IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN (formerly known as James Lee Jones, Jr.)
v. STATE OF TENNESSEE

No. M1988-00026-SC-DPE-PD

Filed by Clerk's Office January 15, 2002 (jsr)

DISSENTING ORDER

This matter is before the Court on the State's motion to set an execution date and four motions filed by Abdur'Rahman, captioned: (1) "Motion for Style to Reflect Legal Name of Party"; (2) "Motion for a Certificate of Commutation Pursuant to S.Ct.R. 12.4 and T.C.A. § 40-27-106, and for Other Relief Pursuant to S.Ct.R. 11"; (3) "Notice of Putative Ford Claim and Motion to Modify Van Tran Proceeding"; and (4) "Motion for Appointment of Counsel." I agree with the majority's decision to grant the motions to amend the style to reflect Abdur'Rahman's legal name and to appoint counsel. With regard to the majority's disposition of the motions requesting issuance of a certificate of commutation and modification of the Van Tran proceeding, however, I cannot agree. As a consequence, my views are contrary to the majority's decision to set an execution date. Accordingly, and respectfully, I write separately to express these views.

I. Motion for a Certificate of Commutation Pursuant to S.Ct.R. 12.4 and T.C.A. § 40-27-106, and for Other Relief Pursuant to S.Ct.R. 11

Abdur'Rahman has requested that this Court issue a certificate of commutation because (1) prosecutorial misconduct deprived him of a fair trial and (2) his trial and post-conviction counsel were ineffective. In response, the majority summarily states without explanation that "[t]here is no basis for issuing a certificate of commutation." I respectfully disagree.

This Court set forth the possible bases for issuing a certificate of commutation in Workman v. State, wherein we held that a certificate of commutation may be issued when extenuating circumstances are evident either from facts in the record or new evidence that is uncontroverted. 22 S.W.3d 807 (Tenn. 2000). Although, in this case, the evidence of prosecutorial misconduct alleged by Abdur'Rahman is strong but not overwhelming, cogent evidence of the ineffectiveness of Abdur'Rahman's trial counsel exists in the record and is well-documented. The trial court in Abdur'Rahman's original state post-conviction proceeding found that his trial counsel was ineffective in failing to investigate or obtain information regarding Abdur'Rahman's background of mental illness and extraordinary childhood physical abuse, though it denied relief based on the conclusion that Abdur'Rahman suffered no prejudice as a result of this ineffectiveness. See Jones v. State, No. 01C01-9402-CR-00079, available at 1995 WL 75427 at * 1 (Tenn. Crim. App. 1995). The Court of Criminal Appeals affirmed the trial court, but it also acknowledged that

Abdur'Rahman's representation at trial was incompetent. Id. The federal district court, reviewing Abdur'Rahman's petition for habeas corpus, also agreed that his trial counsel was "utterly ineffective" and further concluded that he was "seriously prejudiced" by the incompetent representation. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1077 (M.D. Tenn. 1998). That court stated:

> [A] sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at sentencing.

Id. Based on its findings, the district court overturned Abdur'Rahman's death sentence. On appeal before a panel of the Sixth Circuit Court of Appeals, a bare majority of judges held, in a 2-1 decision, that the findings of the state post-conviction court should be presumed correct and the death sentence reinstated, but even those judges voting to reinstate the death sentence did not seriously challenge the finding that Abdur'Rahman had received deficient representation from his trial attorneys. See Abdur'Rahman v. Bell, 226 F. 3d 696 (6th Cir. 2000). A dissent agreed that Abdur'Rahman's counsel was ineffective, but further contended that he had suffered serious prejudice as a result of his counsel's failures. Id. at 719-24 (Cole, J. dissenting).

Without a showing of prejudice, of course, Abdur'Rahman is not entitled to relief from this Court, and the holding of the Sixth Circuit Court of Appeals regarding this issue is final as a matter of law. Even though the deficient performance of trial counsel in this case does not entitle Abdur'Rahman to relief, however, it 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 trial as mitigation proof. Indeed, though the issue was ultimately resolved against him, the opinion of the district court and the strong dissenting opinion in the Sixth Circuit Court of Appeals demonstrate that reasonable minds may differ regarding whether Abdur'Rahman suffered prejudice because of his ineffective representation at trial. Thus deprived of these grounds, I believe that proven ineffective assistance of counsel does stand as an "extenuating circumstance" sufficient to justify issuance of a certificate of commutation to the Governor.

Because this Court is not of one mind on the commutation issue, I am persuaded that it is my duty to separately address Abdur'Rahman's request for a certificate of commutation and to do so on the record. Now, therefore, in accordance with that duty, and after a careful consideration of the pertinent parts of the entire record, I do hereby certify to His Excellency, the Honorable Don Sundquist, Governor of the State of Tennessee, that the punishment of death ought to be commuted.

II. Notice of Putative Ford Claim and Motion to Modify Van Tran Proceeding

In Van Tran v. State, this Court set forth the protocol to be followed in determining whether a prisoner is competent to be executed. See 6 S.W.3d 257, 265-73. Under Van Tran, the issue of competency is raised in the first instance in this Court, at which time the Court then remands the issue to the trial court for determination of the issue. Id. at 267. The prisoner then must file a petition with the trial court accompanied by "affidavits, records, or other evidence supporting the factual allegations of mental [incompetency]." Id. Based on the evidence submitted by the prisoner, the court then decides if competency "is genuinely in issue" before allowing a mental evaluation and hearing. Id. at 268. We emphasized in Van Tran that trial courts must require a "high threshold showing" of present incompetency before relief would be allowed:

> [A]t least some of the evidence submitted must be the result of recent mental evaluations or observations of the prisoner. . . . We also note that the unsupported conclusory assertions of a family member of the prisoner or an attorney representing the prisoner will ordinarily be insufficient to satisfy the required threshold showing."

Id. at 269.

In this case, Abdur'Rahman's position is unusual in that he admits to present competency but suggests that his mental condition will deteriorate as the hour of execution approaches. If this occur, Abdur'Rahman will be unable to assert his incompetency claim effectively without access to a mental health professional, for, even if he is able to file a satisfactory affidavit in this Court, on remand he will be unable to present sufficient evidence of his present mental state to satisfy the high threshold showing required by the trial court. Moreover, without access to a mental health professional, it is unclear what evidence he will be able to present to this Court to demonstrate a "substantial change" in his competency. It is doubtful that the conclusory statements of counsel or unqualified lay testimony, unsupported by expert proof, would be sufficient to properly make such a demonstration. Indeed, without access to trained mental health professionals, it is conceivable that Abdur'Rahman could become incompetent and his attorneys, who certainly are not experts trained in the recognition and diagnosis of mental illness, may fail to recognize their client's plight. Nonetheless, the majority has refused to guarantee that Abdur'Rahman will be allowed access to a mental health professional as the hour of execution approaches. The protocol offered by the majority creates a true paradox: he cannot have access to a mental health professional unless the trial court grants him a hearing, but he will be unable to obtain a hearing without access to a mental health professional. Such an impossible procedure is, arguably, worse than no procedure at all.

III. Motion to Set Execution Date

Because of my view that this Court should certify to the Governor that Abdur'Rahman's sentence ought to be commuted, I cannot agree with the decision of the majority to set an execution date in this matter. See State v. Workman, 22 S.W.3d 807, 816-17 (Tenn. 2000) (Birch, J., dissenting, on the ground that a certificate of commutation should have been issued by the Court). Additionally, I would note that Abdur'Rahman continues, at this time, to have a number of filings pending in the Sixth Circuit Court of Appeals in relation to his habeas corpus petition. As reflected by documents filed in this Court, the pending filings include Abdur'Rahman's "Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings," Sixth Circuit Docket Nos. 98-6568 / 98-6569, and his appeal from the U.S. District Court's ruling on his "Rule 60 Motion," Sixth Circuit Docket No. 01-6504. Nothing is to be gained by haste in the execution of Abdur'Rahman's death sentence, and I would find it more compatible with the interests of justice to defer to the Sixth Circuit Court of Appeals until these filings are resolved. Cf. generally Wainwright v. Adams, 466 U.S. 964, 965, 104 S. Ct. 2183, 2184, 80 L. Ed. 2d 809 (1984) (Marshall, J., dissenting) (noting that "haste and confusion surrounding [a decision to vacate a stay of execution] is degrading to our role as judges"). Accordingly, I respectfully disagree with the majority's decision to set an execution date in this matter.

IV. Conclusion

For the foregoing reasons, I am unable to join the majority decision to deny the aforementioned motions filed by Abdur'Rahman. Moreover, I disagree with the decision to set an execution date in this matter. Accordingly, and for the reasons above outlined, I respectfully dissent.

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ADOLPHO A. BIRCH, JR., JUSTICE