

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

<b>ABU-ALI ABDUR'RAHMAN,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b>No. M2002-01561-SC-R11-PD</b>
<b>v.</b>	)	
	)	
<b>STATE OF TENNESSEE,</b>	)	
	)	
<b>Respondent.</b>	)	

**Filed February 5, 2003**

**PETITION FOR REHEARING**

Pursuant to Tenn.R.App.P. 39, Petitioner Abu-Ali Abdur'Rahman respectfully requests that this Court grant rehearing, grant his application for permission to appeal, and order further briefing and argument on his claim that his death sentence violates Ring v. Arizona, 536 U.S. \_\_\_, 122 S.Ct. 2428 (2002) because aggravating circumstances were not charged in the indictment.

Rehearing is warranted in light of the North Carolina Supreme Court's recent order granting certiorari review of this exact issue in State of North Carolina v. Henry Lee Hunt, No. 5A86-8 (N.C. 2003) – *an order which calls into question the very premise of this Court's pre-Ring ruling on the issue in State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002).

**I.**

**THE RING-RELATED ISSUES IN HUNT AND ABDUR'RAHMAN ARE IDENTICAL**

1. On January 22, 2003, in State of North Carolina v. Hunt, the North Carolina Supreme Court recently issued a stay of execution and granted Hunt's petition for certiorari to address the exact issue presented by Abu-Ali Abdur'Rahman in this case: Whether *Ring* requires allegation of aggravating circumstances in the indictment for first-degree murder.

2. Specifically, the North Carolina Supreme Court has granted review to decide:

[W]hether the failure to include aggravating circumstances in the indictment is inconsistent with *Ring v. Arizona*, \_\_\_ U.S. \_\_\_, 153L.Ed.2d 556 (2002), and hence violative of the United States Constitution.

See State of North Carolina v. Henry Lee Hunt, No. 5A86-8 (N.C. 2003) (Attached as Exhibit 1 hereto). The North Carolina Supreme Court has ordered expedited briefing and argument on the issue. Id. The Petition For Writ of Certiorari filed by the Petitioner in Hunt is attached as Exhibit 2 hereto.

3. The North Carolina Supreme Court’s grant of certiorari on the identical issue presented in this case is highly significant, because North Carolina is our “sister state,” and this Court has adopted the North Carolina Supreme Court’s doctrines concerning aggravating circumstances. See State v. Middlebrooks, 840 S.W.2d 317, 341 (Tenn. 1992) (adopting North Carolina Supreme Court’s interpretation of felony-murder aggravating circumstance in State v. Cherry, 298 N.C.86, 257 S.E.2d 551 (1979): “Our sister state of North Carolina has accepted the double-counting challenge to its death penalty statute, which contained similar duplicative aggravating circumstances.”).

4. Just as Tennessee and North Carolina faced identical claims in Middlebrooks and Cherry, identical issues are raised in Hunt and in Mr. Abdur’Rahman’s case. Both sets of claims are based on Ring, and Tennessee and North Carolina’s law on aggravating circumstances is identical. See N.C. Gen. Stat. §15A-2000; Tenn. Code Ann. § 39-13-204.<sup>1</sup>

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<sup>1</sup> Mr. Abdur’Rahman’s claim is likewise predicated on the Tennessee Constitution and Tennessee law, which require proper indictment of necessary elements of any offense. Tenn. Const. Art. I §14 provides: “[N]o person shall be put to answer any criminal charge but by presentment, indictment, or impeachment.” This is identical to N.C.Const.Art. I §22 (raised by Hunt in his petition) which provides, in pertinent part, that “[N]o person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.” See Exhibit 2, p. 13 (Petition For Writ of Certiorari in *State of North Carolina v. Hunt*).

## II.

### **THIS COURT REJECTED THE CLAIM PRE-RING BASED ON NORTH CAROLINA LAW WHICH MAY BE OVERRULED IN HUNT**

5. Critically, before Ring was decided, the North Carolina Supreme Court rejected this claim in State v. Golphin, 533 S.E.2d 168 (N.C. 2000) and this Court relied on Golphin to reject the claim as well. State v. Dellinger, 79 S.W.3d 458, 467 (Tenn. 2002)(citing Golphin).

6. In Hunt, however, the North Carolina Supreme Court is considering whether Golphin is still good law in light of the Supreme Court's decision in Ring. Compare Golphin, 533 S.E.2d at 193-194 (rejecting, pre-Ring, claim that aggravating circumstances were elements that had to be charged by indictment) and Appendix 2, pp. 10-12 (Petition For Writ of Certiorari in Hunt)(arguing that Golphin was wrongly decided).

7. If Golphin is overruled in Hunt, then the basis for Dellinger will no longer exist, and this Court must consider whether Dellinger should be overruled, and whether Abu-Ali must be granted relief under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the Tennessee Constitution.

8. Since Ring, this Court has not decided the exact issues that the North Carolina Supreme Court has decided to review in Hunt. This Court's decision pre-Ring was based on the North Carolina law of Golphin. The North Carolina Supreme Court's recent action in Hunt demonstrates that Golphin's reasoning is flawed and may be rejected. The North Carolina Supreme Court's recent action therefore calls into question the rationale underlying this Court's decision in Dellinger.

## III.

## MR. ABDUR'RAHMAN PRESENTS A MERITORIOUS CLAIM FOR RELIEF

9. Importantly, Mr. Abdur'Rahman's claim is meritorious under Ring and Tennessee law. It is now clear that aggravating circumstances are elements essential to the imposition of any death sentence. See Ring, 536 U.S. at \_\_\_, 122 S.Ct. at 2440-2442. As Justice Scalia has stated recently, the essential holding of Ring is that: "[T]he underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" Sattazahn v. Pennsylvania, 537 U.S. \_\_\_, \_\_\_, 123 S.Ct. 732, \_\_\_ (2003). It follows, therefore, that all of the essential elements of this offense of "murder plus one or more aggravating circumstances" must be charged in an indictment if a death sentence is to be imposed.<sup>2</sup>

10. Justice Scalia's explanation of the offense of "murder plus aggravating circumstances" as being a distinct offense is fully consistent with the Tennessee Constitution, which requires that an indictment contain all facts necessary to "enable the trial court upon conviction to enter an appropriate judgment *and sentence*." State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996)(emphasis supplied). See State v. Pearce, 7 Tenn. 65 (1823). An enhanced sentence – in this case the death sentence – could only be imposed if contained in the facts appearing on the face of the indictment. For by itself, the indictment of the lesser offense of first-degree murder did not "enable the trial court to enter . . . a[] sentence" of death. Trusty, 919 S.W.2d at 309. See Ring, 536 U.S. at \_\_\_, 122 S.Ct. at 2441-2442. In Mr. Abdur'Rahman's case, proof of the facts contained in the indictment permitted only imposition of a life sentence – just as do the numerous first-degree murder indictments upon which life sentences are based every day. The

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<sup>2</sup> As the Supreme Court has explained, under the Fifth and Sixth Amendments, such aggravating circumstances – because they "increase[] the maximum penalty [for first-degree murder]," "*must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 1224 n. 6 (1999)(emphasis supplied).

indictment itself was insufficient to allow entry of the “sentence” of death and therefore the sentence cannot stand.

11. This conclusion is likewise consistent with Tennessee courts’ holdings in non-capital cases. For years, the Tennessee courts have held that a sentence cannot stand when an essential element necessary for imposition of an enhanced sentence was not contained in the indictment. Ayers v. State, 115 Tenn. 722, 91 S.W. 195 (1906) (value of stolen property had to be stated in indictment where relative to the degree of crime or punishment.); State v. Hilliard, 906 S.W.2d 466 (Tenn.Cr.App. 1995) (enhanced sentence invalid where indictment failed to include weight of drugs essential to degree of punishment); State v. Griffith, 649 S.W.2d 9, 11 (Tenn.Cr.App. 1982) (drug sentence enhanced for use of a firearm invalid because “the defendant had no notice in the indictments that he was being charged with a firearm while committing drug felonies.”); State v. Sanders, 1995 Tenn.Crim.App.Lexis 900 (Nov. 15, 1995) (sentence for Class B felony invalid where indictment only stated facts supporting finding of Class C felony); State v. Pulley, 1995 Tenn.Crim.App.Lexis 773 (Sept. 20, 1995).

12. It would violate due process and equal protection under the United States and Tennessee Constitutions (and Article I §16 of the Tennessee Constitution) to prohibit sentencing enhancements in non-capital cases absent indictment of necessary elements, while permitting such enhancements in capital cases without proper indictment of aggravating circumstances. Compare State v. Middlebrooks, 840 S.W.2d at 341 (Article I §16 of the Tennessee Constitution prohibits duplication of elements as aggravating circumstances when Tennessee law in non-capital cases prohibits such duplication).

13. And like the Tennessee courts, the North Carolina courts have also concluded that sentencing enhancements must be charged in the indictment, or else the enhanced sentence

cannot be imposed upon conviction under the indictment. See State v. Lucas, 548 S.E.2d 712, 731 (Tenn. 2001) (enhanced sentence for use off a firearm forbidden “unless use of a firearm under the statute is charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury.”); State v. Wilson, 571 S.E.2d 631 (N.C.App. 2002) (firearm enhancement invalid where not charged in the indictment). It thus appears that, in non-capital cases, North Carolina and Tennessee have been fully consistent in their view that a sentencing enhancement is impermissible unless charged in the indictment.

#### IV.

#### **MR. ABDUR’RAHMAN’S CLAIM PRESENTED HERE HAS BEEN UPHeld BY OTHER RECENT POST-RING DECISIONS**

14. Mr. Abdur’Rahman’s claim, and the identical claim presented by the petitioner in Hunt, has been upheld by recent post-*Ring* decisions by courts in other jurisdictions. In United States v. Lentz, 2002 U.S. Dist. LEXIS 16336 at \*19-20 (E.D. Va. Aug. 22, 2002), the court said that “it appears to be a foregone conclusion that aggravating factors that are essential to the imposition of the death penalty must appear in the indictment.” Similarly, in United States v. Fell, 217 F.Supp.2d 469 (D. Vt. 2002), the court held that the “clear implication of the [*Ring*] decision is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply.” *Id.* at 483. Further, the United States Supreme Court remanded United States v. Allen, 247 F.3d 741, 761-64 (8<sup>th</sup> Cir. 2001), which presented the very issue raised in this petition, for further consideration in light of *Ring*. Allen v. United states, 122 S.Ct. 2653 (2002).

#### CONCLUSION

Having followed the North Carolina Supreme Court in Dellinger, the prudent course for this Court is to follow the North Carolina Supreme Court’s lead in Hunt and to grant rehearing

and order further proceedings on Mr. Abdur'Rahman's Ring claim because: (a) The law of our sister state North Carolina on this claim is identical to Tennessee's; (b) The North Carolina Supreme Court's action in Hunt makes clear that the case on which this Court based its pre-*Ring* decision in *Dellinger* has been called into question; and (c) Mr. Abdur'Rahman's claim appears meritorious under Justice Scalia's understanding of Ring, and long-settled Tennessee law that a sentence cannot be imposed unless embraced by facts actually charged in the indictment.

For the foregoing reasons, this Court should grant Mr. Abdur'Rahman's application for permission to appeal and order further briefing and argument on his claim that his death sentence is unconstitutional under the United States and Tennessee Constitutions because the grand jury did not indict him for any aggravating circumstances.

Respectfully submitted,

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### **VERIFICATION**

I, Bradley A. MacLean, do hereby swear and affirm that the facts contained in the foregoing Petition are true and correct to the best of my knowledge, information and belief.

\_\_\_\_\_  
Bradley A. MacLean

Sworn to and subscribed before me  
this the \_\_\_\_ day of February, 2003.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by hand delivery upon Joseph F. Whalen, Assistant Attorney General, Office of the Tennessee Attorney General, 500 Charlotte Avenue, Nashville, TN 37202-0207, on this the \_\_\_\_\_ day of February, 2003.

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Bradley A. MacLean



**DESIGNATION OF ATTORNEY OF RECORD**  
**FOR MR. ABDUR'RAHMAN**

Mr. Abdur'Rahman designates the following attorneys of record:

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