

UNITED STATES OF AMERICA

Not in the jury's name: the imminent execution of Abu-Ali Abdur'Rahman

Basically I am upset that all this information was withheld from us in deciding this man's life. That is a very hard decision to make, and I think we should have had complete information.
Juror from Abu-Ali Abdur'Rahman's 1987 trial, Affidavit 26 May 2001.

Introduction

In June 2000, a landmark study of the US capital justice system was published by Columbia University.¹ The study covered 23 years of death penalty cases, and concluded that the system was riddled with serious error, with the appeal courts finding errors requiring a judicial remedy in almost seven out of every 10 cases. The most common errors, the study found, were “egregiously incompetent defence lawyers who didn't even look for – and demonstrably missed – important evidence that the defendant was innocent or did not deserve to die”, and “police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury.”

The study expressed grave doubt as to whether the courts were catching all such errors. A case in point is that of Abu-Ali Abdur'Rahman, who is facing imminent death at the hands of government executioners.

This 52-year-old man of mixed African American and Native American descent has been on Tennessee's death row for the past 16 years. He was sent there by 12 jurors after a trial marked by inadequate legal representation and allegations of prosecutorial misconduct.

If any one of the jurors had voted for life imprisonment, that would have been the outcome. Today, having learned of exculpatory and mitigating evidence kept from them 16 years ago, eight of Abu-Ali Abdur'Rahman's jurors have signed affidavits making it clear that they no longer have confidence in their sentencing decision. Nevertheless, Abdur'Rahman will be put to death by lethal injection on 18 June 2003 unless his lawyers manage to obtain a stay of execution from the courts or clemency from the state governor.

The former outcome may be a long shot given the state's success so far in relying on legal and procedural technicalities to keep the appeal courts from reviewing the case in its entirety. In April last year, Abu-Ali Abdur'Rahman was 36 hours from execution when the US Supreme Court issued a stay to consider if he could get back into the lower courts to have his claims of prosecutorial misconduct heard. Following a hearing on highly esoteric legal issues – any lay observer of the hour-long hearing could have been forgiven for not realizing that a man's life

¹ *A broken system: Error rates in capital cases, 1973-1995.* James Liebman et al., 12 June 2000.

depended on its outcome – the Supreme Court announced that its decision to look at the case had been “improvidently granted”, and dismissed the appeal.²

A new execution date was set and a new governor is faced with a clemency petition from Abu-Ali Abdur'Rahman. Governor Phil Bredesen, who took office in January 2003, supports the death penalty, but “knows that every alleged criminal is entitled to due process under the law”.³ As several judges have indicated during the appeals process, Abu-Ali Abdur'Rahman was denied a fair trial, primarily because of his inadequate defence representation. It is a sad irony that Abu-Ali Abdur'Rahman is facing execution in the 40th anniversary year of the US Supreme Court's landmark ruling that “the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial”.⁴ Abu-Ali Abdur'Rahman's trial lawyer even failed to file a motion declaring his client indigent and to ask the court for funds for investigation or experts – a “significant error”, in the words of a federal judge who has characterized the case as a “miscarriage of justice”.⁵

The executive must act where the judiciary has failed. Governor Bredesen cannot, in good conscience, rely on the jury's sentencing decision. He should commute this death sentence in the interest of fairness, decency, and the reputation of his office, his state, and his country.

International standards and the death penalty

“Abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”. UN Commission on Human Rights – 1997, 1998, 1999, 2000, 2001, 2002, 2003.

Amnesty International opposes the death penalty in all cases, unconditionally. It has the utmost sympathy for the victims of violent crime and their families, but believes that every death sentence is an affront to human dignity, and that every execution is a symptom of, rather than a solution to, a culture of violence. The death penalty extends the suffering of one family – that of the murder victim – to another, the loved ones of the condemned. It also carries with it the risk of irrevocable error. As the 14-member Illinois Commission on Capital Punishment unanimously concluded in 2002 after two years of study into the state's capital justice system, “no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death”.⁶

² *Abdur'Rahman v Bell*, 537 U.S. ___ (10 December 2002). An Amnesty International researcher attended the hearing on 6 November 2002.

³ See Governor Bredesen's website. <http://www.state.tn.us/governor/priorities/publicsafety.htm>

⁴ *Gideon v Wainwright*, 372 US 335 (1963).

⁵ *Abdur'Rahman v Bell*, US District Court, Middle District of Tennessee, Nashville Division. No. 3:96-0380, 8 April 1998.

⁶ Report of the Governor's Commission on Capital Punishment, April 2002. The Commission was appointed by Governor George Ryan in 2000 after he declared a moratorium on executions in Illinois.

Today, 112 countries are abolitionist in law or practice, with a small group of countries, the USA among them, accounting for the vast majority of the world's annual judicial death toll. International human rights law and standards recognize the possibility of some countries retaining the death penalty, but seek progress towards the goal of abolition.

The case of Abu-Ali Abdur'Rahman once again calls the USA's commitment to international standards of justice and decency into question. Some specific standards are relevant to this case. For example, the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved in 1984, guarantee "the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of proceedings." In 1989, this safeguard was strengthened by a resolution calling on all UN member states to ensure that for capital defendants, legal representation was "above and beyond the protection afforded in non-capital cases".⁷ A Tennessee Supreme Court Justice has pointed out that "none of the judges who have reviewed this case...has seriously disputed that Abdur'Rahman's trial counsel was woefully incompetent and demonstrably ineffective in representing Abdur'Rahman."⁸

The UN Safeguards also state: "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." There is residual doubt about Abu-Ali Abdur'Rahman's guilt. Indeed, the prosecutor in Abu-Ali Abdur'Rahman's case, in the same internal pre-trial memorandum in which he noted the existence of a potentially exculpatory forensic report, also wrote that the case was "not open and shut on the issue of guilt".

Several allegations of prosecutorial misconduct "have surfaced to plague this case"⁹, including in relation to the above forensic report. The UN Guidelines on the Role of Prosecutors state: "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system". The Guidelines also require prosecutors to avoid all forms of discrimination. In this case, as in so many others in the USA over the years, there is evidence that jury selection was tainted by racially discriminatory prosecutorial tactics.

Abu-Ali Abdur'Rahman's jury was left unaware of his history of mental illness, including Post-Traumatic Stress Disorder as a possible result of his appalling childhood abuse and his abuse in prison. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated not only that "all safeguards and due process guarantees, both at pre-trial stages and during the actual trial, as provided for by several international instruments, must be fully respected in every case", but also that "all mitigating factors must be taken into account."¹⁰

⁷ ECOSOC resolution 1989/64, 24 May 1989, UN Doc: E/1989/INF/7, at 128.

⁸ *Abdur'Rahman v State*. No. M1988-00026-SC-DPE-PD. Dissenting Order. (Justice Birch).

⁹ *Id.*

¹⁰ A/51/457, 7 October 1996. Paragraphs 110 and 111.

In repeated resolutions, most recently that of 17 April 2003, the UN Commission on Human Rights has urged all retentionist states not to impose or carry out the death penalty against anyone "suffering from any form of mental disorder". In its April 2003 resolution, the Commission expressed concern that "several countries, in imposing the death penalty, do not take into account the safeguards guaranteeing the protection of the rights of those facing the death penalty." The USA is one such country. This is one such case.

The crime, trial, and issues of race

"It is plainly unconscionable in a death penalty case to ponder our errors, declare that our hands are tied, and yet send Abdur'Rahman to be executed. Our duty clearly calls for us to relentlessly pursue a just result". Tennessee Supreme Court Justice, 2002¹¹

Patrick Daniels was stabbed to death on 17 February 1986 with a knife from his kitchen after Devalle Miller and Abu-Ali Abdur'Rahman had come to his Nashville apartment. Miller and Abdur'Rahman were members of the Southeastern Gospel Ministry (SGM), a Christian organization which aimed, among other things, to combat the abuse of drugs in the black community of north Nashville. SGM believed that Patrick Daniels had sold drugs from his apartment to children and adults in the neighbourhood. It was alleged that Miller and Abdur'Rahman's went to his home with the aim of intimidating him into dropping the practice, and that they went to the apartment with unloaded guns provided by the SGM leadership, who also assisted them after the crime.

Norma Norman and her two young children were also in the apartment at the time. Norma Norman was stabbed, but survived (the children were shut in another room during the attack). Norma Norman was unable to identify which of the two men had wielded the knife – both she and Patrick Daniels had been bound and blindfolded with duct tape before the stabbing.

Abu-Ali Abdur'Rahman, then known as James Lee Jones, was arrested two days later. Devalle Miller fled the state and was not arrested until over a year later in Pennsylvania.

Abu-Ali Abdur'Rahman was tried for the murder in July 1987. By this time, Devalle Miller had become the key witness for the state, specifically the only person who could identify Abdur'Rahman as the assailant. Miller had originally been charged with first-degree murder, assault with intent to kill, and robbery, and was facing the possibility of a death sentence or a minimum prison sentence of 90 years without parole. However, before the trial, the Davidson County prosecutor struck a deal with him in exchange for his testimony. Under this arrangement, Miller pleaded guilty to second-degree murder and armed robbery. Six years later, he would be released on parole.

It is noteworthy that in contrast to the lack of time the defence lawyer spent in preparing witnesses for the trial, the prosecutor spent 13 hours with Devalle Miller in the week before the trial. In any event, the unreliability of co-defendant testimony is reflected in rules recently adopted by the Davidson County prosecutor's office. They state that "the death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single

¹¹ *Abdur'Rahman v State*. No. M1988-00026-SC-DPE-PD. Dissenting Order. (Justice Birch).

eyewitness or of a cooperating co-defendant or accomplice".¹² If this rule had been in place in 1987, it is likely that the prosecutor would have been prevented from seeking the death penalty against Abu-Ali Abdur'Rahman in the first place.

Abdur'Rahman was one of seven defendants who came before juries for sentencing in capital cases between 1978 and 1987 in Davidson County, a jurisdiction with a population that was 23 per cent black. All seven defendants were African American. Abu-Ali Abdur-Rahman's jury consisted of 11 whites and one black.¹³ There is evidence that the state dismissed black jurors on the basis of their race. The prosecution's notes from jury selection ranked prospective jurors, on a scale of 1 to 4, according to their perceived likelihood to favour the state. The race of the individual was also noted, an indication in itself that race was in the mind of the prosecution.¹⁴ One of the blacks was dismissed despite being ranked as equally pro-prosecution as five of the whites who were selected for the jury and more pro-prosecution than five other white jurors chosen. Upon being challenged, the "race-neutral" reason given by the prosecution was that the prospective black juror had given the "appearance that he was an uneducated, not very communicative individual". The prosecution had made no notes to this effect about this juror. It had done so in the case of one of the white jurors, who was noted as "dumb" and "not real smart". He was selected to sit on the jury.

One of the reasons for the prosecution's dismissal of another black juror was that she gave "short cryptic answers" and "avoided eye contact" with the prosecution. At least two white jurors whom the prosecution had noted were non-communicative or had difficulty answering questions were selected. A judge on the Tennessee Supreme Court would write in 2002 that "the nature of [the black juror's] answers were understandable... in the light of the lengthy, complex leading questions, some stretching for a paragraph or more in the record, asked by the State." The judge questioned, given the state's apparently different treatment of different jurors, whether the reasons given by the state for dismissing this black juror were "honest, or whether they were merely pretextual". However, the majority dismissed the appeal.¹⁵

After the jury was selected, the trial itself lasted for three days. On the second day, 14 July 1987, the jury convicted Abu-Ali Abdur'Rahman of the murder of Patrick Daniels. The

¹² Office of the District Attorney General, 20th Judicial District. Death Penalty Guidelines. Issued 18 October 2001.

¹³ Almost 30 per cent of African Americans sentenced to death in Tennessee since 1977 were tried by all-white juries. At least 20 per cent of blacks executed in the USA since 1977 were convicted by all-white juries. Others were tried in front of almost all-white juries. Recent research indicates that the racial mix of capital juries can play a role in deliberations, lending weight to anecdotal evidence that stereotypes about race and crime can infect capital sentencing. See *USA: Death by discrimination – the continuing role of race in capital cases* (AI Index: AMR 51/046/2003, April 2003). <http://web.amnesty.org/library/Index/ENGAMR510462003>

¹⁴ In a ruling on a death penalty case in February 2003, in which the US Supreme Court noted compelling evidence of racial discrimination in jury selection, the majority wrote: "The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards." *Miller-El v Cockrell*, 000 U.S. 01-7662 (2003).

¹⁵ *Abdur'Rahman v State*, No M1988-00026-SC-DPE-PD, Justice Birch, dissenting to order denying recall of mandate, 2002.

defence lawyer's opening statement had consisted of three paragraphs which filled a mere single page of trial transcript. The defence called no witnesses. The sentencing phase lasted less than a day, 15 July, including the opening and closing statements, the jury instructions and their deliberations. The 12 jurors unanimously voted for death.

If Abu-Ali Abdur'Rahman is executed as scheduled, he will become the second prisoner and the first African American to be executed in Tennessee since 1960 (the state resumed executions in April 2000 with the killing of Robert Glen Coe). From 1909 to the time of writing, there had been 135 executions in Tennessee. Two thirds (90) of them were of African Americans. Of the 25 executed prisoners who were tried in Davidson County, 20 (80 per cent) were African American.¹⁶

The defence performance at the sentencing phase

"The defence was breathtakingly brief in content, and lacking in quality, and quantity". Federal District Judge Todd Campbell, April 1998.

To win an appeal on the grounds of inadequate legal representation in the USA, the defendant must show not only that the trial lawyer was ineffective, but that the ineffectiveness prejudiced the outcome of the trial. This is a heavy burden to meet, particularly given that "judicial scrutiny of counsel's performance must be highly deferential" and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."¹⁷

The only judge in Abu-Ali Abdur'Rahman's case to have heard live testimony from all the witnesses who were not called at the original trial concluded in no uncertain terms that Abdur'Rahman's death sentence must be overturned. After hearing such testimony from 20 witnesses in a two-week evidentiary hearing in February 1998, and after considering more than 150 exhibits of evidence and written testimony from another seven witnesses, District Judge Todd Campbell concluded that Abu-Ali Abdur'Rahman had been "seriously prejudiced by utterly ineffective assistance of counsel" at the sentencing hearing 11 years earlier. The federal judge noted that the two trial lawyers themselves – they testified at the hearing – "admitted most of the deficiencies alleged". Judge Campbell wrote that he was persuaded that:

"had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It takes only one juror to decide that the mitigation evidence...outweighs the aggravating circumstances established by the prosecution. No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favour of the death penalty.

¹⁶ William J Bowers. *Legal Homicide: Death as punishment in America, 1864-1982*. Northeastern University Press, 1984.

¹⁷ *Strickland v Washington*, 466 US 668 (1984).

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. Defence counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial....

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts, and the almost complete failure to present a defence at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand."¹⁸

Yet the death sentence does still stand. In September 2000 a three-judge panel of the US Court of Appeals for the Sixth Circuit overturned Judge Campbell's 1998 ruling and reinstated the death sentence on the grounds that Abdur'Rahman had not proved that he had been prejudiced by the lawyer's ineffectiveness.¹⁹ One of the three judges issued a strong dissent, citing the "constitutionally ineffective" defence at the sentencing phase due to "counsel's utter failure to investigate or present available mitigating evidence". Circuit Judge Cole believed that the lawyer'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". His two colleagues who voted to reinstate the death sentence were, according to a December 2001 appeal brief in the case, "two of the most conservative judges on the Sixth Circuit who have, without fail, voted against granting relief in every capital case they have been involved with".²⁰

Abu-Ali Abdur'Rahman's lawyers appealed for a rehearing in front of the full Sixth Circuit of 12 judges, rather than a three-judge panel. It is believed that the Court voted by six votes to one to rehear the appeal. Five of the judges are believed to have abstained, with their abstentions counted as votes against a rehearing. The vote was held to be a six-six tie, and the appeal was denied.

In January 2002, a Tennessee Supreme Court judge noted that even the two Sixth Circuit judges - "a bare majority" - who had voted to reinstate the death sentence "did not seriously challenge the finding that Abdur'Rahman had received deficient representation". Justice Adolpho Birch continued: "[I]t certainly seems inconsistent with visceral notions of fairness and justice that this state should impose the ultimate and irreversible penalty of death upon a man whose opportunity to defend himself in court was compromised by the proven ineptitude of his attorneys. Because of their failure, the jury in this case never heard any of the evidence of mental illness and severe abuse which Abdur'Rahman could have presented at

¹⁸ *Abdur'Rahman v Bell*, US District Court, Middle District of Tennessee, 8 April 1998.

¹⁹ *Abdur'Rahman v Bell*, US Court of Appeals for the Sixth Circuit, 13 September 2000.

²⁰ *Abdur'Rahman v State*, In the Supreme Court of Tennessee, Motion for certificate of commutation.

trial as mitigating proof.”²¹ Justice Birch concluded by stating for the record that the Tennessee governor should commute the death sentence.

What the jury did not hear in mitigation

“The state may have given me some misleading information. But it was my responsibility to investigate the case. The fault in the case was my lack of investigation and my lack of preparation.” Abu-Ali Abdur'Rahman's trial lawyer, clemency hearing 2002.²²

Delivering the US Supreme Court's opinion in a death penalty case in 1989, Justice Sandra Day O'Connor wrote: “If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”²³ In a speech 12 years later, Justice O'Connor said: “After 20 years on the high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country”.²⁴ Such questions have been raised about Abu-Ali Abdur'Rahman's trial.

Abu-Ali Abdur'Rahman's jurors were left almost entirely in the dark about the person they were condemning to death. At the sentencing phase, they heard only two witnesses for the defence, the defendant and his estranged wife. Neither knew they were going to be called as witnesses until the morning of the sentencing hearing, leaving them unprepared to testify. The questioning of Abdur'Rahman's wife on the stand related to whether she had written some bad checks while her husband had been in prison. In the case of the defendant, who broke down during questioning and was inarticulate during cross-examination, one of his trial lawyers would later describe the testimony as “one of the saddest things I have seen in my legal career”. It will be an even more tragic injustice if the jury's verdict is carried out.

As a child, Abu-Ali Abdur'Rahman suffered appalling abuse at the hands of his father, a military policeman. This included being stripped, tied up, locked in a cupboard, tethered to a hook with a piece of wet leather tied around the head of his penis. The leather would tighten as it dried. His father struck him on the penis with a baseball bat. The boy would be made to eat a pack of cigarettes as punishment for smoking, and when he vomited, he was forced to eat the vomit. Abu-Ali Abdur'Rahman ran away from home several times, and eventually left for good at the age of 15. An expert who testified at the 1998 hearing before District Judge Campbell said that Abdur'Rahman's was “singularly the worst case of abuse I have come across in 25 years being an academic psychologist... I can't even in my memory remember anything that remotely comes close to some of the things I read”. In 2000, Judge

²¹ *Abdur'Rahman v State*, Supreme Court of Tennessee, dissenting order.

²² *A legal lynching?* Nashville Scene, 4-10 April 2002.

²³ *Penry v Lynaugh*, 479 U.S. 302 (1989).

²⁴ Speech to Minnesota Women Lawyers, Minneapolis, 2 July 2001.

Cole of the Sixth Circuit wrote that “the abuse suffered as a child by Abdur'Rahman... was inhumane and shocking”.²⁵ The jury knew nothing of this abuse.

Circuit Judge Cole was in no doubt that the defence lawyer's performance, as it related to the sentencing stage of the trial, was constitutionally inadequate. He listed some of the failings:

“Counsel failed to ask the trial court to declare Abdur'Rahman indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.”

Abu-Ali Abdur'Rahman has a history of serious mental problems. Indeed, immediately following his arrest there were signs of possible illness. Police found it necessary to place him in a padded cell for two days after he began banging his head against walls and the table. Reports of this behaviour were not turned over to the defence. As part of his post-conviction appeals, six mental health experts have diagnosed Abu-Ali Abdur'Rahman as suffering from Post-Traumatic Stress Disorder and/or Borderline Personality Disorder. School, military and prison records reveal that he had received mental evaluations on several occasions. As a teenager and young man, records variously describe him as “very sick” and in need of “immediate commitment to institution”; “in serious need of therapy”; and “highly disturbed”. He had made numerous suicide attempts. Other evidence of mental illness that the trial lawyer failed to investigate was Abdur'Rahman's belief that he and his wife would have a child who would be the next Messiah; his having carried on conversations with non-existent people and animals; and his having engaged in banging his head against the wall on various occasions. Also unknown to the jury, there was a history of mental illness in his family. His sister attempted suicide on numerous occasions and was held in psychiatric care several times. His brother has committed suicide since the trial.

In 1969, at the age of 18, Abu-Ali Abdur'Rahman was arrested for assault with a dangerous weapon and sent to a youth facility, where he was supposed to receive “treatment and supervision”. He reportedly received neither. Instead, because of his young age and small size, he became the victim of repeated homosexual rape at the hands of other inmates. He attempted suicide a number of times. He also was diagnosed as suffering from episodes of “hysterical blindness”, a form of blackout brought about by stress after which the sufferer has no memory of what occurred. Notably, Abu-Ali Abdur'Rahman does not deny that he was involved in the crime against Patrick Daniels and Norma Norman in 1986, but has claimed that he cannot remember the stabbing itself, a possible sign of one his blackouts.

²⁵ *Abdur'Rahman v Bell*. US Court of Appeals for the Sixth Circuit, 13 September 2000, Judge Cole concurring in part, dissenting in part.

In 1972, at the age of 21, after the prison authorities had allegedly failed to respond to his calls for protection from rape, he stabbed a fellow inmate to death in this context. At his one-day trial for the murder, the defence presented psychiatric testimony supporting the claim that Abu-Ali Abdur'Rahman had lost control of himself at the time of the killing due to the abuse against him. The jury rejected this temporary insanity defence and returned a verdict of second-degree murder. However, the judge recommended "commitment to an institution where defendant may receive psychiatric treatment". In the event, Abu-Ali Abdur'Rahman was placed in federal prison where he was only sporadically medicated with anti-psychotic and other medication. He continued to be the victim of rape. In 1973 he apparently underwent another episode of hysterical blindness when being forced to commit oral sex on other inmates. Prison records also indicate that he attempted suicide and other acts of self-mutilation.

In his 1998 opinion holding that Abu-Ali Abdur'Rahman's death sentence should be overturned, District Judge Campbell wrote that "without some information tending to mitigate this prior [1972] murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defence counsel made a substantial mistake."

Abu-Ali Abdur'Rahman was released on parole in 1983, and worked as a cleaner and became engaged to a Quaker woman. He became involved in voluntary Quaker activities in the community, working with impoverished youth. District Judge Campbell noted that "trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society [and that] he was hard-working and giving... The jury heard nothing of the sort from any witness. This was a very significant failure by defence counsel."

Judge Campbell continued: "The jury in this case heard no witnesses who expressed a concern whether [Abu-Ali Abdur'Rahman] lived or died, even though such witnesses were available and known to defence counsel. This was a grievous flaw".

On death row, Abu-Ali Abdur'Rahman is reported to have been a model prisoner, with an unblemished disciplinary record. He has been an inmate advisor for many years and works with the authorities to address prisoner grievances. He converted to Islam in 1988, and retains an interest in all the major faiths. He has continued his education and completed various courses. He is said to be particularly concerned about children growing up in abusive environments, and has written articles on the effects of such abuse.

The allegations of prosecutorial misconduct

"The pursuit of justice is incompatible with deception. Prosecutors may not conceal facts or knowingly fail to disclose what the law requires them to reveal.... Nowhere in our legal system is strict adherence to these principles more vital than in cases in which the State seeks the death penalty." Former prosecutors seeking justice for Abu-Ali Abdur'Rahman, 2002.

While Abu-Ali Abdur'Rahman was represented by lawyers who made little attempt to protect him from the death penalty, he faced a prosecutor whose pursuit of a death sentence appears

to have descended into misconduct. In 2002, six former prosecutors, all of whom had served as state or federal prosecutors in the State of Tennessee, filed an *amici curiae* (friends of the court) brief in the US Supreme Court in Abu-Ali Abdur'Rahman's case. They argued that the record "shows that the prosecutor engaged in a pattern of deception that deprived [Abdur'Rahman], and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of [the] trial."²⁶

A forensic report by the Tennessee Bureau of Investigation (TBI) had found no blood on Abu-Ali Abdur'Rahman's clothing, including on a long wool coat that he was wearing at the crime scene (Devalle Miller's clothing was never tested). The crime scene had been very bloody. The prosecutor was aware of the TBI report, and identified it as a weakness in the case against Abdur'Rahman. In an internal memorandum written to an assistant prosecutor, he wrote: "Photographs of the decedent's house show blood spattering all over the kitchen... [I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred." However, the prosecutor did not inform Abu-Ali Abdur'Rahman's eventual trial lawyer of the TBI report.²⁷ The police reports describing the crime scene were likewise not turned over to the defence.

Norma Norman and Devalle Miller both testified at the trial that Abdur'Rahman was wearing the long black coat during the crime. The prosecution had no evidence that he removed the coat. The prosecutor not only appears to have kept from Abdur'Rahman's eventual trial lawyer the fact that the coat was potentially exculpatory evidence, but attempted to turn it into aggravating evidence by repeatedly describing it to the jury as the defendant's "gangster coat".

In the federal district court hearing in 1998, a forensic pathologist testified that, in his opinion, the assailant would have had blood from the victims' wounds splattered on his body and his clothing. He further stated that any blood stains could not have been removed from the coat by cleaning, and that anyway the TBI testing would have detected blood even if the coat had been laundered.

The prosecutor's failure to tell the defence about the forensic report is one of a number of instances of alleged prosecutorial misconduct attributed to this official in this case, including the allegation that the prosecutor withheld and misrepresented evidence relating to Abu-Ali Abdur'Rahman's mental health. No court has addressed the totality of these misconduct claims in the Abdur'Rahman case because of procedural obstacles.

²⁶ *Abdur'Rahman v Bell*. In the Supreme Court of the United States. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Brief for former prosecutors James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels, *Amici Curiae*, in support of Petitioner. 10 July 2002.

²⁷ The prosecution did turn over the TBI report to Abdur'Rahman's original trial lawyer. However, he subsequently withdrew from the case due a conflict of interest. The replacement lawyer did not review his predecessor's files, and therefore did not become aware of the TBI report. This replacement lawyer did ask the prosecutor for all forensic reports and other potentially exculpatory evidence. The prosecutor did not turn over the TBI report at this point.

In his decision overturning Abu-Ali Abdur'Rahman's death sentence in 1998, District Judge Todd Campbell ruled that he could not address most of the prosecutorial misconduct claims because they had not been exhausted in the state courts.²⁸

Judge Campbell considered only two of the prosecutorial misconduct claims. He found that the failure to tell the defence lawyer about the TBI forensic report on Abdur'Rahman's clothing had not been misconduct because he had supplied the report to the defendant's original lawyer (who withdrew due to a conflict of interest). However, when the replacement lawyer requested all exculpatory information from the prosecutor, the latter failed to notify the defence about the TBI report. In any event, whether characterized as prosecutorial misconduct or inadequate legal representation, the end result was that the jury never heard the evidence about the coat. In their post-conviction affidavits (see below), several of the jurors expressed concern that they did not know about the forensic report's findings. Studies have shown that residual doubt about a capital defendant's guilt is the most powerful mitigating factor against a death sentence in the minds of capital jurors.²⁹

The second allegation of prosecutorial misconduct that the District Judge considered was the prosecutor's failure to provide the defence lawyer with the transcript of Abdur'Rahman's 1972 murder trial (see above). The prosecutor had told the defence lawyer that the crime had stemmed from gang-related drug activities in the prison, rather than in the context of homosexual assaults against Abdur'Rahman. The *amici curiae* brief filed by the former prosecutors noted that the transcript "would have made clear to counsel that the earlier event did not involve gangs and drugs, as the prosecutor asserted, but was the result of homosexual assaults on [Abdur'Rahman] in prison. In addition, the transcript included testimony from two psychiatrists, including one for the government, that [Abdur'Rahman] was not able to control his behaviour, information that would have been crucial in [his] sentencing hearing." Several of the jurors have expressed particular concern in the post-conviction affidavits that they were not told this information (see below).

District Judge Todd Campbell concluded that "there is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defence". However, Judge Campbell stated that although the withheld information was favourable to the defendant, "standing alone" its withholding did not amount to a constitutional violation.

The *amici curiae* brief filed by the former prosecutors in the US Supreme Court argued that "because the district court did not consider the extensive remaining misconduct in the case, it did not address how these two matters related to [Abdur'Rahman's] claim that the prosecutor undertook a concerted effort to withhold and distort evidence he knew would make it difficult

²⁸ Justice Stevens of the US Supreme Court emphasised in his dissent against his colleagues' decision to dismiss Abu-Ali Abdur'Rahman's appeal in December 2002, that it is "perfectly clear that the District Court's procedural bar holding was, in fact, erroneous". *Abdur'Rahman v Bell*, 537 US ____ (2002), Justice Stevens dissenting.

²⁹ For example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors think?* 98 Colum. L. Rev. 1538, 1563 (1998).

to secure a death sentence. Nor did the court consider the aggregate effect of the misconduct on [Abdur'Rahman's] sentencing-phase defense and on the jury's search for the truth. No federal court has addressed the full range of the prosecutor's misconduct."

What the jurors say now

"Further, given the nature of the evidence I would further offer for consideration that the death penalty be overturned in this case." Jury Foreman from Abu-Ali Abdur'Rahman's trial, affidavit 2001.

Eight of the nine jurors whom Abu-Ali Abdur'Rahman's current lawyers have been able to contact have made clear that the sentencing verdict they reached 16 years ago is not safe. Their affidavits, which refer to James Jones, Abu-Ali Abdur'Rahman's name before he converted to Islam in 1988, contain the following assertions:

1. *In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think that the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for the death penalty. If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe that I would have voted for the death penalty.* Bonnie M. Meyer, 1997.
2. *I would have wanted to know [in 1987] about Mr Jones' history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr Jones' coat, and in particular I think the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us.* Alice Stoddard, 2001.
3. *I would have wanted to hear everything about Mr Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems. I don't want Mr Jones put to death. I would like the governor to spare his life. We should have gotten to hear all the information about Mr Jones.* Jimmy Swarner, 2001.
4. *I certainly would have wanted to see the TBI Lab report which showed Mr Jones had no blood on his clothes. I would have wanted to know all about Mr Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father, which occurred when he was young. I really would have wanted to have heard from his wife about his behavior, talking to nonexistent people and animals and also heard about his family's mental health problems. We were given none of this at sentencing*

to consider for mitigation. Had I known all this at the time, there is a chance my decision would have been different. Scarlett McAllister Smith, 2001.

5. *I had no idea that James Jones had a history of very serious mental illness and hospitalizations for treatment of his problems. It seems to me the defense attorneys didn't bring out any of this, nor did they tell us anything about his family's problems either. I didn't know about the horrible abuse of this man by his father, and I certainly would have wanted to consider all this in deciding his sentence. It is my belief that I would have voted for life for Mr Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr Jones at all because we weren't informed. Another thing that really bothers me is that we did not see the TBI Lab report about the blood tests. It seems important that we should have known that no blood was found on Mr Jones' clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr Jones clothes. Basically I am upset that all this information was withheld from us in deciding this man's life. That is a very hard decision to make, and I think we should have had complete information. Yolanda Howard, 2001.*
6. *We were not given information detailing Mr Jones' mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr Jones' clothes based on the TBI Lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr Jones. I would have wanted them to present everything about me... I do not want Mr Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr Jones before deciding his sentence - life or death. Given all the history of mental illness Mr Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then. I believe people with problems can be helped. Loretta Galloway Simpson, 2001.*
7. *I am giving this statement because I think the jury in James Jones' case should have heard evidence of Mr Jones's mental illness and details of the childhood abuse he experienced. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results could have been different at sentencing if I had heard the true facts. James Wimberley, 2001.*
8. *Having reviewed various evidence in relation to Mr Abu Ali, aka James Jones, it is my belief and opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence I would further offer for consideration that the death penalty be overturned in this case. Everett C. Stone (Jury Foreman), 2001.*

The jurors are not alone in having deep concerns about their sentencing verdict. The *Nashville City Paper*, for example, has called for clemency: "We believe for the first time the death penalty in the specific case of Abu-Ali Abdur'Rahman would be a miscarriage of justice." The editorial continued: "We believe Gov. Bredesen should take a careful look at this case when the option of clemency is presented to him. We believe when he looks at the Rahman case he will be unable to come to any other conclusion except that clemency is necessary in this instance."³⁰

Executive clemency – remedying judicial failure

"[T]he questions raised by judges at every level in this case echo back to the issues of justice. Abdur'Rahman has been convicted of a horrible crime. He should pay with his freedom. But the injustice will only be compounded if Abdur'Rahman is subjected to the ultimate punishment due to the "complete failure" of his trial attorneys. [The governor] should prevent that atrocity." Editorial, *The Tennessean*, 19 January 2002.

On 2 May 2003, the Ohio Adult Parole Authority voted 6-2 to recommend clemency for a prisoner on Ohio's death row facing execution the week after Abu-Ali Abdur'Rahman.³¹ Even though the majority remained convinced of Jerome Campbell's guilt, they felt that his appeal lawyers had "presented credible evidence sufficient for the majority members of this Board to question any sustained confidence or reliability in the jury's recommendation of the death penalty." So too, surely, in the case of Abu-Ali Abdur'Rahman.

The majority of the Ohio board wrote: "Who can rightly say [indeed, who can truly know] exactly how the same jurors would have considered, weighed, balanced, deliberated and concluded as to the remaining circumstantial evidence. The potential imposition of the death penalty should require this Board to base our recommendation on more than conjecture or assumption that the jury "probably" or "most likely" or "undoubtedly" would have returned the same verdict and/or the same recommendation of death. When imposing the death penalty the State should proceed cautiously."³²

In Abu-Ali Abdur'Rahman's case, a majority of the jurors have signed affidavits that must give the State of Tennessee pause for thought. It is clear that if eight of the jurors now have doubts about their sentencing decision, the state cannot have confidence in it either. After all, if only one of the jurors had voted for life at the trial, that would have been the result.

In Jerome Campbell's case in Ohio, the majority on the Parole Authority also agreed that Campbell had been denied, on technical and procedural grounds, a full and fair consideration by the appeal courts of the merits of the new evidence. They stated that they should not be bound by "restrictive judicial notions" of rules of evidence or "procedural default"³³: "We

³⁰ *Clemency should be considered in Rahman case.* Nashville City Paper, 28 May 2003.

³¹ Amnesty International Urgent Action. <http://web.amnesty.org/library/Index/ENGAMR510712003>

³² In re: Jerome Campbell, #A211-228. State of Ohio Adult Parole Authority, Columbus, Ohio.

http://wcpo.com/news/2003/local/05/02/noon/campbell_report.pdf

³³ In general, when reviewing state prisoners' habeas corpus appeals, federal courts in the USA may not consider issues seeking reversal of a sentence or conviction if those issues were not first introduced in

should not simply defer to appellate courts on all issues of importance in capital cases. We have a duty to make our own independent analysis and judgment of life-and-death justice.”

The State of Tennessee has been successful in keeping the appeal courts from reviewing Abu-Ali Abdur'Rahman's case in its entirety. In 2002, a Tennessee Supreme Court Justice expressed his deep concern about this issue:

“I am compelled to comment, on the record, upon what I perceive to be the most egregious of the several problems in this case. As this Court has considered the issues before us, it has become increasingly clear to me that our appellate review failed at the post-conviction stage. The Tennessee Court of Criminal Appeals's review of Abdur'Rahman's ineffective assistance of counsel claim can only be described as cursory. The case was reviewed by only two judges rather than the usual three, and one of those two judges was a Special Judge whose experience was predominantly civil. The opinion rendered by that court was barely three pages long, with merely two paragraphs devoted to discussion of the ineffectiveness of trial counsel. Unfortunately, this Court refused to grant permission to appeal that decision. And ironically, when the Sixth Circuit Court of Appeals overturned the United States District Court's lengthy, detailed holding that Abdur'Rahman was “seriously prejudiced” by his trial counsel's “utterly ineffective” performance, its fundamental rationale was that the findings of the state post-conviction court, as upheld by the Court of Criminal Appeals, must be “presumed correct.” Hence, the cursory review described above essentially barred Abdur'Rahman from receiving appropriate consideration at the federal level. Such a result is, in my view, unacceptable. Lamentably, there are some who would opine, notwithstanding the glaring insufficiencies present in this case, that the ineffective assistance of counsel issue has been litigated, is final as a matter of law regardless of the result, and that our justice system's shortcomings, however clear in hindsight, are now beyond correction. In my view, however, it is plainly unconscionable in a death penalty case to ponder our errors, declare that our hands are tied, and yet send Abdur'Rahman to be executed. Our duty clearly calls for us to relentlessly pursue a just result.”³⁴

The power of executive clemency exists to compensate for the rigidities of the judiciary. Governor Phil Bredesen should use it to pursue a just result. He should ensure that Abu-Ali Abdur'Rahman is not executed.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

state court proceedings. The failure to introduce a claim in earlier proceedings will usually result in procedural default, whereby the merits of the issue will not be addressed by the appellate courts.

³⁴ *Abdur'Rahman v State*. No. M1988-00026-SC-DPE-PD. Dissenting Order. (Justice Birch).

Please take action

If you want to oppose the execution of Abu'Ali Abdur'Rahman, please write to the governor urging him to grant clemency. Encourage others to join you.

Governor Phil Bredesen,
Governor's Office,
Tennessee Capitol State,
Nashville, TN 37243-0001, USA.

Fax: +1 615 532 9711

Email: Phil.Bredesen@state.tn.us

Salutation: Dear Governor