IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V

ABU ALI ABDUR'RAHMAN Petitioner,	)	
v.	)	No. 87-W-417 (capital case) (post-conviction) (habeas corpus)
STATE OF TENNESSEE Respondent.	)	

ORDER GRANTING POST-CONVICTION RELIEF

This case is before the Court on Petitioner's *Motion to Reopen Post Conviction Petition* filed on June 24, 2016, and on Petitioner's subsequently filed state habeas corpus petition and supplement to his *Motion to Reopen.* Specifically, before the Court is Petitioner's claim that during jury selection in Petitioner's capital trial, the prosecution was motivated in substantial part by racial discriminatory intent when it exercised peremptory challenges to strike three African American prospective jurors from Petitioner's jury panel. Petitioner alleges that his constitutional rights were thereby violated and that his convictions should be vacated pursuant to Tenn. Code Ann. §§ 40-30-103 and 40-30-111(a).

On August 28, 2019, the Court conducted a hearing in this matter at which the Petitioner introduced into evidence a number of exhibits. On November 1, 2021, the parties jointly filed *Stipulations of the State and Petitioner Abdur'Rahman.* The Court has independently reviewed the evidence and the entire record in this matter and finds that the parties' stipulations are supported by the evidentiary record. Accordingly, the Court herein adopts the parties' stipulations as independent findings of the Court.

For the reasons explained below, the Court finds that there were constitutional violations in Petitioner's trial, and therefore vacates his convictions. This order shall constitute findings of fact and conclusions of law pursuant to Tenn. Code Ann. § 40-30-111(b) and Tenn. Sup. Ct. R. 28, § 9(A). Accordingly, the Court makes the following findings:

PROCEDURAL HISTORY

1. In July 1987, Petitioner, Abu Ali Abdur'Rahman (f/k/a James Lee Jones, Jr.), was tried by a jury and convicted of three counts for which he was sentenced as follows:

> Count 1: First Degree Murder, for which Petitioner was sentenced to death;
>
> Count 2: Attempted First Degree Murder with Bodily Injury, for which Petitioner was sentenced to prison for life, to run consecutive to Count 1;
>
> Count 3: Armed Robbery, for which Petitioner was sentenced to prison for life, to run consecutive to Count 2.

2. During jury selection in Petitioner's trial the defense raised a claim under *Batson v. Kentucky*, 476 U.S. 79 (1996) (the "*Batson* claim"), arguing that the prosecution engaged in "purposeful racial discrimination" in exercising peremptory strikes. After the jury was selected, the Court conducted a hearing on Petitioner's "*Batson* claim" and denied the claim.

3. Petitioner's convictions and sentences were affirmed on direct appeal. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990). With respect to Petitioner's "*Batson* claim," the Tennessee Supreme Court affirmed the trial court's finding that "[t]he State offered neutral reasons for the exercise of its challenges." *Id.* at 549.

4. Petitioner timely filed in this Court a petition for post-conviction relief which commenced this action. The Court denied Petitioner's post-conviction claims. The Court summarily dismissed Petitioner's "*Batson* claim" without expressly addressing the merits of the claim and thus without making particularized findings of fact regarding the claim.

5. The Court of Criminal Appeals affirmed the denial of Petitioner's post-conviction petition. *Jones v. State*, 1995 WL 75427 (Tenn. Crim. App. 1995). In its decision, the Tennessee Court of Criminal Appeals did not address Petitioner's "*Batson* claim."

6. There ensued extensive litigation in the federal courts on Petitioner's federal habeas corpus petition that was filed in the Middle District of Tennessee in 1996. This litigation is briefly summarized in the *Stipulation of the State and Petitioner Abdur'Rahman* jointly filed by the parties in this action.

7. On May 23, 2016, the United States Supreme Court decided *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

8. On June 24, 2016, within one year of *Foster*, Petitioner filed in this Court his *Motion to Reopen Post-Conviction Petition* under Tenn. Code Ann. § 40-30-117(a)(1) in which he asserts, among other things, that he is entitled to present his claim of racial motivation in jury selection in light of *Foster* and in light of evidence outside of the trial record that has been discovered since completion of the trial and direct appeal. This new evidence includes, among other things, the prosecution's notes taken during jury selection – the same type of evidence considered by the Supreme Court in *Foster* – as well as extra-judicial statements made by the lead prosecutor which reveal his motivation to improperly use race as a factor in jury selection.

9. On October 5, 2016, the Court entered its *Order Granting 'Motion to Reopen Post-Conviction Petition' in Part and Denying in Part*, in which the Court ruled that it would hold an evidentiary hearing in order to make a determination as to whether Petitioner is entitled to relief under *Foster v. Chatman* based on the prosecution's discriminatory practices during jury selection.

10. After the Court reopened the post-conviction proceeding, Petitioner and the District Attorney General negotiated an *Agreed Order* to settle Petitioner's racial discrimination claim under *Foster*.

11. On August 28, 2019, the Court conducted a hearing at which Petitioner introduced evidence in support of his *Foster* claim. The State offered no defense to Petitioner's *Foster* claim, and at the conclusion of Petitioner's proof, the parties signed and presented the *Agreed Order* for the Court's consideration. Under the *Agreed Order*, Petitioner waived all current and future claims regarding his conviction and sentence, including his state habeas claim and his right to any further appeals or litigation, in exchange for the State's agreement to vacate his death sentence. The *Agreed Order* preserved Petitioner's convictions and resulted in three life sentences on each of the three counts to run consecutively, precluding possibility of release.

12. On August 29, 2019, this Court signed and entered the *Agreed Order* and, on August 30, 2019, stated its findings in open court that it had the authority to enter the *Agreed Order*, and that the *Agreed Order* represented an "equitable and just resolution" of the case "to correct an injustice."

13. On September 20, 2019, the Tennessee Attorney General filed a Notice of Appeal in the Court of Criminal Appeals.

14. On November 30, 2020, the Court of Criminal Appeals issued its decision setting aside the *Agreed Order* and remanding the case back to this Court. *Abdur'Rahman v. State*, No. M201901708CCAR3PD, 2020 WL 7029133 (Tenn. Crim. App. Nov. 30, 2020).

15. On November 1, 2021, the parties filed their *Stipulations of the State and Petitioner Abdur'Rahman* (the "Parties' Stipulations") and their *Agreement Between the State and Petitioner Abdur'Rahman* (the "Parties' Agreement"). In the Parties' Stipulations the State joined the

Petitioner in praying the Court to find a constitutional violation in Petitioner's trial and therefore to vacate Petitioner's convictions. Under the Parties' Agreement, the parties agreed that if Petitioner's convictions were vacated by this Court, the State would withdraw its notice to seek the death penalty, and the parties would enter into a plea agreement under which Petitioner would plead guilty to each of the three counts for which he was charged, and he would receive three life sentences for the three counts to run consecutively.

FINDINGS OF FACT

16. The Court takes note of the Parties' Stipulations. The parties are in the best position to ascertain and determine the relevant facts, and the Court accepts the parties' stipulated facts.

17. Additionally, the Court has independently considered the evidence introduced in this case and the applicable law. The Court hereby makes its findings of fact and conclusions of law based upon its independent review of the evidence and the law.

18. References to exhibits herein are references to the exhibits introduced into evidence in the August 28, 2019 hearing.

19. Pursuant to Tenn. Code Ann. § 40-30-110(f), the Court hereby finds that Petitioner has proven the following facts by clear and convincing evidence:

20. Petitioner is African American.

21. The prosecutors in Petitioner's trial in 1987 were Assistant District Attorney John Zimmermann and Assistant District Attorney Eddie Barnard.

22. ADA Zimmermann has a known history of unethical conduct, having been censured by the Board of Professional Responsibility on at least two occasions and having been

reprimanded by courts on a number of other occasions. See August 2019 Hearing Collective Exh. U.[1]

23. During jury selection, ADA Barnard took handwritten notes. Relevant portions of those notes (pp. 1-2, 5-8, 10, 12-14, 16-19, 22-24) are included in August 2019 Hearing Exh. G.

24. At the top of the first page of his notes, ADA Barnard made the following notations:

0 1 2 3 4 [indicating a numerical system for rating prospective jurors]
1. No pattern [illegible]
2. Nothing from questioning
Batson v. Ky. –
State v. Peck, 719/553

Id.

25. These notes then list each prospective juror in the order in which they were questioned during voir dire. *Id.* at 1. The sex and race of each prospective juror was noted beside each name (e.g., "*F/W*"). *Id.*

26. To the left of each juror is a number, indicating how the prosecution rated that juror according to their numerical system. *Id.* From the notes, it is apparent that a rating of "0" was the lowest or worst from the prosecution's perspective, and a rating of "4" was the best.

27. At Petitioner's trial, jury selection took place over a five-day period from July 6 to July 10, 1987. Trial Tr. at 50–1267.

28. During the course of jury selection, the prosecution did not exercise all of its available peremptory challenges.

29. The prosecution exercised its peremptory challenges to strike three African American prospective jurors: Sharon Baker, Robert Thomas, and William Green:

[1] This references the exhibits filed with the Court prior to the August 2019 hearing.

The individual voir dire of Sharon Baker, an African American prospective juror whom the prosecution struck, is at pp. 212-228 of the Trial Transcript. August 2019 Hearing Exh. H.

The individual voir dire of Robert Thomas, an African American prospective juror whom the prosecution struck, is at pp. 384-401 of the Trial Transcript. August 2019 Hearing Exh. I.

The individual voir dire of William Green, an African American prospective juror whom the prosecution struck, is at pp. 497-527 of the Trial Transcript. August 2019 Hearing Exh. J.

30. At the end of the third day of jury selection, the trial judge stated that the defense had exercised ten (10) peremptory challenges, and the State had exercised five (5) challenges. Trial Tr. at 862. August 2019 Hearing Exh. K.

31. At that point in the trial, the prosecutors had peremptorily struck all three of the African American jurors who had been on the jury venire panel up to that point in time: African American juror Sharon Baker was struck at p. 819 of the Trial Transcript; African American juror Robert Thomas was struck at p. 834; and African American juror William Green was struck at p. 804. August 2019 Hearing Exh. L.

32. Shortly thereafter, during the group voir dire, which was attended by all jurors who were then on the panel, ADA Barnard stated to a prospective juror: "Now the situation concerning the victim, the facts of their lifestyle – may not have been a Bellemeade [sic] lifestyle." Tr. 840. Belle Meade is a predominantly affluent White neighborhood in Nashville. Shortly thereafter, while addressing another prospective juror, ADA Bernard stated, "Victims in this case weren't from Bellemeade [sic]. Their lifestyle was not, perhaps, a Bellemeade [sic] lifestyle." August 2019 Hearing Ex. K.

33. Trial defense counsel objected to the prosecution's references to a "Bellemeade [sic] lifestyle," stating that "we have basically an all-white jury, which is a matter we'll address at

some other time. And I think that the jury could conceivably view this as some type of racial overtone. And I object to the comment about Bellemeade [sic] lifestyle, because certainly my client is concerned about the fact that it sounds like it may have racial overtones." August 2019 Hearing Exh. M at 842–43.

34. Shortly thereafter, trial defense counsel indicated that they intended to make a motion relating to the racial composition of the jury (all White at that point) and the prosecution's strikes of African American jurors (all of the African Americans who were on the venire panel as of that point in time) (the Petitioner's "*Batson* claim"). The trial judge stated that the motion would be taken up at the end of jury selection. August 2019 Hearing Exh. N at 848–50.

35. At the very end of jury selection, one African American was included as the twelfth juror. Trial Tr. at 1091–1110. Another African American was selected as an alternate juror. Accordingly, Petitioner was tried by a jury of 11 Whites and one African American.

36. The following is a table, prepared by Petitioner, listing the twelve jurors who sat on the jury and the three African Americans who were struck by the prosecution, along with their race, the rating given to each of them according to ADA Barnard's notes, and whether they were on the final jury or were struck. August 2019 Hearing Exh. G. These persons are listed in the order in which they were individually questioned during voir, along with the page numbers of the Trial Transcript where their respective voir dire testimonies are transcribed:

Name	Race	Prosecutors' Rating	Struck or Juror?
Bonnie Meyer (Trial Tr. 95-109)	White	2	Juror
Alice Stoddard (Trial Tr. 183-201)	White	0.5	Juror
Sharon Baker (Trial Tr. 212-228)	**African American**	**6**	**Struck**
Edward Stone (Trial Tr. 234-246)	White	2	Juror
Patricia White (Trial Tr. 290-303)	White	1	Juror
Scarlett McAllister (Trial Tr. 324-344)	White	0	Juror
Robert Thomas (Trial Tr. 385-401)	**African American**	**2**	**Struck**
Cheryl Kline (Trial Tr. 428-444)	White	2	Juror
William Green (Trial Tr. 498-528)	**African American**	**0**	**Struck**
Loretta Galloway (Trial Tr. 587-600)	White	2	Juror
H. W. Morgan Trial Tr. 648-657)	White	2	Juror
James Wimberly (Trial Tr. 877-892)	White	3.5	Juror
Jimmy Swarner (Trial Tr. 1014-1032)	White	1	Juror
Billy Hawkins (Trial Tr. 1058-1067)	White	3	Juror
Yolanda Howard (Trial Tr. 1091-1110)	**African American**	**2.5**	**Juror**

37. At the end of jury selection, the trial judge heard argument on Petitioner's "*Batson* claim," at which ADA Zimmermann stated his purported reasons for striking the three African American jurors. August 2019 Hearing Exh. B.

38. With respect to African American Robert Thomas, the following portions of the Trial Transcript and ADA Barnard's notes are relevant to a determination of the pretextual nature of ADA Zimmermann's stated reasons for striking Mr. Thomas:

a. ADA Zimmermann first asserted that Mr. Thomas was struck because, "[A]t the time we felt that Mr. Thomas had given us the appearance that he was an uneducated, not very communicative individual; that he lacked the communication skills that the other ten jurors seemed to have." August 2019 Hearing Exh. B at 1239.

b. Then ADA Zimmermann compared Thomas with another prospective juror whom they struck, Mr. Harding, as "a slow learner, and that he was a slow intellectual individual." *Id.* at 1239.

c. Then ADA Zimmermann said, "We wanted both of those individuals off the jury.... But both Mr. Thomas and Mr. Harding being equal in the other respects, of being less in the communicative type skills and the intellect skills ..." *Id.* at 1241.

d. Then ADA Zimmermann said that Mr. Thomas was "less in the communicative type skills and the intellect skills." *Id.* at 1241.

e. As a final reason, ADA Zimmermann said that Mr. Thomas was acquainted with defense counsel Lionel Barrett. *Id.* at 1240–41.

f. And yet, as the chart above shows, ADA Barnard rated Mr. Thomas a "2" which was higher than the ratings he gave to four of the White jurors who were not struck, and equal to the ratings he gave to five of the White jurors who were not struck. August 2019 Hearing Exh. G at 10.

g. And yet, ADA Barnard's notes about Mr. Thomas make no reference to communication skills or education or intelligence. *Id.*

h. By contrast, ADA Barnard's notes about White juror Swarner, whom the prosecution rated a "1" but did not strike, include the following notations: "dumb," "not real smart," and a "rough ole boy." *Id.* at 22.

i. Also, by contrast, ADA Barnard's notes about Mr. Harding (with whom ADA Zimmermann compared Mr. Thomas) includes the notation, "Not very smart." *Id.* No such notation was made with reference to Mr. Thomas. *Id.* at 7.

j. Further, regarding Mr. Thomas's communication skills, most of the questions ADA Zimmermann asked of him during voir dire were leading or closed questions calling only for "yes" or "no" answers. August 2019 Hearing Exh. I at 385–391.

k. Additionally, regarding Mr. Thomas's education and communication skills, ADA Zimmermann never followed-up with questions asking Mr. Thomas about his educational background or vocation, *id.*, even though at one point during the group voir dire it came out that Mr. Thomas had founded and pastored his own church. To this, also, there were no follow-up questions. August 2019 Hearing Exh. O (Trial Tr. 801).

l. And in fact, Mr. Thomas, who is now deceased, was college educated. August 2019 Hearing Exh. P.

39. With respect to African American Sharon Baker, ADA Zimmermann gave the following pretextual reasons for striking Ms. Baker:

a. ADA Zimmermann began by saying Ms. Baker "was not very communicative during her answers that she gave. She would express in very short cryptic answers." August 2019 Hearing Exh. B at 1237.

b. However, Ms. Baker was one of the last prospective jurors called during the first day of jury selection and, at the beginning of her voir dire, ADA Zimmermann asked, "Q. Are you tired, having to wait all day long? A. Pretty tired." August 2019 Hearing Exh. H at 213.

c. Additionally, virtually all of the questions ADA Zimmermann asked of Ms. Baker were "yes-or-no" questions that did not call for extended responses, and ADA Zimmermann never followed up with questions that would call for explanation. *Id.* at 213–220.

d. Further, when not asked a leading question, her response was not cryptic, as when she said, "I've never really given the death penalty much thought, to be perfectly honest with you, but I can't think of anything offhand that would keep me from going along with it if we found a person guilty." *Id.* at 216–217.

e. By contrast, the prosecution did not strike White juror Swarner who, according to ADA Barnard's notes was not communicative. August 2019 Hearing Exh. G at p. 22.

f. Next ADA Zimmermann gave as an additional reason for striking Ms. Baker that, "She stated that she would only give the death penalty if she felt like – if a person wouldn't serve the whole term, then the death penalty would be proper." August 2019 Hearing Exh. B at 1237.

g. In fact, ADA Zimmermann's characterization of Ms. Baker's statement was false. While making clear that she did not have strong feelings about the death penalty one way or another and that she could impose a death sentence, she was asked the following question and gave the following answer: "Q. Can you think of any factors that you would give weight to, in general terms, as far as adhering to or favoring the death penalty as opposed to life in prison? A. With the life sentence maybe the person wouldn't serve the whole term." August 2019 Hearing Exh. H at 222. This was just one factor Ms. Baker would give. She did not say she would only give the death penalty if a person wouldn't serve the whole term.

h. ADA Zimmermann did not ask any follow-up questions of Ms. Baker to inquire into or investigate whether there were other circumstances in which she felt the death penalty would be appropriate.

i. Then ADA Zimmermann said that Ms. Baker "seemed to avoid eye contact with myself when I was questioning her. She seemed to avoid eye contact with all the people." August 2019 Hearing Exh. B at 1238.

j. Then ADA Zimmermann stated that Ms. Baker seemed to have reservations about the death penalty. *Id.* at 1239.

k. But, in response to ADA Zimmermann's questions, Ms. Baker made it very clear that she could impose a death sentence if the defendant is found guilty and if the aggravating circumstances outweigh the mitigating circumstances. August 2019 Hearing Exh. H at 216–220.

l. Additionally, the prosecution did not strike White jurors who expressed reservations about the death penalty.

m. For example, White juror Alice Stoddard admitted to "strong reservations about capital punishment," August 2019 Hearing Exh. Q at 196, and ADA Bernard gave her a low rating of "0.5." August 2019 Hearing Exh. G at 5. The prosecution did not strike Ms. Stoddard.

n. For another example, White juror Scarlett McAllister expressed reservations about the death penalty on a couple of occasions during her voir dire:

> Q. ... [I]s there anything in your personal beliefs that would make you think, hey, I could not vote for the death penalty under certain circumstances?
>
> A. Well, I have thought of maybe the religious side, saying that, you know, I am a human being just like this person is, the defendant, am I one to be a part of his life being taken, you know, as God sees us, we are equal. You know, in that part – in that way I have a problem, but it just depends on what the circumstances were, you know – and, of course, the laws.

o. August 2019 Hearing Exh. R at 333.

p. And later in the voir dire:

> Q. I think you also indicated that one of the reservations, or at least one of the thoughts that you had, was whether or not as a human being you had the right to determine with other human beings who lives or dies, or words to that effect.
>
> A. That's correct.
>
> Q. Do you still recognize that that is – or do you still consider that to be at least a factor that you had to think about in the imposition of the death penalty?
>
> A. That would just depend. I can't really say that that would be a –
>
> Q. Like I said, we're not talking in terms of this particular case, but I guess what I'm asking, have you now totally abandoned that as a factor that you would consider?
>
> A. Not totally. Not totally.

Id. at 339.

q. ADA Bernard gave Ms. McAllister the lowest rating of "0," August 2019 Hearing Exh. G at 8, yet the prosecution did not strike her.

40. With respect to African American William Green, ADA Zimmermann stated that he struck Mr. Green primarily because of Mr. Green's misgivings about the death penalty. August 2019 Hearing Exh. B at 1235–1237.

41. However, during voir dire Mr. Green clearly stated that he felt there are certain kinds of cases where the death penalty would be proper (August 2019 Hearing Exh. J at 505), that he was not opposed to the death penalty (*id.* at 507), and that he could impose a death sentence (*id.* at 509).

42. And yet, the prosecution's questioning of Mr. Green about the death penalty, as compared to their questioning of other jurors on the issue, was disparate. Unlike White jurors who expressed reservations about the death penalty (e.g., Alice Stoddard and Scarlett McAllister, *supra*), ADA Bernard continued to press Mr. Green with vigorous questioning even after Mr. Green stated that he could impose a death sentence. *Id.* at 510–517. In no other instance did the prosecution interrogate a prospective juror as vigorously as ADA Bernard interrogated Mr. Green.

43. ADA Zimmermann went on to claim that Mr. Miller's leadership in his Church of Christ congregation was another reason for striking him from the jury, because he would have a difficult time facing his congregation if he voted for the death penalty. August 2019 Hearing Exh. B at 1236–37.

B. The Racial Context of Petitioner's Trial

44. Tennessee's current death penalty system was enacted in 1977. Tenn. Code Ann. §§ 39-13-204, 206.

45. Tennessee Supreme Court Rule 12 requires trial judges to fill out and file reports (the "Rule 12 reports") in all first-degree murder cases. The Tennessee Administrative Office of the Courts maintains copies of all filed Rule 12 reports.

46. According to the Rule 12 reports on file in the Tennessee Administrative Office of the Courts, and according to Tennessee Supreme Court decisions, during the first ten years after enactment of Tennessee's death penalty system, through July 1987, the date of Petitioner's trial, the Davidson County District Attorney General's office sought death sentences in seven (7) cases that were tried through sentencing hearings. All of those defendants were African Americans. August 2019 Hearing Collective Exh. S (Rule 12 reports filed in the cases of James Looney (Trial Date 5-15-78); Terry Lynn Howard (Trial Date 6-18-79); Raymond Jackson (Trial Date 11-5-79); Charles Wright (Trial Date 11-5-79); Cecil Johnson (Trial Date 1-13-81); Douglas Bell (Trial Date 11-7-83); and James Lee Jones (Trial Date 7-6-87)).

47. Thus, according to the Rule 12 reports, through Petitioner's trial in July 1987, the Davidson County District Attorney General's office did not seek death sentences against any White defendants. *Id.*

48. During the course of Petitioner's trial, the prosecution made use of language with racist overtones and connotations, as follows:

a. During jury selection, the prosecution twice asked a prospective juror questions that referred to persons who live a "Bellemeade lifestyle," referring to an affluent predominantly White neighborhood in Nashville, in contrast to Petitioner and the

victims. The defense objected because of the term's racist innuendo when used in the context of Petitioner's trial.

b. Throughout the trial, with emphasis during closing arguments, ADA Zimmermann labeled Petitioner as a "gangster from Chicago" who was proud to wear his "gangster coat." E.g., August 2019 Hearing Exh. W at Tabs 27, 28 and 30. These are racially loaded terms.

49. At the conclusion of jury selection, in response to the "*Batson* claim" raised by defense counsel, ADA Zimmermann testified that race was a factor he took into account during the jury selection process. August 2019 Hearing Exh. B at 1234-35.

C. The Prosecutor's Extra-Judicial Statements Evidencing Racial Motivation

50. ADA John Zimmermann, who is no longer with the Davidson County District Attorney General's office, was a seminar speaker at the annual conference of the Tennessee District Attorneys General Conference held in October 2015. ADA Zimmermann spoke on the topic of jury selection. August 2019 Hearing Exh. T.

51. While on that CLE panel, speaking to the entire audience, ADA Zimmermann "made comments which were insulting to the 20th Judicial District. More importantly, his presentation encouraged unethical and illegal conduct." *Id.*

52. Specifically, as explained by General Funk and corroborated by three assistant District Attorneys General who attended the seminar and heard ADA Zimmermann speak, ADA Zimmermann made the following comments:

> The first of these inappropriate comments was when he [Zimmermann] said that as an ADA in Nashville, he would strike jurors with a 37215 area code, an affluent part of town, if the if the [sic] case involved people from the "inner city" because "in Nashville, rich people don't care about what happens in East Nashville."

> While the racial implications in the previous comment were inferential, his next statements were blatant advice to use race in jury selection. Specifically, Mr. Zimmermann described prosecuting a conspiracy case with all Hispanic defendants. He stated he wanted an all African-American jury, because "all Blacks hate Mexicans."

Id.

D. ADA Zimmermann's Documented History of Misconduct

53. ADA Zimmermann's documented history of misconduct is relevant to this case because it demonstrates a willingness on his part to deviate from ethical and constitutional standards of conduct.

54. ADA Zimmermann has been reprimanded or disciplined for unethical conduct on numerous other occasions. *See, e.g.*, BPR public censure for his misconduct in *Garrett v. State*, 2001 Tenn. Crim. App. LEXIS 206 (2001) (finding that Zimmermann committed a *Brady* violation requiring reversal of a first degree murder conviction); *State v. Vukelich*, 2001 Tenn. Crim. App. LEXIS 734 (Sept. 11, 2001) (trial court "strongly admonished" Zimmermann for violating trial judge's ruling regarding inadmissible evidence); *State v. Middlebrooks*, 995 S.W. 2d 550 (Tenn. 1999) (Zimmermann reprimanded for making improper closing arguments to the jury); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989) (affirming the BPR's public censure of Zimmermann for unethical conduct in making improper statements to the press); *In re Zimmermann*, 1986 WL 8586 (Tenn. Crim. App. 1986) (Zimmermann held in contempt for failing to disclose evidence as required by the discovery rules). (August 2019 Hearing Collective Exh. U). This is a prosecutor who has been frequently recognized as violating baseline obligations like *Brady*, and most recently, being denied the immunity that prosecutors are almost always afforded. *Rieves v. Town of Smyrna, Tennessee*, 959 F.3d 678, 696 (6th Cir. 2020).

55. In the direct appeal of Petitioner's case, the Tennessee Supreme Court found that ADA Zimmermann's action in handing inadmissible documents to the jury, after the trial judge

instructed him not to, "bordered on deception." *State v. Jones*, 789 S.W.2d 545, 551–52 (Tenn. 1990) (August 2019 Hearing Exh. C).

56. In the federal habeas proceeding, the District Court found that ADA Zimmermann suppressed exculpatory evidence, in violation of the dictates of *Brady*, but that this misconduct "standing alone" was not prejudicial. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1088–90 (M.D. Tenn. 1998) (August 2019 Hearing Exh. F).

57. The District Court also found that ADA Zimmermann made misrepresentations to defense counsel regarding the nature of Petitioner's prior conviction. *Id.* at 1099–1100 ("The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.").

58. In the federal habeas proceedings, Petitioner made numerous other claims of prosecutorial misconduct, but the bulk of those claims were dismissed as procedurally defaulted, because Petitioner's prior post-conviction counsel failed to properly present those claims in the prior post-conviction proceedings; and, accordingly, those claims were not addressed by the federal habeas court on the merits. *Id.* at 1079–84.

59. Nevertheless, Judge R. Guy Cole, Jr., formerly the Chief Judge of the United States Court of Appeals for the Sixth Circuit, described in detail the nature of ADA Zimmermann's pattern of misconduct in Petitioner's case. *Abdur'Rahman v. Colson*, 649 F.3d 468, 478–83 (6th Cir. 2011) (August 2019 Hearing Exh. V).

60. Judge Cole's findings of ADA Zimmermann's prosecutorial misconduct were not disputed by the State or by other judges on the Sixth Circuit panel.

61. Judge Cole concluded his opinion by declaring:

> A parting thought. Whatever your take on the merits of Abdur'Rahman's claims, one thing about this case is undeniable: the prosecutor desecrated his noble role.

> He failed grossly in his duty to act as 'the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States*, 295 U.S. 78, 88 (1935). Abdur'Rahman may face the ultimate penalty as a result; Justice will bear a scar.

Id. at 483.

62. Documentation evidencing ADA Zimmermann's unethical conduct in Petitioner's case is included in August 2019 Hearing Collective Exh. W.

CONCLUSIONS OF LAW

63. Petitioner timely filed his Motion to Reopen this case within one year of *Foster v. Chatman*, 136 S. Ct. 1737 (2016). Petitioner alleges that *Foster v. Chatman* provides him with a proper ground to reopen this post-conviction case on his *Foster* claim.

64. Tenn. Code Ann. § 40-30-117 (a)(1) provides that a petitioner may file a motion to reopen a post-conviction case if "[t]he 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."

65. The Court of Criminal Appeals upheld this Court's granting the motion to reopen, in part, to consider Petitioner's *Foster* claim and set it for hearing. The Court now turns to the merits of the *Foster* claim.

66. The district attorney general of a judicial district controls the State's response to any post-conviction claim where the conviction originated in that district. Tenn. Code Ann. § 40-30-108. The district attorney general's powers in litigating post-conviction claims are extensive and incorporate principles of traditional prosecutorial discretion. *See, e.g.*, Tenn. Code Ann. § 40-30-108(d) ("The answer shall respond to each of the allegations of the petition and shall assert the affirmative defenses the district attorney general *deems* appropriate.") (emphasis added).

67. The district attorney general is also a constitutional officer whose powers are extensive. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 281 (Tenn. 2001); *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994). His or her discretion is without veto, save for the ultimate veto held by the citizens he or she represents. *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995). Chief Justice Henry once described the District Attorney as the most powerful officer in the state. *Pace v. State*, 566 S.W.2d 861, 866 (Tenn. 1978) (Henry, C.J., concurring).

68. The Davidson County District Attorney's Office has conducted an independent inquiry into the circumstances regarding the *Foster* Claim. This inquiry included the evidence of pretextual jury strikes as revealed by the trial transcript, contemporaneous notes by the prosecutors, and ADA Zimmermann's shocking comments at the Tennessee District Attorneys General Conference held in October 2015. Based upon that inquiry, the Davidson County District Attorney has reached the conclusion that the State relied on race-based animus during the course of jury selection in the proceedings at Petitioner's trial.

69. As a prosecutor, the Davidson County District Attorney General must comply with the directives contained in the Rules of Professional Conduct and binding authority from the Tennessee Supreme Court. These directives require the District Attorney General to act as a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost. *State v. Superior Oil*, 875 S.W.2d 658, 661 (Tenn. 1994). These ethical duties govern prosecutors in all proceedings, including post-conviction cases. The ethical rules require prosecutors to remedy or mitigate the consequences of misconduct that has already occurred. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467, at 5 (2014).

70. The American Bar Association Criminal Justice Standards for the Prosecution Function are "directory" in Tennessee. *See, e.g., Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *State v. Hunter*, No. M2011-00535-CCA-R3CD, 2012 WL 2914116, at *4 (Tenn. Crim. App. July 17, 2012) (Woodall, J.). Those standards direct that a prosecutor shall seek justice and not merely seek to convict, shall determine the public's interests, shall consider negotiated settlements at every stage of a criminal matter, and shall consider potential negotiated dispositions to collateral attacks on convictions. Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function 3-1.2(b), 3-1.3, 3-5.6(a), 3-8.5 (4th ed. 2017). Consistent with these principles, the parties have submitted evidence that many post-conviction petitions in capital cases have settled through cooperation between prosecutors and petitioners. Petitioner's Supplemental Exhibit 1. The Court takes judicial notice of these court records. Tenn. R. Evid. 201; *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 862 n.5 (Tenn. 2016).

71. The State of Tennessee is one litigant, though it is represented by different lawyers. *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring). The State's lawful agent in this Court is the District Attorney General for Davidson County. In this case, the District Attorney has participated in the structuring and the advocacy for the finding the Court makes today. This Court routinely relies on the District Attorney's judgment and discretion in resolving matters by agreement and doing so in this case is consistent with that established practice.

72. The Court finds that the District Attorney's decision not to contest the factual allegations and not to contest the relief sought in the petition is determinative in the finding it makes. The discretion the District Attorney has exercised to agree to settle this case, subject to the Court's approval, is grounded in his ethical, constitutional, and statutory duties. *See* Tenn. R. of Prof. Cond. 3.8; Tenn. Const. Art. xx; Tenn. Code Ann. § 40-30-108(a) ("The district attorney

general shall represent the state . . ."); Tenn. Code Ann. § 40-30-108(c)(6) ("The district attorney general has the option to assert by motion to dismiss that . . . The facts alleged fail to establish that the claims for relief have not been waived or previously determined.") (emphasis added); Tenn. Code Ann. § 40-30-108(d) ("The answer . . . shall assert the affirmative defenses the district attorney general deems appropriate.") (emphasis added); *see also City of Chattanooga v. Davis*, 54 S.W.3d 248, 281 (Tenn. 2001); *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994).

73. Alternatively, based on the Court's independent consideration of the record in this case and applicable law, the Court concludes that *Foster v. Chatman* established a constitutional right that was not recognized as existing at the time of trial, and that retrospective application of that right is required.

74. Tenn. Code Ann. § 40-30-122 codifies a two-part test that determines whether Petitioner is entitled to a reopening of his post-conviction case. The first part requires a "new rule," which the statute defines as a final ruling by an appellate court whose "result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." *Id.* The second part requires that the new rule be retroactively applied. The statute defines the second part as follows: "A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty." *Id.*; *see also Bush v. State*, 428 S.W.3d 1, 20 (Tenn. 2014).

75. Petitioner's *Foster* claim meets the two-part test contained in Tenn. Code Ann. § 40-30-122.

76. First, *Foster* announced a "new rule" because its result was not dictated by precedent existing at the time Petitioner's conviction became final in 1990, and application of the rule in *Foster* was susceptible to debate among reasonable minds. In 1990, it was not at all clear how *Batson* would be applied in post-conviction proceedings. *Foster* is unique in that the U.S. Supreme Court bypassed the Georgia Supreme Court, reaching down to reverse an intermediate state court's erroneous holding in post-conviction on a *Batson* claim, based on extraordinary post-trial evidence that the prosecutors undoubtedly based their peremptory strikes based on race. That the Court's decision in *Foster* was not dictated by precedent, and that reasonable minds could debate whether the Court was required to take that unprecedented step, appears to this Court to be beyond question.

77. *Foster* was a state post-conviction case in which the petitioner asserted a claim of racial motivation in jury selection in his original trial. The petitioner had previously presented that claim under *Batson* in his original trial and on direct appeal, and the state courts had denied that claim, which had become a final judgment in the case. In his post-conviction proceeding, the petitioner sought to relitigate his claim by relying on intervening United States Supreme Court cases that (i) had developed a method of analyzing these kinds of claims beyond the analysis applied in *Batson*, (ii) allowed the introduction of evidence outside the original trial record to support the claim, and (iii) applied a different formulation of the standard for assessing the claim. Under *Batson,* the standard was whether the prosecutor had engaged in "purposeful discrimination" in striking African Americans from the jury panel. Under the more recent decision of *Snyder v. Louisiana*, 128 S. Ct. 1203, 1212 (2008), the current standard is whether the prosecutor was "motivated in substantial part by discriminatory intent" even in the face of the prosecutor's otherwise legitimate racially neutral reasons for striking the prospective juror. In *Foster*, for the

first time in a post-conviction proceeding, the United States Supreme Court applied the new method of analyzing the evidence, considered evidence outside the original trial court record, and applied the *Snyder* formulation of the standard in finding a constitutional violation of racial discrimination in jury selection, contrary to the state court's prior holding under *Batson*.

78. This unique combination of the three elements in *Foster* outlined above also exists in Petitioner's case. Never before had the Supreme Court, or any court in Tennessee, upheld a claim of race discrimination in jury selection in a post-conviction case, based in part on newly discovered evidence, after a *Batson* claim had been previously determined and dismissed in the original trial and on direct appeal. Thus, the *Foster* decision represents a "new rule" which, prior to *Foster*, was subject to debate among reasonable minds.

79. Second, the Court also finds that, under the facts of this case, Petitioner is entitled to retroactive application of the new rule in *Foster* because it requires the observance of fairness safeguards that are implicit in the concept of ordered liberty. A defendant's right to an impartial jury of his peers selected in a racially non-discriminatory manner is of paramount importance to our concept of ordered liberty.

80. Here, the Court faces evidence that the prosecutor who conducted jury selection advised seminar attendees at the District Attorneys General Conference, many years after Petitioner's judgment became final, to expressly rely on race in jury selection. He did so in blatantly offensive and stereotypical terms. The prosecutor's contemporaneous notes taken during jury selection confirm the prosecutor's impermissible reliance on race as a factor in jury selection. Coupled with the evidence from the trial record, described above, that the prosecutor's stated reasons for striking every African American prospective juror up to that point in the trial were pretextual, it is clear to the Court that Petitioner's trial was borne of discriminatory racial animus.

The evidence of racial bias is so complete that the District Attorney has gone to the extraordinary length of stipulating to that fact.

81. Whereas the new rule announced in *Foster* determined that extraordinary post-trial evidence of race discrimination compels a finding that the defendant suffered a constitutional violation, the Court holds that such a rule should be retroactively applied because it safeguards the most sacred tenets of the Fourteenth Amendment: that every person is entitled to the equal protection of the laws, and that no person should be derived of his life without the due process of law. The factual scenario in *Foster* is virtually identical to the fact scenario here. As in *Foster*, in this case, petitioner's *Batson* claim was previously adjudicated and denied. Since the denial, new evidence has come to light, including prosecutor notes taken during the jury voir dire and new evidence of prosecutorial misconduct. The exact same kind of evidence that justified reopening the case in *Foster* is present here.

82. The standard the Court must apply in determining the merits of Petitioner's *Foster* claim is whether the prosecution was "motivated in substantial part by discriminatory intent" when it exercised its peremptory challenges to strike from Petitioner's jury prospective African American jurors. *Foster v. Chatman*, 136 S. Ct. at 1754; *Snyder v. Louisiana*, 128 S. Ct. at 1212.

83. In applying this standard, the Court must take into consideration all relevant circumstances that bear upon the issue of race discrimination. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).

84. The Court concludes that the proof in this case establishes by undisputed, clear and convincing evidence that this standard is met – that the prosecution was motivated in substantial part by racially discriminatory intent when they struck each of the following prospective African American jurors: Sharon Baker, Robert Thomas, and William Green. The undisputed, clear and

convincing evidence that supports this conclusion, detailed above, includes the pattern of the prosecution's juror strikes, the prosecution's disparate voir dire questioning of White and Black jurors, and the contemporaneous notes taken by the prosecution during jury selection, which evidence the pretextual nature of the prosecution's allegedly "race-neutral" reasons for striking those jurors and the comparison between similarly situated Black jurors who were struck and white jurors who were not. The undisputed, clear and convincing also includes the racially biased statements made by the lead prosecutor after the fact at a seminar for prosecutors at an annual conference of the District Attorneys General Conference, in which the lead prosecutor advocated the improper and unconstitutional use of race and ethnicity in jury selection.

85. Separate due process considerations justify the grant of relief under the post-conviction statute. Due process principles clearly apply in post-conviction proceedings. *See, e.g.*, *Raines v. State*, No. M201900805CCAR3PC, 2020 WL 773089, at *2 (Tenn. Crim. App. Feb. 18, 2020) ("Additionally, due process principles may, in very limited circumstances, require tolling of the post-conviction statute of limitations."). Petitioner has a standalone due process claim based on the State's breach of the prior Agreed Order. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (vesting of rights); *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (discussing *Wolff*); *see also State v. Bond*, 407 N.W.2d 277, 281 (Wis. Ct. App. 1987); *Hummel v. State*, 110 N.E.3d 423, 428 (Ind. Ct. App. 2018). These due process principles constitute independent grounds for relief in addition to the Court's finding that Petitioner's rights were infringed under Tenn. Code Ann. § 40-30-103. The Court also finds that because the Attorney General of Tennessee receives notice of final judgments in post-conviction cases, Tenn. Code Ann. § 40-30-112, the State has knowledge of

other instances where prosecutors and post-conviction petitioners cooperated to craft a resolution to their dispute. *See* Petitioner's Supplemental Exhibit 1.

86. The petitioner is entitled to a new trial under Tenn. Code Ann. § 40-30-103. In the interests of justice, Petitioner and the District Attorney have agreed that immediately following the grant of post-conviction relief as to all of Petitioner's convictions, the Petitioner will plead guilty to the charges against him and agree to three life sentences for the three counts to run consecutively. This will obviate the need for any further appellate proceedings and terminate the longstanding collateral litigation attacking Petitioner's convictions and sentences.

87. Therefore, upon taking into consideration all relevant circumstances bearing on the issue of race discrimination, the Court concludes that in accordance with the ruling in *Foster*, a case virtually identical to this case, Petitioner's constitutional rights were violated during jury selection under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States; and under the Tennessee Constitution, Article I, Section 6 (right to jury trial) and Section 8 (right to judgment of his peers; and right to compliance with the law of the land).

88. For the foregoing reasons, the Court further concludes that, pursuant to Tenn. Code Ann. §§ 40-30-103 and 40-30-111(a), Petitioner's convictions in this case are void and shall be and are hereby vacated.

IT IS SO ORDERED.

Entered this the 9th day of November, 2021.

MONTE D. WATKINS, Judge
Criminal Court Division V