravating circumstances or circumstance.

Tr. 1995.

Such an instruction was unconstitutional, as it required only "moral certainty" about the existence of aggravating circumstances. See Victor v. Nebraska, 511 U.S. 1, 6, 14, 114 S.Ct. 1239, 1243, 1247 (1994)(when used to define the prosecution's burden of proof, the term "moral certainty" is "ambiguous in the abstract"); Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30 (1991) (striking down reasonable doubt instruction which equated reasonable doubt with moral certainty).³

³When a trial court uses the term "moral certainty" to define the concept of "reasonable doubt," there is reason to be concerned that "a jury might understand the phrase [moral certainty] to mean something less than the very high level of probability required by the Constitution in criminal cases." Victor, 511 U.S. at 114, 114 S.Ct. at 1247. Therefore, there is a "reasonable likelihood that the

Importantly, not only was the jury improperly instructed regarding the meaning of the “reasonable doubt” standard, but there is no record of the jury’s written verdict at sentencing – no record of what aggravating circumstances were found by the jury, whether those circumstances were found beyond a reasonable doubt, or whether those circumstances were found unanimously. See Abdur’Rahman v. Bell, 226 F.3d 696, 710 (6th Cir. 2000) (“the jury’s verdict form in the instant case was not preserved”). While the trial transcript indicates that the jury’s verdict was death, it gives no insight as to what, if any, aggravating circumstances were found by the jury, whether the jury’s findings were unanimous, or whether the jury properly found the aggravating circumstances beyond a reasonable doubt. Tr. 2000.

In addition, as noted *infra*, the jury was instructed that it could find as an aggravating circumstance that the offense was “especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.” Because this aggravating circumstance on its face is unconstitutional, and because the *jury* received no proper limiting construction of the circumstance before the jury imposed the sentence of death, any alleged jury finding of this circumstance likewise violated the right to jury trial on the finding of aggravating circumstances.

It was not until the jury made a *unanimous* finding of the existence of a statutory aggravating circumstance *beyond a reasonable doubt* that Mr. Abdur’Rahman could have been eligible for the death penalty. Here, the jury did not properly make such a finding – the jury’s reliance on an unconstitutional reasonable doubt instruction and the lack of evidence of the jury’s verdict dictate such a conclusion. Therefore, Mr. Abdur’Rahman was unconstitutionally subjected to the death sentence. In violation of Ring and Dellinger, and their application of Apprendi, Mr. Abdur’Rahman’s sentence was increased beyond the prescribed statutory maximum penalty based on facts that were not properly found by the jury beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2362-63. As such, Mr. Abdur’Rahman is entitled to relief.

3. The Motion To Reopen Should Be Granted Because Mr. Abdur’Rahman Is Seeking Application Of A Rule Of Law Which Is New In Tennessee And Retroactively Applicable

Because the aggravating circumstances that increased Mr. Abdur’ Rahman’s sentence from the maximum penalty of life to a death sentence were: (1) never charged by the grand jury; (2) not

jurors who determined [Mr. Abdur’Rahman’s] guilt [and sentence] applied the instructions in a way that violated the Constitution.” Victor v. Nebraska, 511 U.S. 1, 6 (1994).

included the indictment; and (3) not properly found by the jury beyond a reasonable doubt, Mr. Abdur' Rahman is entitled to relief under the upcoming decisions in Ring and/or Dellinger, and their application of Apprendi. Under Van Tran, *supra*, Mr. Abdur' Rahman is entitled to reopen his post-conviction proceedings because Ring and Dellinger will establish a new rule that is retroactively applicable, namely that Apprendi applies to capital sentencing in Tennessee, that Mr. Abdur' Rahman was denied his rights in this case, and that Mr. Abdur' Rahman is entitled to relief. Because Ring and Dellinger and their application of Apprendi will establish such a new rule of law in Tennessee, relief must be granted under Tenn.Code Ann. §40-30-217.

C. Abu-Ali Abdur' Rahman Is Entitled To Relief On His Claim That The Prosecution Withheld Material And Exculpatory Evidence, And He Is Entitled To Relief Under The Upcoming Decision In *Sample v. State* (Tenn.S.Ct.No. W2001-00402-SC-OT-PD)

The prosecution violated Abu-Ali Abdur' Rahman's rights under the Sixth, Eighth, and Fourteenth Amendment to the United States Constitution and his rights guaranteed under Article I, §§ 8, 9, and 16 of the Tennessee Constitution when it withheld exculpatory and material evidence which would have led the jury not to impose the death sentence.

1. The Prosecution Withheld Evidence Which Was Material And Exculpatory As To Mr. Abdur' Rahman's Sentence

Despite the fact that this is a death penalty case, state agents have either just recently disclosed – or have as of this date failed to disclose – material exculpatory evidence which establishes that Abu-Ali Abdur' Rahman does not deserve the death sentence. Specifically, that evidence – which was not revealed at trial – establishes that Mr. Abdur' Rahman does not deserve the death sentence because he did not (as the prosecution claimed at trial) deliberately commit the offense to rob and kill the victim, but was instead a mentally disturbed individual who was unwittingly being used as a pawn in a larger enterprise involving illegal activities.

The evidence withheld from Mr. Abdur' Rahman and his attorneys at trial includes the following:

- (1) Evidence establishing that Alan Boyd – who was Mr. Abdur' Rahman's employer and who Mr. Abdur' Rahman has always said was a driving force behind the murder as an organizer of the Southeast Gospel Ministry – was engaging in allegedly illegal behavior at or around the time of the offense and Mr. Abdur' Rahman's trial. [See Attachment 1, filed Under Seal, and Attachments 2 and 6]

(2) Evidence from a taped statement of Susie Bynum which would appear to indicate Mr. Abdur' Rahman's mental illness and/or establish that (contrary to the prosecution's claims at trial) Mr. Abdur' Rahman did not deliberately kill. Records from the Metropolitan Davidson County Police Department establish that Ms. Bynum gave a taped statement to the police concerning her knowledge of the offense. Though Mr. Abdur' Rahman has made various requests for *all* records of the Police Department, he has yet to receive a copy of the taped statement. The failure of the Police Department to produce this critical statement indicates that the evidence contained in that taped statement is indeed exculpatory as to Mr. Abdur' Rahman's culpability and role in this offense. See and compare Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); Ferguson v. State, 2 S.W.3d 912 (Tenn. 1999)(state has duty to preserve potentially exculpatory evidence). Mr. Abdur' Rahman could not have raised this claim earlier because, even as of today, he has not been provided the taped statement of Ms. Bynum.

(3) Evidence of the reasons why authorities refused to try to arrest the co-defendant Harold Devalle Miller for this offense, even though they apparently knew where he was for a length of time before they ultimately arrested him in Pennsylvania in March 1987 (nearly a year after the offense). Assistant Attorney General Zimmerman has stated that there were "valid reasons" for not arresting Miller (even though they apparently knew where he was all along),⁴ but those reasons have never been revealed. Those reasons – which are exculpatory as to sentence – would appear to include the fact that authorities were protecting Miller and others involved in the offense, and seeking to place the blame almost exclusively on Mr. Abdur' Rahman. The reasons behind the prosecution's and authorities' failure to arrest Miller call into question the integrity of the prosecution of Mr. Abdur' Rahman and establish that, contrary to the prosecution's assertions at trial, Mr. Abdur' Rahman was not nearly as culpable as the prosecution and Miller claimed him to be. This evidence was therefore exculpatory as to sentence, and because the reasons for not arresting Miller have not been revealed – even to date – Mr. Abdur' Rahman could not have presented this claim earlier.

⁴ Zimmerman made this statement at Miller's sentencing hearing.

Consequently, at trial and in prior proceedings, Mr. Abdur' Rahman was not privy to three critical facts which supported his claims that he does not deserve the death sentence – authorities knew that Boyd was engaging in what has been described as an “apparent crime,” Susie Bynum had critical information concerning the offense itself, and authorities had “reasons” for not arresting Miller and those reasons are exculpatory as to Mr. Abdur' Rahman's sentence.

2. The Motion To Reopen Should Be Granted Because Mr. Abdur'Rahman Is Seeking Relief On A New Rule Of Law For Tennessee Which Applies To His Case, And Denial Of Relief Would Constitute A Denial Of Due Process Of Law Because He Could Not Have Presented His Claims Earlier

Because the exculpatory evidence at issue was not available in prior proceedings (and some of it has yet to be disclosed) it would violate due process under Burford v. State, 845 S.W.2d 204 (Tenn. 1992) to preclude Mr. Abdur' Rahman from presenting his claims in this proceeding. Under Burford, due process requires that a post-conviction petitioner be provided an opportunity to litigate his claims, and he cannot be denied that opportunity simply because evidence which he needed to present his claim was not available during prior proceedings. See Workman v. State, 41 S.W.3d 100 (Tenn. 2001)(capital defendant entitled to forum and opportunity to present claims of innocence where evidence not previously available). Because the T.B.I. records and other evidence cited herein was not reasonably available in prior proceedings, under Burford, Mr. Abdur' Rahman is entitled to review of his claims through this motion to reopen. See also Williams v. State, 44 S.W.3d 464 (Tenn. 2001)(as a matter of due process, post-conviction petitioner cannot be barred from relief by statute of limitations if petitioner failed to comply with statute of limitations through no fault of his own).

In fact, the Tennessee Supreme Court is currently considering an identical issue in Sample v. State, 2001 Tenn.Crim.App.Lexis 33 (2001), *application for permission to appeal granted*, July 9, 2001. In Sample, the Tennessee Supreme Court is considering the following questions:

“[W]hether *Wright v. State*, 987 S.W.2d 26 (Tenn. 1999) should be revisited because its holding is inconsistent with this Court's jurisprudence interpreting the due process restrictions upon application of the post-conviction statute of limitations to later-arising claims and encourages the State to violate its constitutional obligation to disclose exculpatory evidence by insulating its violations from post-conviction review” and

“Whether due process prohibits the application of the post-conviction statute of limitations to bar litigation of the merits of Mr. Sample's Brady claim that could not have been brought to the court's attention before the expiration of the limitations period.”

In Sample, as here, a capital post-conviction petitioner was denied a hearing on his *Brady* claims, even though he did not receive access to the alleged *Brady* material until *after* the post-conviction statute of limitations had expired. In Sample, the petitioner has argued that due process requires consideration of his claims. That is the same situation here.

Because the Tennessee Supreme Court's decision in Sample will establish that due process requires a hearing under such circumstances (as here) and because that decision will likewise overrule the contrary decision in Wright v. State, 987 S.W.2d 26 (Tenn. 1999), the decision in Sample will (under Tennessee law) establish a new rule which is applicable here. Therefore, Mr. Abdur' Rahman is entitled to relief under Tennessee Code Annotated §40-30-217. Further, as in Sample, as a matter of due process under Burford, he simply cannot be denied relief under the circumstances. The motion to reopen should therefore be granted.

D. Abu-Ali Abdur' Rahman Is Entitled To Relief Because The Jury Imposed The Death Sentence By Weighing A Vague "Heinousness" Aggravating Circumstance

Mr. Abdur' Rahman is also entitled to relief because the jury weighed a vague aggravating circumstance, the Tennessee Supreme Court has yet to acknowledge the constitutional infirmity in the aggravating circumstance, and under Tennessee law, Mr. Abdur' Rahman is requesting a new rule of law in Tennessee which is retroactively applicable to his case.

1. The Jury Weighed A Vague "Heinousness" Aggravating Circumstance

Well-established precedent of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit makes clear that Tennessee's "heinous, atrocious, or cruel" aggravating circumstance (that an offense is "heinous, atrocious, or cruel in that it involved torture or depravity of mind") is unconstitutionally vague. Coe v. Bell, 161 F.3d 320 (6th Cir. 1998); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995). See Barber v. Tennessee, 513 U.S. 1184, 115 S.Ct. 1177 (1995)(Stevens, J., concurring in denial of certiorari); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313 (1990); Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420, 110 S.Ct. 1759 (1980).

However, at Mr. Abdur' Rahman's trial, the court instructed the jury to weigh this unconstitutionally vague "heinous, atrocious, or cruel" aggravating circumstance when imposing the death sentence. The court instructed that the jury could impose the death sentence if it found that

the murder “was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind.” Tr. 1990. The court then provided additional instructions concerning the meaning of the terms in the aggravating circumstance:

In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil and cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful – causing suffering – excuse me – painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked or perverse act.

Tr. 1990-1991. Subsequently, in imposing the death sentence, the jury purportedly found as an aggravating circumstance that "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."⁵

Because the aggravating circumstance is unconstitutionally vague and because the sentencing jury weighed this unconstitutionally vague circumstance when imposing the death sentence, Mr. Abdur’Rahman is entitled to a new capital sentencing hearing:

2. The “Heinousness” Aggravating Circumstance Is Unconstitutional And As A Result Mr. Abdur’Rahman Is Entitled To Relief

Tennessee is a so-called "weighing" state, in which the capital sentencing jury imposes sentence by weighing aggravating factors against mitigating factors. Houston v. Dutton, 50 F.3d 381, 387 (6th Cir. 1995). In a "weighing" state, "when the sentencing body weighs an invalid aggravating factor, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 503 U.S. 222, 232, 112 S.Ct. 1130, 1137 (1992). The death sentence is unconstitutional even if the jury found other aggravating factors when imposing sentence. Richmond v. Lewis, 506 U.S. 40, 46-47, 113 S.Ct. 528, 534 (1992); Espinosa v. Florida, 505 U.S. 1079, 1080, 112 S.Ct. 2926, 2929 (1992); Stringer, 503 U.S. at 229-232, 112 S.Ct. at 1136-1137.

"Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." Richmond, 506 U.S. at 49, 113 S.Ct. at 535; Houston v. Dutton, 50 F.3d at 387. "When the weighing process itself has been skewed, only

⁵There is no written record of which aggravating circumstances were found by the jury at sentencing. Apparently, the jury’s verdict at sentencing was not preserved. See Section B(2), infra.

constitutional harmless-error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence" to which he is entitled under the Eighth and Fourteenth Amendments. Stringer, 503 U.S. at 229-232, 112 S.Ct. at 1136-1137; Richmond v. Lewis, 506 U.S. at 48-49, 113 S.Ct. at 535 (1992).

Here, the Tennessee Supreme Court has never found the aggravating circumstance to be unconstitutionally vague, and thus, there has been no constitutional harmless-error analysis performed by the state courts or any re-weighing within the state courts to impose a new death sentence on Mr. Abdur' Rahman.⁶

Therefore, exactly as in the Houston case, re-sentencing is required and Mr. Abdur' Rahman is entitled to relief, because: "The State courts in Tennessee have not found this instruction to constitute error and therefore have not performed a 'new sentencing calculus' in this case." Houston, 50 F.3d at 387. See Rickman v. Dutton, 854 F.Supp. 1305, 1313-1314 (M.D.Tenn. 1994)(granting relief where "heinous, atrocious, or cruel" aggravating circumstance vague, but state courts failed to acknowledge error, and failed to reweigh evidence to impose new death sentence, or determine that error was harmless beyond a reasonable doubt under Chapman v. California), aff'd on other grounds sub nom., Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997).

Further, it is clear that a state court's mere finding that there is sufficient evidence to support an aggravating circumstance *is not* the equivalent of harmless-error analysis or re-weighing. Wiley v. Puckett, 969 F.2d 86, 91 (5th Cir. 1992)(following the invalidation of a vague aggravating circumstance, mere conclusion that there was sufficient evidence to support circumstance does not allow execution of sentence).⁷ And here, in any event, no Tennessee court could possibly have "cured" the error in any manner – no state court ever acknowledged the error in Mr. Abdur' Rahman's case.

⁶ On appeal, the Tennessee Supreme Court addressed Mr. Abdur' Rahman's challenge to the sufficiency of evidence supporting the "heinousness" aggravating circumstance, briefly concluded that the evidence was sufficient and therefore the issue was "without merit." Jones v. State, 789 S.W.2d 545, 550 (Tenn. 1997).

⁷Furthermore, the jury's weighing of the vague aggravating circumstance in Mr. Abdur' Rahman's case can in no way be deemed "harmless" for numerous reasons, including the fact that the prosecution repeatedly argued the vague terms to the jury. Throughout its closing statements, for example, the prosecution repeatedly relied upon the unconstitutionally vague circumstance, telling jurors that they should impose the death sentence because the murder was a "depraved," (Tr. 1984), "cruel," (Tr. 1939), and "vicious, brutal murder," (Tr. 1984), committed by a "depraved man," (Tr. 1981), in a "wicked, cruel and depraved manner." (Tr.1939).

Therefore, where both the Sixth Circuit and the United States Supreme Court have held the “heinousness” aggravating circumstance weighed by the jury in this case to be unconstitutionally vague and where no new sentencing calculus or proper re-weighting was performed to “cure” the error, Mr. Abdur’Rahman is entitled to relief.

3. The Motion To Reopen Should Be Granted, Because Granting Relief Will Establish A New Rule Of Law In Tennessee Which Is Retroactively Applicable Here

The Tennessee courts have repeatedly upheld the validity of the “heinousness” aggravating circumstance that was weighed by the jury in Mr. Abdur’ Rahman’s case. See State v. Black, 815 S.W.2d 166 (Tenn. 1991); State v. Henley, 774 S.W.2d 908, 918 (Tenn. 1989); State v. Taylor, 771 S.W.2d 387, 399 (Tenn. 1989); State v. Thompson, 768 S.W.2d 239, 252 (Tenn. 1989); State v. Williams, 690 S.W.2d 517, 526-530 (Tenn. 1985). Respectfully, these cases are wrongly decided, as both the Sixth Circuit and the United States Supreme Court have found this very aggravating circumstance to be unconstitutionally vague. See Coe v. Bell, 161 F.3d 320 (6th Cir. 1998); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995); Barber v. Tennessee, 513 U.S. 1184, 115 S.Ct. 1177 (1995)(Stevens, J., concurring in denial of certiorari); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313 (1990); Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420, 110 S.Ct. 1759 (1980). The Tennessee courts should acknowledge the constitutional infirmity of this aggravating circumstance in this case, thereby creating a new rule of law that the “heinousness” aggravating circumstance is unconstitutional and that it is retroactively applicable.

Under Van Tran, *supra*, Mr. Abdur’ Rahman is entitled to reopen his post-conviction proceedings because, just as in Van Tran, his case will establish a new rule of law that is retroactively applicable, namely, that the heinousness aggravating circumstance here is unconstitutional, that Mr. Abdur’ Rahman was denied his rights in this case, and that Mr. Abdur’Rahman is entitled to relief. Because such a ruling will establish a new rule of law in Tennessee, relief must be granted under Tennessee Code Annotated §40-30-217.

E. Mr. Abdur’ Rahman Is Entitled To Relief Because The Jury Received Unconstitutional Instructions On The Meaning Of “Reasonable Doubt”

Mr. Abdur’Rahman is also entitled to relief because the jury received unconstitutional instructions on the meaning of “reasonable doubt.”

1. The Jury Received Instructions On “Reasonable Doubt” Which Precluded Required Only “Moral Certainty” And Precluded The Consideration Of “Possible” Doubts

At the guilt phase of trial, the jury received an instruction on the meaning of “reasonable doubt” which equated “reasonable doubt” with “moral certainty,” while excluding the consideration of “possible” doubts, while allowing conviction if the jury could merely “let the mind rest easily as to the certainty of guilt.” The jury was instructed as follows:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt is a high burden. It is higher than proof by a preponderance of the evidence, and it is higher than proof by clear and convincing evidence. But it does not mean proof to an absolute certainty. Reasonable doubt does not mean a capricious, possible or imaginary doubt. While absolute certainty of guilt is not demanded by the law to convict of any criminal charge, moral certainty is required as to every proposition of proof requisite to constitute the offense.

Tr. 1715. At the sentencing phase of trial, the jury received a similar instruction which once again equated “reasonable doubt” with “moral certainty”:

Reasonable doubt is that doubt engendered by investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your findings. Reasonable doubt does not mean a capricious, possible or imaginary doubt. Absolutely certainty is not demanded by the law to determine the certainty of your find [sic], but moral certainty is required as to every proposition of proof, requisite to determine the certainty of your findings, as to the aggravating circumstances or circumstance.

Tr. 1995.

2. The Motion To Reopen Should Be Granted

No court in the state of Tennessee has ever held that a jury instruction on “reasonable doubt” is unconstitutional, despite numerous cases raising such issues. Similarly, when petitioners have raised identical “reasonable doubt” claims challenging the identical instructions provided to the jury here, no Tennessee has acknowledged the error in the instruction. Thus, to the extent that the instructions provided to the jury are unconstitutional, a finding by this Court (or an appellate court in this case) reaching this conclusion would be the first time a Tennessee court has recognized the right asserted by Mr. Abdur’ Rahman -- even though the principles of federal law upon which he relies were firmly established long before his direct appeal. While the federal courts have firmly established the right he asserts here, the Tennessee courts have not. Thus, in this case, granting relief on this claim would establish in Tennessee a “constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. §40-30-217(a)(1); Van Tran v. State, *supra*.

Moreover, a proper reasonable doubt instruction is essential to any conviction. It is the *sine qua non* of any constitutionally valid conviction and is essential to the integrity and reliability of any conviction or death sentence. Therefore, the ruling requested here is retroactive under Tenn. Code Ann. §40-30-217(a)(1): “[A] new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial.” Meadows v. State, 849 S.W.2d 748, 755 (Tenn. 1993).

On the merits, the “reasonable doubt” instructions in this case are unconstitutional, for the very reasons cited by the United States District Court in Rickman v. Dutton, 864 F.Supp. 686 (M.D.Tenn. 1994) -- the phraseology “moral certainty” coupled with the instruction that jurors could not consider any “possible” doubt lessened the prosecution’s burden of proof at both the guilt and sentencing phases of trial. This result is required by the Supreme Court decisions which acknowledge that the phrase “moral certainty” understates the burden of proof, especially where the jury is precluded from considering “possible” doubts. See Victor v. Nebraska & Sandoval v. California, 511 U.S. 1, 5, 114 S.Ct. 1239, 1242 (1994)(“moral certainty”); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1991). Therefore, Mr. Abdur’Rahman is entitled to relief.

In addition, with no Tennessee court having yet to grant relief on a “reasonable doubt” claim, it would be a violation of due process to preclude relief under the circumstances here. Burford v. State, 845 S.W.2d 204 (Tenn. 1992). Mr. Abdur’Rahman is entitled to a reasonable opportunity following the recognition of the constitutional right to a proper instruction on reasonable doubt. With the Tennessee courts having failed to grant relief on any such claim to date, he has not had a reasonable opportunity to have his claim properly adjudicated and to have relief granted. Further, under the due process balancing test of Burford and its progeny, Mr. Abdur’Rahman’s rights to life and liberty far outweigh any State interest in seeking to convict him or execute him in violation of the Constitution. The motion to reopen should be granted, and relief should be granted. Tenn. Code Ann. §40-30-217(a)(1).

F. Lethal Injection Is Unconstitutional

Abu-Ali Abdur’Rahman also challenges lethal injection as a means of execution, because it is cruel and unusual under Article I §16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. This claim is raised now because when Petitioner was sentenced to death the authorized method of execution was by electrocution, and the legislature has only

recently changed the method to lethal injection. Tenn. Code Ann. §40-23-114 (latest amendment, making lethal injection default method, enacted March, 2000). Mr. Abdur’Rahman has just refused to affirmatively choose electrocution as a means of execution, therefore he will die by lethal injection. Also, to the extent that the Tennessee Supreme Court has yet to declare lethal injection to be unconstitutional, a ruling in Mr. Abdur’Rahman’s favor will establish a rule of law applicable to his case under Tenn. Code Ann. §40-30-217. It must be noted that no Tennessee trial court has held an evidentiary hearing on lethal injection, especially in light of the flawed procedures as explained below. Therefore, no consideration of the constitutionality of lethal injection by a Tennessee state appellate court has had the benefit of examining a fully developed evidentiary record.

1. Lethal Injection: Procedures and Problems

The Department of Corrections intends to kill Mr. Abdur’Rahman by injecting into his body three substances, one after the other: Sodium Pentathol (an ultrashort-acting barbiturate that induces brief general anesthesia), Pavulon (pancurium bromide, a curare-derived paralyzing medication) (when potassium chloride is used as an additional third chemical, Pavulon serves no real purpose other than to keep the inmate still while potassium chloride kills)⁸, and potassium chloride (stops the heart). Mr. Abdur’Rahman submits that the combination of these drugs does not cause instantaneous unconsciousness and painless death. It is impossible for this or any Court to have confidence, in the absence of an evidentiary hearing, that the procedures and methods actually being employed by the execution personnel do not include a significant risk of inflicting severe and unnecessary pain and suffering upon Mr. Abdur’Rahman.

Sodium pentathol is a barbiturate that does not necessarily cause instantaneous or rapid anesthesia. Drug manufacturers warn that without careful medical supervision of dosage and administration, barbiturates can cause “paradoxical excitement” and can heighten sensitivity to pain. See Physicians Desk Reference, 50th Ed. 1996 at 438-440. Manufacturers warn against administration by intravenous injection (hereinafter “IV”) unless a patient is unconscious or out of control. *Id.* A patient’s weight, physical condition and age is critical when adjusting dosage. The protocols for lethal injection promulgated by the Tennessee Department of Correction (hereinafter “TDOC”) do not take any of these issues into consideration. In fact, the guidelines are devoid of any

⁸Pavulon creates the serene appearance that witnesses often describe of a lethal injection execution because the inmate is totally paralyzed.

mention of dosage, examination of the subject, supervision by an anaesthesiologist, or other safeguards. Therefore, there is a great risk of the unnecessary and wanton infliction of severe pain and suffering.

Prisoners differ in the physiological constitution as well as their drug tolerance and drug use histories; therefore, some prisoners may need a far higher dosage of sodium pentothal than others "before losing consciousness and sensation." Inmates can experience substantial pain and suffering if they receive an inadequate dosage of sodium pentothal and therefore retain consciousness and sensation while being injected with the second and third chemicals. For example, initially the procedure applied in Illinois required an amount of pentothal that would be insufficient to produce unconsciousness in approximately twenty percent of the population. If the three chemicals are administered out of sequence (for example, pancuronium bromide is administered first), there also is a high risk that the inmate will experience excruciating physical pain during a lethal injection even without the outside appearance of pain because pancuronium bromide paralyzes him.

Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, Ohio St. L.J. (forthcoming February 2002)(footnotes omitted).

Pancurium bromide is derivative of curare that, ironically, has been outlawed by the Tennessee legislature for euthanization of non-livestock animals, defined as "living creatures." See Tenn.Code Ann. §44-17-303(c), §39-14-201. The reason these drugs are outlawed for animal euthanasia is because of the torture and lingering death caused by paralysis of the lungs and other organs. Mr. Abdur'Rahman is a human being, and should be entitled to at the least the same protection as other living creatures.

The risk of inflicting severe and unnecessary pain and suffering upon the Petitioner in the lethal injection process is particularly grave in Tennessee because the procedures and protocols designed by TDOC fail to include safeguards regarding the manner in which the execution is to be carried out, fail to establish the minimum qualifications and expertise required of the personnel performing the critical tasks in the lethal injection procedure, and fail to establish appropriate criteria and standards that these personnel must rely upon in exercising their discretion during the lethal injection procedures. For instance, TDOC execution protocols do not explain what to do in case an

IV port cannot be established. The experience of other states teaches that, in such a case, a medically trained person must perform a “cut down” to expose a deeply buried vein, or perform an infraclavicular catheterization, or other invasive medical procedure to facilitate the subsequent lethal injection such as an attempt to establish a port through the carotid enclosure in the neck. Infra. The contract that TDOC provides for a physician limits his or her participation to pronouncing death. See Contract, attached as Attachment 4.

The scenario that might arise in an emergency is even more critical in light of the ethical rules governing physicians in Tennessee. No physician, physician’s assistant, nurse or any other licensed health-care provider of any nature can provide or administer the substances necessary to cause plaintiff’s death. TDOC was informed of this early in its adoption of lethal injection protocols. See Attachment 5 (Letter from Tennessee Medical Association (“TMA”) to Commissioner Donal Campbell, dated October 25, 1999, stating that the TMA Board of Trustees is against physician participation in executions. The letter notes that the TMA has adopted applicable sections of the American Medical Association (“AMA”) Code of Ethics prohibiting physicians from participating in executions, and the Tennessee Board of Medical Examiners may suspend a physician for unethical conduct.)⁹

There are no directions and no standards for the necessary training, education, or expertise of the personnel who will be exercising this critical discretion and performing these tasks and duties. TDOC guidelines totally fail to articulate the criteria or standards that such personnel must rely upon in exercising this discretion.¹⁰ The consequences of this failure will likely result in the unnecessary and wanton infliction of severe pain and suffering.

Perhaps most importantly, the TDOC regulations fail in material ways to answer critical questions governing a number of crucial tasks and procedures in the lethal injection procedure such

⁹ The Tennessee Supreme Court has applied the AMA Code to Tennessee physicians in Swafford v. Harris, –SW3rd __ (Tenn 1998). To allow licensed health-care providers to assist in executions violates well settled Tennessee statutory and regulatory provisions. See, e.g., Tenn. Code Ann. §§63-6-101 - 415, 63-7-101 - 209, 63-9-101 - 114, 63-19-101 - 210 (Supp. 1999); Tenn. Comp. Rules & Regs. R. 0880-2.14, 0880-3.15 (1999); etc. Such conduct by a licensed health care provider is unethical, criminal and illegal pursuant to well-settled Tennessee law

¹⁰ AThe protocols also fail to provide any direction regarding how TDOC is to obtain these controlled substances in a manner that insures the drugs are effective, how to store the drugs in a manner to keep them effective, how to “mix” the drugs, or how to store and label the drugs once they have been prepared and transported to the execution chamber.

as

(a) the minimum qualifications and expertise required for the different personnel performing the tasks involved in the lethal injection procedure;

(b) the methods for obtaining, storing, mixing, and appropriately labeling the drugs, the minimum qualifications and expertise required for the person who will determine the concentration and dosage of each drug to give, and the criteria that shall be used in exercising this discretion;

(c) the manner in which the IV tubing, three-way valve, saline solution and other apparatus shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

(d) the manner in which the heart monitoring system shall be modified or fixed in the event it is malfunctioning during the execution process, the minimum qualifications and expertise required of the person who shall have the discretion to decide to attempt such action, and the criteria that shall be used in exercising this discretion;

(e) the manner in which the IV catheters shall be inserted into the condemned prisoner, the minimum qualifications and expertise required of the person who is given the responsibility and discretion to decide when efforts at inserting the IV catheters should be abandoned and the cut down procedure begun, and the criteria that shall be used in exercising this discretion;¹¹

(f) the manner in which the condition of the condemned prisoner will be monitored to confirm that proceeding to the next procedure would not inflict severe and unnecessary pain and suffering on the condemned prisoner;

(g) the minimum qualifications and expertise required of the person who is given the

¹¹See Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, Ohio St. L.J. manuscript 63, n. 303 (forthcoming February 2002) (citing Thomas O. Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. Legal Med. 383, 397 (1983) (explaining that "(l)ethal injections may not work effectively on diabetics, drug users, and people with heavily pigmented skins"); Harold L. Hirsh, *Physicians as Executioners*, Legal Aspects of Med. Prac., Mar. 1984, at 1 (noting that "if a person is nervous or fearful, his veins become constricted"); *On Lethal Injections and the Death Penalty*, 12 Hastings Center Rep. 2, 2 (Oct. 1982) (explaining that lethal injections are particularly difficult to administer "to people with heavily pigmented skins . . . and to diabetics and drug users"); Jacob Weisberg, *This is Your Death: Capital Punishment: What Really Happens*, *New Republic*, July 1, 1991, at 23 (describing the 45 minutes required for technicians to find a serviceable vein in a former heroin addict); *Another U.S. Execution Amid Criticism Abroad*, N.Y. Times Apr. 24, 1992, at B7 (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user.)

responsibility and discretion to order the staff to divert from the established protocols if necessary to avoid inflicting severe and unnecessary pain and suffering on the condemned prisoner, and the criteria that shall be used in exercising this discretion; and

(h) the minimum qualifications and expertise required of the person who is given the responsibility and discretion to insure that appropriate procedures are followed in response to unanticipated problems or events arising during the lethal injection procedure, and the criteria that shall be used in exercising this discretion. An evidentiary hearing is necessary to insure that the lethal injection procedures do not inflict unnecessary pain and suffering.

Regardless of the manner in which “execution protocols” are drafted, the process of lethal injection, from start to finish, is entirely manual. The administration of these drugs has created numerous, and horrific, mistakes and errors in other states. These mistakes include “blow-outs”, prison personnel spending almost two hours probing and sticking the condemned prisoner with various intravenous needles in efforts to start an IV catheter¹², improperly inserted catheters (no doubt attributable to the fact that, for ethical reasons, most physicians refuse to be involved in the process), kinks in the IV tubing or other problems restricting the rate at which the drugs flow into the condemned prisoner, and executions in which the condemned prisoner appeared to be conscious during the course of the execution and made unusual verbal noises or the condemned person’s body jerked violently and moved against the restraint straps during the execution.

Where, as here, evidence about how future executions will be carried out is limited given the lack of experience using lethal injection in Tennessee, the fact the TDOC protocols are incomplete, and that independent official witnesses are precluded from observing most of the processes of lethal injections, heightens the risk of a cruel and torturous death. Absent experience, it is incumbent upon this Court to look to expert and other objective proof about the method and protocol and any other

¹²Medically trained people have enough difficulty finding a vein with certain individuals; for untrained executioners, the problems are compounded substantially. Executioners experiencing trouble finding a vein can unnecessarily insert the catheter: (1) into a sensitive area of the body, such as the groin or hand; (2) in the wrong direction so that chemicals flow away from the inmate's heart and therefore hinder their absorption; (3) intramuscularly instead of intravenously. In some cases, executioners must perform a "cutdown," a surgical procedure that exposes the vein if there is difficulty finding one. In addition, if the inmate eats or drinks six-to-eight hours before the execution, he may choke or gag from the injection of sodium pentothal. Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, Ohio St. L.J. (forthcoming February 2002) (manuscript at 63) (footnotes omitted).

evidence produced at a hearing. See also, Sech, *Hang'em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, VAL. U.L. REV. 381, 401 (1995) ("courts need to consider all relevant scientific . . . evidence when analyzing an execution method's constitutionality"). There can be no "one free execution" rule under applicable constitutional doctrine that would automatically entitle Tennessee to "try out" newly adopted procedures of execution regardless of how flawed or likely to result in pain.

Though Tennessee may not be constitutionally obliged to make executions absolutely pain-free, significant, conscious pain that lasts for more than a few seconds is constitutionally intolerable.¹³ See Fierro v. Gomez, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (execution by lethal gas in California held unconstitutional where evidence indicated "death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger"; "symptoms of air hunger include intense chest pains . . . acute anxiety, and struggling to breath"), aff'd, 77 F.3d 301, 308 (9th Cir. 1996), vacated on other grounds, 519 U.S. 918 (1996).

There is a significant risk that the Petitioner's execution by lethal injection will cause him significant pain and suffering. A prisoner who has been executed in a painful and inhumane fashion obviously has no remedy after-the-fact. Moreover, it is unreasonable to subject the Petitioner, or any other condemned prisoner, to what amounts to a game of Russian Roulette, requiring him to bear a significant risk that his execution will be botched.

2. Legal Standard: Cruel and Unusual Punishment

The Tennessee Supreme Court has recently held that, in at least one area, the Tennessee Constitution provides a stricter standard against cruel and unusual punishments than its federal

¹³Likewise, the spasms, flailing, and other bodily indignities that a prisoner may suffer because of inadequacies in the Tennessee Department of Corrections' procedures for lethal injection also offend the constitution. See Adolf, Killing Me Softly: Is the Gas Chamber, Or Any Other Method of Execution, Cruel and Unusual Punishment?" 22 Hastings Const. L.Q. 815, 848 (1995) (constitutional requirement that method of execution not abridge basic human dignity "is violated to the degree that the prisoner, as a person, loses control over her own body When a state's execution apparatus takes away control of the body's functions in the throes of death, the prisoner's pathetic flailings . . . even if unconscious and painless . . . rob the prisoner of dignity in the most visceral sense. This kind of degradation includes . . . spasms").

counterpart. Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001) (holding that executing the mentally retarded is cruel and unusual punishment under article I, § 16 of the Tennessee Constitution). This greater protection may extend to the method of execution, and not only the the subject upon whom it is administered. Even under a minimal federal constitutional standard, the issues presented here support the conclusion that the lethal injection of Mr. Abur’Rahman will violate both the state and federal constitutions.

“The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in the determination that death is the appropriate punishment’ in any capital case.” Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (citations omitted). It is well established that when a defendant's life is at stake, a court must be “particularly sensitive to insure that every safeguard is observed.” Gregg v. Georgia, 428 U.S. 153, 187 (1976). This heightened standard of reliability is “a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” Ford v. Wainwright, 477 U.S. 399, 411 (1986).

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); and Gardner v. Florida, 430 U.S. 349, 357-58 (1977).

When evaluating the constitutionality of a challenged execution method under the cruel and unusual punishment provision, courts must look at whether the method involves “something more than the mere extinguishment of life, such as torture or a lingering death...something inhuman and barbarous or inflicts “unnecessary pain, undue physical violence, or bodily mutilation and distortion.” In re Kemmler, 136 U.S. 436, 447 (1890); Louisiana ex rel. Francis v. Resweber, 329 U.S. 445, 473-474 (1947) (plurality opinion). In addition, the execution method and the manner it

is carried out must comport with evolving standards of decency. Thus, the cruel and unusual punishment clauses of the state and federal constitutions must be read in a "flexible and dynamic manner." Gregg v. Georgia, 428 U.S. 153, 171 (1976), Van Tran v. State, *supra*. "Whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of a mature society.'" Trop v. Dulles, 356 U.S. 86 at 101 (1958), *accord* Van Tran v. State, *supra*. Failure to pass any one of the prongs mentioned above amounts to a violation of the Eighth Amendment and Article I, § 16. Gregg, 428 U.S. at 172-73. The Tennessee Supreme Court agrees with the three prong approach, stating that, "This Court has applied the same analysis to determine whether a particular punishment constitutes cruel and unusual punishment under article I, § 16 of the Tennessee Constitution." Van Tran at ___ (citing State v. Black, 815 S.W.2d 166, 189 (Tenn.1991)). While the inquiry is flexible and must by definition change over time, it is anything but a "subjective judgment" that turns judges into legislators. Gregg 428 U.S. at 173, 175. Instead, the evolving standards of decency test turns on "objective indicia" of contemporary values. Gregg, 428 at 173. *Accord* Penry v. Lynaugh, 492 U.S. 302, 331 (1989); Coker v. Georgia, 433 U.S. 584, 592 (1977).

Central to this analysis is the *risk* of inflicting substantial and prolonged pain. *See* Farmer v. Brennan, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under 8th Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted); Helling v. McKinney, 509 U.S. 25, 36 (1993) (8th Amendment analysis, "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency").

The prohibition against cruel and unusual punishment embraces unnecessary mental as well as physical pain and suffering during the execution process. Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring). *See also* Fierro v. Gomez, 865 F. Supp. 1387, 1413 n.34 (N.D. Cal. 1994) ("terror" of prisoner in midst of prolonged execution that is linked to effect of execution process on body is constitutionally significant to determination of whether method is cruel and unusual; court distinguishes anxiety presumably experienced by all inmates awaiting and fearing execution), *aff'd*, 77 F.3d 301, 308 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996).

Accordingly, lower courts confronted with modern challenges have found the infliction of

unnecessary pain and suffering on a prisoner during his execution, pain and suffering beyond that inherent in the extinguishment of life and required to carry out any death sentence, constitutes cruel and unusual punishment. See Fierro v. Gomez, 77 F.3d 301, 308 (9th Cir. 1996) (execution by lethal gas in California held cruel and unusual where substantial risk that prisoners would suffer "intense pain" for more than "a matter of seconds"), vacated on other grounds, 519 U.S. 918 (1996); Booker v. Murphy, 953 F. Supp. 756, 759 (S.D. Miss. 1997) (denying motion for summary judgment by Commissioner of Corrections in lawsuit challenging execution by lethal gas in Mississippi; given evidence of type and length of pain plaintiff prisoners would suffer if put to death by this method).

Under the modern Eighth Amendment analysis, lingering death accompanied by pain and torture is only one of the many factors demonstrating that execution by lethal injection constitutes cruel and unusual punishment. The attempt to adopt and adapt procedures used therapeutically in the medical field to judicially sanctioned state killings create an unacceptably high risk of inflicting severe and unnecessary physical pain and suffering upon a condemned person during an attempted execution. The Eight Amendment of the United States Constitution and Article I, § 16 of the Tennessee Constitution were specifically enacted to proscribe torturous and barbarous punishments. The use of an execution method commonly referred to as "lethal injection" is a torturous and barbarous punishment. A review of the use of lethal injection by this and other jurisdictions clearly shows that this method of execution violates the prohibitions against cruel and unusual punishment.

Where, as here, the Petitioner has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, no court can, in good conscience, condone the risk of sending a man to his state sponsored death without first assuring itself that the constitutional prohibition against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947)(plurality opinion). Mr. Abdur'Rahman seeks the protection of this Court against the unnecessary and wanton infliction of pain, physical violence and offense to his human dignity. To allow its infliction would be a derogation of evolving standards of decency.

CONCLUSION

The motion to reopen should be granted. This Court should order further proceedings, and grant post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing motion has been hand delivered to Mr. Victor S. Johnson, District Attorney General, 20th Judicial District, 222 Second Avenue North, Suite 500, Washington Square, Nashville, TN 37201 on this _____ day of April, 2002.

PETITIONER'S VERIFICATION

I affirm under penalty of perjury that the foregoing is true and correct.

Singed on _____

Signature of Petitioner

AFFIDAVIT OF INDIGENCY

I, Abu-Ali Abdur'Rahman do solemnly swear (or affirm) that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear or affirm that to the best of my knowledge, I am justly entitled to the relief sought.

Signature of Petitioner

Sworn to and subscribed before me this the ____ day of April, 2002

Notary Public

My Commission Expires: _____