**IN THE SUPREME COURT OF TENNESSEE**

**AT NASHVILLE**

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| **ABU-ALI ABDUR'RAHMAN, *et al.*,** | ) | |
| **Appellants,** | ) | |
| | ) | |
| **v.** | ) | **No. M2018-01385-SC-RDO-CV** |
| | ) | |
| **TONY PARKER, et al.,** | ) | |
| **Appellees.** | ) | |

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**APPELLEES' RESPONSE**
**IN OPPOSITION TO APPELLANTS'**
**MOTION TO CONSIDER POST-JUDGMENT FACTS**
**AND APPELLEES' MOTION TO STRIKE**

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Appellants Abdur'Rahman, *et al.*, have asked this Court to consider extra-record documents, media reports, and an un-cross-examined expert opinion regarding events that occurred after the Chancery Court judgment that is the subject of this appeal. The motion should be denied because the material may not be considered under Tenn. R. App. 14(a). Moreover, Appellants' brief, lodged with this Court on September 6, 2018, includes extensive discussion of the prohibited extra-record material and directly relies on that material to support Appellants' legal arguments. *See* Brief of Abdur'Rahman Plaintiffs-Appellants, at pp. 2-3, 5, 116-22, 179-82, 203, 293, 296. The Court should thus direct that all portions of the brief that refer to or rely on those facts be stricken.

## ARGUMENT AND AUTHORITY

### 1. The Material Presented in Appellants' Motion Is Plainly Outside the Scope of Tenn. R. App. P. 14.

Appellants' request to augment with record with additional evidence, including un-cross-examined expert testimony, is so far outside the scope of Tenn. R. App. P. 14 that it should be denied. Appellants are asking this Court—a court with appellate jurisdiction only—to augment the record so it can then consider not even facts, but merely a medical opinion offered by an un-cross-examined expert, which opinion is based entirely on hearsay and media accounts. And what is more, according to Appellants, that opinion goes to the very heart of the issues on appeal—*i.e.*, to the merits of the appeal—before this Court. *See, e.g.,* Abdur'Rahman Brief, at p. 182 (alleging "[t]he Tennessee lethal injection protocol, by content, omission, and *failed application* creates a substantial risk of severe pain and suffering for Plaintiffs") (emphasis added). None of this calls for the exercise of the Court's discretion to consider post-judgment facts; on the contrary, Appellants are merely seeking a retrial in this Court, which is clearly outside the bounds of Rule 14, not to mention outside the bounds the Court's appellate jurisdiction.

Tennessee Rule of Appellate Procedure 14 permits an appellate court to consider "facts concerning the action that occurred after judgment." Tenn. R. App. P. 14(a). Consideration of post-judgment facts "generally will extend only" to "facts" that (a) are "capable of ready demonstration" and that (b) "affect[] the positions of the parties or the

subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." *Id.*

Rule 14 allows for an exception to the rule that an appellate court may generally consider only the facts established at trial, and that exception is tightly circumscribed:

> Although the appellate court should generally consider only those facts established at trial, it occasionally is necessary for the appellate court to be advised of matters arising after judgment. These facts, *unrelated to the merits and not genuinely disputed*, are necessary to keep the record up to date. This rule gives the appellate court discretion to consider such facts. *This rule is not intended to permit a retrial in the appellate court*.

The Advisory Commission Comment, Rule 14 (emphasis added).

Post-judgment facts under Tenn. R. App. P. 14 must be "unrelated to the merits and not genuinely disputed." *Edwards v. Hallsdale-Powell Utility Dist. Knox County,* 115 S.W.3d 461, 464 n.3 (Tenn. 2003) (citing *Duncan v. Duncan*, 672 S.W.2d 765, 768 (Tenn. 1984); *Hall v. Bookout*, 87 S.W.3d 80, 87 (2002)). The requirement that post-judgment facts allowed under Rule 14 be unrelated to the merits and beyond dispute is dictated by the constitutionally limited scope of the jurisdiction of this Court, which "shall be appellate only." Tenn. Const. art. VI, § 2. For that reason, a rule permitting appellate courts to "receive additional evidence would be unconstitutional if construed to authorize prolongation or

renewal of trial issues of fact [on] appeal." *Duncan*, 672 S.W.2d at 767 (citing *Crawford v. Crawford*, 181 P.2d 526, 531-32 (Kan. 1947)).

But Appellants ask this Court to do precisely that, and their post-judgment "facts" go directly to the merits and—even if they were admissible in evidence—are genuinely disputed. First, they assert that documents related to the execution of Billy Ray Irick undermine the credibility of testimony on which the Chancery Court relied in reaching its decision below. Motion, Part II, A-B.[1] Second, they contend that an un-cross-examined expert opinion shows that Mr. Irick suffered during his execution. Motion, Part III. Appellants' contention that these matters are "not disputed" is absurd.

Moreover, as demonstrated throughout Appellants' opening brief on appeal in this Court, Appellants claim outright that the alleged post-judgment "facts" go directly to the merits of the case, *i.e.*, whether the State's lethal injection protocol violates the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution by creating an unacceptable risk of severe pain. Abdur'Rahman Plaintiffs-Appellants Brief, at pp. 2-3, 5, 116-22, 179-82, 203, 293, 296. But in *Duncan*, this Court made clear that consideration of post-judgment facts is addressed not to the *propriety* of the action of the trial court, but to the *nature* of the judgment. Rule 14 does not permit

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[1] Appellees will refer to section designations in the motion, since it is not paginated as required by Tenn. R. App. P. 30(a).

considerations of facts that "would be mere cumulative evidence, nor evidence which it would be possible to controvert or dispute in the trial court, nor concerning the effect of which there might be differences of opinion, or from which different conclusions could possibly be drawn." *Duncan*, 672 S.W.2d at 767 (adopting language quoted from *Crawford*, 181 P.2d at 531-32).

Beyond that, Appellants are attempting to use the alleged "post-judgment facts" to bring before this Court an issue that was not before the trial court, namely an as-applied challenge to the protocol. Their claim in the trial court was a facial challenge only. TR X, 1361 (Mem. & Order on Plaintiffs' Motion to Amend) ("At the outset of this lawsuit, in the Rule 16 Conference and motion to dismiss phase, the Court pointedly asked Plaintiffs if they were asserting as-applied challenges and they said they were not. That inquiry by the Court was made because *as-applied challenges fundamentally change a lawsuit of this nature*.") (emphasis added). But they now argue in their brief that the post-judgment material—which is flagrantly incorporated into that brief in violation of Tenn. R. App. P. 13(c), 14(c), and 27(a)(6)—shows that the Department "radically deviated" from its protocol during Irick's execution, Abdur'Rahman Brief, p. 5, thus transforming their claim from a facial challenge to an as-applied challenge to the protocol in direct

contradiction of their position in the Chancery Court and a ruling of that Court.[2] TR X, 1353-62 (Mem. & Order on Plaintiffs' Motion to Amend).

This Court exercises appellate jurisdiction only. It may not consider disputed evidence in the first instance and may not consider assertions of fact—much less an opinion—not supported by the record. *See Fine v. Lawless*, 140 Tenn. 43, 205 S.W.124 (1918). *See also* Tenn. R. App. P. 13(c). Nor should it consider on appeal a claim not litigated below, namely an as-applied challenge to the protocol.

**2. Appellants' Brief Incorporates and Directly Relies on Material Outside the Record Which Should Be Stricken from the Brief**.

The Rules governing this proceeding make clear that "[i]f a motion to consider post-judgment facts is granted," the court shall direct by appropriate order "that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deems fair." Tenn. R. App. P. 14(c). This Court has not granted any motion to consider post-judgment facts, nor has it entered any order directing how such facts may be presented. Yet, Appellants included

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[2] Appellants' discussion of *Jones v. Mulkey*, 620 S.W.2d (Tenn. App. 1981), as authority for their request is misleading as well because it plainly misstates the issue in that case. The question before the Court of Appeals there was whether underinsured motorist coverage for multiple vehicles under a single policy may be stacked to allow greater payment to the survivors of a deceased insured. The post-judgment discharge of debt by the liability insurer under a separate insurance policy had no bearing on the stacking question.

repeated references and discussion of the proposed post-judgment evidence in the brief lodged with this Court on September 6, 2018. *See, e.g.,* Brief of Abdur'Rahman Plaintiffs-Appellants, at pp. 2-3, 5, 116-22, 179-82, 203, 293, 296. Because those references and discussion are not properly before this Court, they should be stricken from the brief.

The expert opinion that Appellants seek to have made part of the record is dated September 2, 2018. Thus, Appellants could have and should have filed any motion to expand the record to include that alleged post-judgment fact before they filed their brief containing the non-record material on September 6, 2018. By filing the motion after having improperly included non-record material in the brief, they seem to be operating not under the rules, but under the old saw: don't ask permission in advance, just ask forgiveness afterward.

This Court has repeatedly admonished Appellants' counsel about compliance with the rules applicable to appeals before this Court. *Abu-Ali Abdur'Rahman, et al. v. Tony Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn., Order, Sept. 7, 2018). But the Abdur'Rahman Appellants apparently continue to believe that deviation from the rules is justifiable—and any consequence obviated—any time the issues involve the imposition of capital punishment. *See, e.g.,* Appellants' Motion to Waive Table of Authorities, p. 2. For instance, they justify filing a brief far in excess of the permissible page limit because of the expedited briefing schedule, and they similarly justify their inability to prepare the requisite table of authorities. Appellants' Motion to Waive

Table of Authorities, p. 1; Motion to Waive Rule 27(j) Page Limit, pp. 1-2. As this Court has noted, however, the Miller Appellants were working under the same expedited briefing schedule and yet managed to file a brief that conformed with the applicable rules. *Abu-Ali Abdur'Rahman, et al. v. Tony Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn., Order, Sept. 7, 2018).

But the deficiencies in this brief go beyond mere technical requirements. The Abdur-Rahman Appellants' brief is tainted by the repeated references to matters outside the record that go directly to the issues before this Court. This violates the plain letter of Tenn. R. App. P. 13(c) and 27(a)(6). Moreover, Appellants would use that improper material to transform this appeal into a trial—not even an appeal—on a new, as-applied claim.

Appellees should not be made to bear the burden of having to respond to all the matters—facts and argument—jumbled together in the 360-page Abdur'Rahman Brief when much of what is presented is not properly before this Court. Nor should it fall to Appellees, who are under the same time constraints as Appellants, to sort through the brief to distinguish what is and what is not properly before the Court.

## CONCLUSION

The motion of the Abdur'Rahman Appellants to consider post-judgment facts should be denied and all portions of their brief that refer to or rely on those facts should be stricken.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion was forwarded by operation of the e-filing system, United States mail, first-class postage prepaid, and by email on the 11th day of September 2018, to the following:

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