

No. 16-144

In the Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

BRUCE WESTBROOKS, Warden,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

Herbert H. Slatery III
*Attorney General and Reporter
State of Tennessee*

Andrée S. Blumstein
Solicitor General

Andrew C. Coulam
*Assistant Attorney General
Counsel of Record*
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-1868
andrew.coulam@ag.tn.gov

Counsel for Respondent

CAPITAL CASE

**RESTATEMENT OF THE
QUESTIONS PRESENTED**

I. Whether a Fed. R. Civ. P. 60(b)(6) motion premised on the intervening decisions of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), is *per se* meritless.

II. Whether, under the holdings of *Martinez* and *Trevino*, alleged ineffective assistance of post-conviction counsel may serve to excuse the procedural default of claims of ineffective assistance of direct-appeal counsel.

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JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on November 4, 2015. (Pet. App. at 1a.) The order denying en banc rehearing was filed on March 2, 2016. (Pet. App. at 46a.) Justice Kagan extended the time for filing the petition for writ of certiorari to July 29, 2016. The petitioner filed his petition on July 29, 2016, and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel in his defence.”

Federal habeas corpus proceedings for petitioners in state custody are governed by 28 U.S.C. § 2254, which provides that the writ “shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A).

STATEMENT OF THE CASE

The petitioner entered the home of Patrick Daniels on February 17, 1986, ostensibly to buy drugs from Mr. Daniels. *Abdur'Rahman v. Bell*, 226 F.3d 696, 699 (6th Cir. 2000). Once inside, however, the petitioner, armed with a shotgun, bound Daniels and covered the man's eyes and mouth with duct tape before robbing him of his bank card, money, and other valuables. *Id.* As Mr. Daniels pled for his life, the petitioner retrieved a butcher knife from the kitchen and fatally stabbed the victim six times in the chest. *Id.*

Mr. Daniels, unfortunately, had not been alone. *Abdur'Rahman*, 226 F.3d at 699. His girlfriend, Norma Norman, was also present when the petitioner came calling. *Id.* The petitioner similarly bound Ms. Norman, and, after Daniels became motionless, stabbed her several times in the back before the petitioner's colleague, Harold Miller, pulled the assailant away. *Id.* She lived to testify against the petitioner and to corroborate Mr. Miller, who also testified about the murder at trial. *Id.*; *State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990).

As a result of these crimes, a jury convicted the petitioner of first-degree murder, assault with the intent to commit murder, and armed robbery. *Abdur'Rahman*, 226 F.3d at 698. The jury further found that (1) the petitioner, who had also murdered someone in 1972, was previously convicted of one or more felonies involving the use of violence to the person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was committed while the defendant was engaged in or attempting to engage in first-degree murder, robbery, burglary, or

theft. *Id.* at 698-99. Consequently, the jury imposed the death penalty for the first-degree murder conviction, and petitioner additionally received two consecutive life terms for the other offenses. *Id.* at 698.

This judgment has been reviewed many times over. The petitioner appealed to the Tennessee Supreme Court, which affirmed, and to this Court, which denied the petition for writ of certiorari. *Abdur'Rahman*, 226 F.3d at 700. He then obtained state post-conviction review, but the post-conviction court did not find his claims meritorious. *Id.* The Tennessee Court of Criminal Appeals affirmed. *Id.* The Tennessee Supreme Court and this Court did not find that the petitioner's issues warranted further review. *Id.*

The petitioner then sought and obtained a full measure, and more, of federal review of his convictions and sentences. *Abdur'Rahman*, 226 F.3d at 700. After considering his amended petition for writ of habeas corpus, the United States District Court for the Middle District of Tennessee denied relief in part and granted relief in part, and both parties appealed. *Id.* at 700. The United States Court of Appeals for the Sixth Circuit reversed the partial relief granted by the lower court and otherwise affirmed. *Id.* at 700, 715. In doing so, the Sixth Circuit found that the district court had failed to accord the state courts' decisions proper deference. *Id.* at 702-04. The Sixth Circuit then held that the defendant reasonably had not suffered significant prejudice from his counsel's failure to adequately investigate his background and mental-health history. *Id.* at 708-09. In particular, the Sixth Circuit agreed that some of the mitigating evidence

that might have been presented equally could have supported aggravating circumstances. *Id.*

The petitioner sought both panel rehearing and rehearing en banc of this decision, but the petition was found to be without merit. *Abdur'Rahman*, 226 F.3d at 696. This Court, after initially granting the petitioner's ensuing petition for writ of certiorari, dismissed the petition as improvidently granted. *Abdur'Rahman v. Bell*, 123 S. Ct. 594 (2002). This Court also considered and denied the petitioner's petition for rehearing of that decision. *Id.*

The petitioner filed his first Fed. R. Civ. P. 60(b) motion for relief from the habeas corpus judgment in November 2001. *Abdur'Rahman v. Colson*, 649 F.3d 468, 471 (6th Cir. 2011), *cert. denied*, 133 S. Ct. 30 (2012). After several appeals, the motion was granted, but the district court found, under plenary review, that the petitioner was not entitled to a writ of habeas corpus. *Id.* at 471-72. The Sixth Circuit agreed, holding that the prosecution had not violated *Brady v. Maryland*, 373 U.S. 83 (1963), as the petitioner alleged. *Id.* at 471, 478. This Court denied review on June 25, 2012. *Abdur'Rahman*, 133 S. Ct. at 30.

On March 20, 2012, the Court issued its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), in which it was decided that ineffective assistance of post-conviction counsel at an initial-review collateral proceeding may serve to excuse the procedural default of substantial claims of ineffective assistance of counsel at trial. Nearly a year later, on March 12, 2013, the petitioner filed the Fed. R. Civ. P. 60(b)(6) motion at issue with the district court and contended that the holding in *Martinez* entitled him to a merits review of

certain claims that had been dismissed under the procedural-default doctrine. (Resp. App. 2 at 104-54.) On July 16, 2013, the district court ordered him to specify the defaulted claims for which he sought relief. (Resp. App. 3 at 156.)

The petitioner responded on July 23, 2013. (Resp. App. 4 at 157-62.) He specified that he wished for a merits review of his defaulted cumulative-error claim, which sought to aggregate the alleged prejudice asserted in his prosecutorial-misconduct claims in his amended petition's paragraphs D1-D8 with the alleged prejudice asserted in his trial-counsel-ineffectiveness claims in paragraphs E2a, E2b, E2c, E2e, and E2g1. (Resp. App. 4 at 158-60.) None of these trial-counsel-ineffectiveness claims involved failure to preserve cumulative error as an appellate issue. (Resp. App. 1 at 95-97, 98-99, 100.)¹ Nor did the petitioner list ineffective assistance of direct-appeal counsel, which he included in his amended petition in paragraph F, as a ground for the cumulative-error claim. (Resp. App. 4 at 158-60.)

The petitioner additionally specified that “[f]or purposes of the Motion For Relief From Judgment, Abu-Ali Abdur’Rahman maintains that he is entitled to relief from judgment on his claims ¶¶C4(4), and ineffectiveness Claims ¶¶E2g and F, *as they embrace the substantive jury instruction error identified in Amended Petition ¶C4(4).*” (Resp. App. 4 at 160-61 (emphasis added).) Claim C4(4) alleged that “[t]he trial

¹ In fact, the amended petition does not contain a claim that trial counsel was ineffective for failing to properly preserve cumulative error as an appellate issue. (Resp. App. 1 at 95-100.)

court erred by failing to instruct the jury that testimony of [an] accomplice must be corroborated by independent evidence.” (Resp. App. 1 at 53.)

The petitioner identified no further claims at issue in his Rule 60(b)(6) motion. *Abdur’Rahman v. Carpenter*, 805 F.3d 710, 712 (6th Cir. 2015) (“Abdur’Rahman responded by stating that he was presenting two claims: (1) cumulative error affecting his sentencing arising from prosecutorial misconduct and ineffective assistance of counsel; and (2) an improper jury instruction regarding accomplice testimony and trial counsel’s and appellate counsel’s failure to challenge the instruction.”); (Resp. App. 4 at 157-62). The district court denied the motion on the ground that *Martinez’s* holding did not apply to Tennessee cases. *Id.*

After the district court’s ruling, the Sixth Circuit issued its decision in *Sutton v. Carpenter*, 745 F.3d 787, 789 (6th Cir. 2014), in which it held that *Martinez* applies to Tennessee cases. *Abdur’Rahman*, 805 F.3d at 712. The petitioner filed a motion for remand, which the respondent opposed because the Rule 60(b)(6) motion was without merit under the equitable, multi-factored approach followed in *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741 (6th Cir. 2013). *Id.*

The Sixth Circuit affirmed the district court on alternative grounds and denied the motion for remand. *Abdur’Rahman*, 805 F.3d at 713-17. The Sixth Circuit noted that *Sutton* invalidated the district court’s reasoning for denying the Rule 60(b)(6) motion. *Id.* at 712, 713. On the other hand, the Sixth Circuit held that under well-established authority it could affirm the lower court on any ground supported by the record.

Id. at 713-14 (citing *United States v. Phillips*, 752 F.3d 1047, 1049 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 464 (2014)).

To affirm, the Sixth Circuit considered several equitable factors, including the application of *Martinez* to the claims at issue, the non-extraordinary nature of *Martinez* itself, and the absence of other extraordinary circumstances. *Abdur'Rahman*, 805 F.3d at 714. For example, the cumulative-error claim at issue, the court held, was not one of ineffective assistance and, therefore, its default could not be excused under *Martinez*. *Abdur'Rahman*, 805 F.3d at 714. The court also noted that to the extent the petitioner was arguing that his direct-appeal counsel was ineffective for failing to preserve the cumulative-error claim, such a claim did not fall under the *Martinez* holding either. *Id.* Furthermore, the claims underlying cumulative error—prosecutorial misconduct and ineffective assistance—either did not fall under *Martinez* (e.g., prosecutorial misconduct), or had been fully adjudicated so that there was no default to excuse under *Martinez*, or both. *Id.* at 714-15.

Regarding the accomplice-jury-instruction claim, the Sixth Circuit again held that the claim was not one of ineffective assistance; therefore, *Martinez* could not serve as a basis to excuse any theoretical default. *Abdur'Rahman*, 805 F.3d at 716. The court further noted that any related ineffective-assistance claims were not substantial because the surviving victim's testimony, as well as physical evidence, easily corroborated the accomplice's testimony, and Tennessee law required that there be only minimal corroboration. *Id.* at 716. Therefore, alleged default of

an ineffective-assistance claim in connection with the missing accomplice-corroboration jury instruction could not be excused under *Martinez*. *Id.*

The Sixth Circuit concluded that the petitioner had not established any extraordinary circumstances necessary to clear the high Rule 60(b)(6) bar for relief in part because *Martinez* itself could not aid the petitioner. *Abdur'Rahman*, 805 F.3d at 714. Accordingly, the court implicitly found that there was no abuse of discretion below and affirmed the denial of the petitioner's motion. *Id.* at 712-13, 717. The petitioner sought a rehearing en banc, but his petition was denied. (Pet.'s App. at 46a-47a.)

REASONS FOR DENYING THE PETITION

This Court's review is properly reserved for a case raising important questions of federal law actually implicated by the case itself. This petition presents no such question. The petitioner first posits that the federal circuits are split as to whether *Martinez* categorically fails to provide sufficient grounds for relief under Fed. R. Civ. P. 60(b)(6). Even if that assertion were true, it is of no import in this particular case because the Sixth Circuit has never held that Rule 60(b)(6) relief is categorically unavailable where *Martinez* is the basis for the motion. To the contrary, the Sixth Circuit follows a multi-factored equitable approach to analyze entitlement to relief under the rule. Consequently, if there were a split, the petitioner received the beneficial side of it, and the case does not serve as a proper vehicle for the question.

The petitioner's second question is similarly inappropriate under the procedural history of this case.

He argues that his cumulative-error claim—which he reframed on appeal as ineffective assistance of direct-appeal counsel for failure to properly preserve cumulative error as an issue—is meritorious and that it is important to decide whether *Martinez*'s holding applies to defaulted appellate-counsel-ineffectiveness claims. But his Rule 60(b)(6) filings in the district court did not assert that *Martinez* should excuse the default of a claim that his direct-appeal counsel was ineffective for failing to preserve a cumulative-error claim.

In the end, this case centers on whether the denial of the Rule 60(b)(6) motion was proper in light of the grounds asserted in the motion itself. The petitioner's legal question is an academic exercise divorced from the reality of this case. That question, like the one before it, does not warrant this Court's discretionary review.

I. The Petition Asks the Court to Overrule a Position the Sixth Circuit Did Not Take.

The petitioner alleges that a circuit split exists as to whether *Martinez* can ever serve as a basis for a meritorious Fed. R. Civ. P. 60(b)(6) motion. (Pet. at 18-22.)² He further claims that the Sixth Circuit belongs

² The petitioner's contention does not appear to be entirely accurate. As is discussed in detail, *infra*, the Sixth Circuit does not categorically reject *Martinez* as a basis for a Rule 60(b)(6) motion. *McGuire*, 738 F.3d at 750. Nor does the Fourth Circuit. *Moses v. Joyner*, 815 F.3d 163 (4th Cir. 2016) (quoting with approval the Third Circuit in *Cox v. Horn*, 757 F.3d 113, 124 (3rd Cir. 2014), that “the jurisprudential change rendered by *Martinez*, without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief.”)

to the camp that allegedly believes that *Martinez* categorically can never give rise to Rule 60(b)(6) relief. (Pet. at 2, 18, 19, 21.) As a result, the petitioner reasons, this case is similarly situated to the *Buck v. Stephens* matter, in which this Court has agreed to review the Fifth Circuit's decision denying Mr. Buck a certificate of appealability on a Rule 60(b)(6) motion premised upon *Martinez*. (Pet. at 18-22.) The petitioner asks that the Court hold his petition for possible grant while *Buck* is being decided. (Pet. at 2, 21, 35.)

The petitioner's argument fails for two reasons. First, if there is a categorical/non-categorical split among the circuits, the Sixth Circuit has steadfastly adhered to the position the petitioner desires: *Martinez* can serve as the basis for a meritorious Rule 60(b)(6) motion if a multi-factored equitable analysis favors relief. As a result, this case is a poor vehicle to resolve the alleged circuit split because the resulting decision would not alter the outcome of the petitioner's case. Additionally, this matter is readily distinguishable from *Buck* where the applicability of the claim in question to the *Martinez* holding was not in question and because the petitioner received what Mr. Buck did not, a certificate of appealability. Accordingly, the Court should not grant review here.

The Fifth Circuit, moreover, has not yet decided whether it should analyze Rule 60(b)(6) motions in habeas corpus proceedings under an equitable multi-factored approach. *Buck v. Stephens*, 623 Fed. Appx. 668, 672 & n.2 (5th Cir. 2015) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)).

And even if one were to agree that there were some sort of categorical/non-categorical circuit split, the Sixth Circuit does not belong to the alleged categorical camp. The seminal Sixth Circuit decision regarding Rule 60(b)(6) and *Martinez* is *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741 (6th Cir. 2013). In that opinion, the Sixth Circuit held that deciding such Rule 60(b)(6) motions, which require extraordinary circumstances to entitle the movant to relief, is a “case-by-case inquiry” that involves the intensive balancing of “numerous factors, including the competing policies of the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” *Id.* at 750. The court then went on to consider at least five equitable factors before affirming the denial of the Rule 60(b)(6) motion. *Id.* at 749-59.

The Sixth Circuit has not veered from *McGuire*’s equitable, multi-factored approach. In *Wright v. Warden, Riverbend Maximum Sec. Inst.*, for instance, the court held that “[the movant’s Rule 60(b)(6)] motion fails because *Martinez* and *Trevino* are not an extraordinary circumstance requiring Rule 60(b)(6) relief . . . and the other equitable arguments that he advances in support of his motion are not compelling.” 793 F.3d 670, 671 (6th Cir. 2015). The court further quoted *McGuire*’s numerous-factors language with approval in *West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015), wherein another Tennessee capital petitioner sought relief under Rule 60(b)(6) and *Martinez*, but was denied after thorough analysis.

Most importantly, the intermediate court in this case, after citing *McGuire*, articulated several considerations which led it to affirm the denial of the

petitioner's Rule 60(b)(6) motion. *Abdur'Rahman*, 805 F.3d at 712-13, 714. These factors included, *inter alia*, the application of *Martinez* to the claims at issue, the non-extraordinary nature of *Martinez* itself, and the absence of other extraordinary circumstances. *Id.* at 714. There is simply no basis for the petitioner's assertion that the Sixth Circuit espouses the categorical rejection of any Rule 60(b)(6) motion based on *Martinez*.

The petitioner, however, cites *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2015), for the proposition that the Sixth Circuit belongs in the alleged categorical camp. (Pet. at 18-19.) But the Sixth Circuit there held that the Rule 60(b)(6) motion in question contained new post-judgment claims for relief and, therefore, constituted an impermissible successive habeas corpus application, not a true Rule 60(b)(6) motion. *Id.* at 322-25. The court then found that the motion did not meet the successive-application requirements under 28 U.S.C. § 2244(b)(2) in part because *Martinez* was not a new rule of constitutional law. *Id.* at 325-26. This holding was undisputedly correct: "This is but one of the differences between a constitutional ruling and the equitable ruling in this case." *Martinez*, 132 S. Ct. at 1319.

This case would serve as a poor vehicle to explore the alleged circuit split. Of the categorical/non-categorical alleged camps, the one more favorable to the petitioner would be the non-categorical camp to which the Sixth Circuit belongs. The petitioner received the more beneficial review of the Rule 60(b)(6) issue, as the categorical approach would have resulted in the denial of his motion without much ado. No

matter which way the Court were to rule on the question, therefore, the result would not change: the petitioner would not be entitled to relief. His petition should be denied for this reason.

Last, this case is readily distinguishable from the *Buck* matter currently under consideration by the Court. In *Buck*, the applicability of *Martinez* to the defaulted claim at issue was not in question: the defaulted claim squarely contended that the petitioner's trial counsel was constitutionally ineffective. *Buck*, 623 Fed. Appx. at 671. Nor did the Fifth Circuit appear to dispute that the claim was substantial for *Martinez* purposes since the State of Texas had conceded that trial counsel had committed constitutional error and at one point had voluntarily offered Mr. Buck relief. *Id.* at 673. Rather, the Fifth Circuit focused on whether any reasonable jurist would disagree that the claim was extraordinary, rather than merely substantial. *Id.* 673-74. Accordingly, Mr. Buck seeks review of the denial of his certificate of appealability.

By contrast, the Sixth Circuit here correctly noted that *Martinez*, even under the lower plenary-review standard, would not aid the petitioner because the claims at issue did not allege ineffective assistance of counsel, had not been dismissed under the procedural-default doctrine, and/or were insubstantial. *Abdur'Rahman*, 805 F.3d at 714-17. That is, the basis for the Rule 60(b)(6) motion was *Martinez*, and *Martinez* was found to be inapplicable under the circumstances. *Id.* This is a far different situation from the one presented by *Buck*. Further, the petitioner here *received* a certificate of appealability

and obtained full review by the court of appeals—the very thing that Mr. Buck complains he was denied. Accordingly, the Court should not hold this petition for *Buck*'s disposition, but should deny certiorari.

II. The Petition Improperly Asks This Court to Reverse the Lower Court's Rule 60(b)(6) Decision on a Claim Not at Issue in the Rule 60(b)(6) Motion Itself.

The petitioner's second question fares no better than his first. At the question's foundation is his assertion that his direct-appeal counsel was ineffective for failing to preserve cumulative error as an issue. (Pet. at 34.) The Sixth Circuit, he avers, unfairly refused to provide him with Fed. R. Civ. P. 60(b)(6) relief under *Martinez* because the court, among others, has followed *Martinez*'s express language that the opinion's holding pertains only to substantial claims of ineffective assistance of counsel at trial. (Pet. at 22, 24, 26-31).³ According to the petitioner, on the other hand,

³The petitioner correctly states the Sixth Circuit's general position on *Martinez* and appellate-counsel claims. *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (holding that *Martinez* does not apply to appellate-counsel-ineffectiveness claims), *cert. denied*, 135 S. Ct. 1545 (2015). The Sixth Circuit's reading of *Martinez*, however, is more than reasonable given this Court's own explanation of the bounds of its ruling in *Martinez*. "The rule of *Coleman* governs in all but the limited circumstances here." *Martinez*, 132 S. Ct. at 1320. "*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial." *Id.* at 1319. "[The holding here] does not extend to attorney errors in any

logic dictates that the *Martinez* holding be expanded to encompass claims of ineffective assistance of direct-appeal counsel such that the direct-appeal claim currently in question may be excused and receive a merits review in federal court. (Pet. at 23-31, 34.) He also notes that the Ninth Circuit has expanded *Martinez* in such a fashion, thereby causing a circuit split. (Pet. at 26.)

The primary problem with his argument is that it rests upon a faulty assumption about the claim at issue. His petition regards, specifically, his filing of a Fed. R. Civ. P. 60(b)(6) motion in the district court, the bases for relief presented in that motion, and the propriety of the denial of that motion. The petition presents as its *pièce de résistance* the alleged strength of a single claim—ineffective assistance of direct-appeal

proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance *at trial*” *Id.* at 1320 (emphasis added). The Court further stated:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a *substantial claim of ineffective assistance at trial* if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. (emphasis added). The subsequent *Trevino* decision did not expand upon the trial-counsel-ineffectiveness limitation: “where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of *ineffective assistance of trial counsel* on direct appeal, our holding in *Martinez* applies. . . .” *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (emphasis added).

counsel for failure to preserve cumulative error as an issue—whose default, he argues, should be excused under *Martinez* after receiving relief from judgment under Rule 60(b)(6). (Pet. at 33-34.)

The problem, however, is that *he never asserted in his Rule 60(b)(6) motion that he sought a merits review of such a claim*. Nowhere in the motion did he mention a claim that direct-appeal counsel was ineffective for failing to preserve cumulative error as an issue. (Resp. App. 2 at 104-54.) The district court even gave him a second opportunity to clarify which defaulted claims he wanted excused under *Martinez*. (Resp. App. 3 at 156.) Significantly, the petitioner, in his clarification, made no mention of the claim he now advances. (Resp. App. 4 at 157-62.) Rather, he specified that the defaulted claim was cumulative error itself. (Resp. App. 4 at 158-60.) As the Court is well aware, there is a significant difference between an ineffective-assistance claim and its underlying claim. See *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986) (holding that the additional rigorous *Strickland* standards make ineffective-assistance claims separate and distinct, whatever the merits of the underlying claim that the allegedly ineffective counsel failed to raise).

Further, it was not as if appellate-counsel performance was absent from the petitioner's mind at the time he made his filings in the district court: he asserted an entirely different claim of ineffective assistance of direct-appeal counsel in the Rule 60(b)(6) motion. He averred there that “[*Martinez's*] equitable principles apply to Abdur'Rahman's cumulative error claim as well as his claim that appellate counsel was ineffective for failing to challenge the defective jury

instructions regarding accomplice liability.” (Resp. App. 2 at 111.) In his subsequent clarification of the claims at issue, he asserted that “[f]or purposes of the Motion For Relief From Judgment, Abu-Ali Abdur’Rahman maintains that he is entitled to relief from judgment on his claims ¶¶C4(4), and ineffectiveness Claims ¶¶E2g and F, *as they embrace the substantive jury instruction error identified in Amended Petition ¶C4(4).*” (Resp. App. 4 at 160-61 (emphasis added).) Claim C4(4) alleged that “[t]he trial court erred by failing to instruct the jury that testimony of [an] accomplice must be corroborated by independent evidence.” (Resp. App. 1 at 53.) Paragraph F of his amended petition alleged ineffective assistance of direct-appeal counsel. (Resp. App. 1 at 101.) The Rule 60(b)(6) motion, in other words, specifically excluded from consideration any ineffective-appellate-counsel claims not related to the accomplice-corroboration jury instruction issue. Petitioner cannot credibly contend that he was entitled to relief from judgment under Fed. R. Civ. P. 60(b)(6) to receive plenary review of a claim he never included in the Rule 60(b)(6) motion. The Court should deny the petition for writ of certiorari on this basis.

The petitioner’s secondary problem is that, while quoting extensively from their dissents, he seeks to overrule the 2000 and 2011 Sixth Circuit decisions against him under the flimsy guise of cumulative error. He quotes, for example, the 2011 dissent, which argued that the 2000 decision “was wrong then and it has aged poorly.” (Pet. at 6.) But he lost the 2000 appeal, and this Court notably decided that the 2000 opinion should stand. *Abdur’Rahman*, 123 S. Ct. 594; *Abdur’Rahman*, 226 F.3d at 708-09. He should not be able to relitigate

claims fully adjudicated against him 16 years ago in federal court.

There was a reason, moreover, why the petitioner's appeals failed, and it had nothing to do with being "hamstrung by a series of procedural rulings": his issues were simply not meritorious. One must not forget that the mitigation evidence his trial counsel allegedly should have presented also would have contained a description of the petitioner's long history of violent character traits, among other problematic information. *Abdur'Rahman*, 226 F.3d at 708-09. Regarding the *Brady* claims, the failure to disclose Mr. Miller's statement was not prejudicial because the statement contained information of which the defense was already fully aware. *Abdur'Rahman*, 649 F.3d at 474-75. The failure to disclose a detective's report regarding the petitioner's post-arrest behavior similarly was without significance because, again, the petitioner was aware of his own conduct, and the conduct in question—his banging his head against the wall—likely indicated anger and guilt over his arrest, not the display of mental illness. *Id.* at 476, 477-78.

Balanced against this minimal or non-existent prejudice were many damning facts that sealed his convictions and sentences. The petitioner was a part of a paramilitary group and specifically targeted Mr. Daniels. *Abdur'Rahman*, 226 F.3d at 699. The jury heard how the petitioner bound Daniels with duct tape in Daniels' own home and how he viciously murdered Daniels with the man's own kitchen knife while the victim pled for his and his girlfriend's lives. *Id.* The petitioner also viciously stabbed the girlfriend, Ms. Norman, multiple times before he was pulled away. *Id.*

The jury heard how the petitioner stole money, a bank card, and other valuables from Daniels, thereby calling into question any noble intentions under which the petitioner purportedly acted. *Id.* On top of all of these facts, the jurors also heard that this was not the first time that the petitioner had ended a man's life and that this was not his first offense involving a knife. *Id.* The trial court, the state post-conviction court, the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court, the district court (mostly), and the Sixth Circuit rejected the petitioner's arguments for a reason, and that reason was that his issues did not entitle him to relief. Likewise, he is not entitled to further review here.

CONCLUSION

For his first question, the petitioner assigns error to the Sixth Circuit for a position which the intermediate court did not take. For his second question, he argues that he was entitled to relief from judgment under Fed. R. Civ. P. 60(b)(6) to receive plenary review of a claim he never asserted or even referenced in the Rule 60(b)(6) motion. The petition for writ of certiorari should be denied.

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Andrew C. Coulam
Assistant Attorney General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-1868
andrew.coulam@ag.tn.gov

Counsel for Respondent

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APPENDIX 1

BRADLEY A. MACLEAN
FARRIS, WARFIELD & KANADAY
Nineteenth Floor, SunTrust Center
424 Church Street
Nashville, Tennessee 37219
Telephone: (615) 244-5200
Facsimile: (615) 726-3185

WILLIAM P. REDICK, JR.
Attorney at Law
P.O. Box 187
6750 Old Hickory Blvd.
Whites Creek, TN 37189
Telephone: (615) 876-6670

Attorneys for Petitioner
ABU-ALI ABDUR'RAHMAN

**IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

**No. 3:96-0380
Judge Campbell**

[Filed December 2, 1996]

ABU-ALI ABDUR'RAHMAN)
 formerly known as James Jones)
)
 Petitioner,)
)
v.)

RICKY BELL, Warden)
)
 Respondent.)
)

**AMENDED PETITION FOR WRIT OF HABEAS
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**AMENDED PETITION FOR WRIT OF
HABEAS CORPUS IN A CAPITAL CASE**

Under Article I § 9 and Article in of the United States Constitution; the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution; 28 U.S.C. § 2241 et seq. (including 28 U.S.C. § 2254); 21 U.S.C. § 848; 18 U.S.C. § 3006A; and all other applicable law, Petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones, Jr.) respectfully submits this Amended Petition for Writ of Habeas Corpus. In support of this Petition, Petitioner states as follows:

I. BACKGROUND.

1. Petitioner is incarcerated at Riverbend Maximum Security Institution in Nashville, Davidson County, Tennessee. Petitioner's social security number is [REDACTED]-7416. Petitioner's date of birth is October 15, 19[REDACTED]. Petitioner's inmate identification number is 117262. Respondent, Ricky Bell, is the Warden at Riverbend Maximum Security Institution.

2. Petitioner was convicted and sentenced pursuant to a judgment entered by the Criminal Court of Davidson County, Tennessee. Petitioner was convicted on July 14, 1987, and he was sentenced to death on July 15, 1987. Judgment was rendered on October 23, 1987, by the Honorable Walter C. Kurtz, Judge of the Davidson County Fifth Circuit Court, at Nashville, Tennessee. This judgment overruled Petitioner's Motion for a new trial, motion for a judgment of acquittal, and motion for correction or reduction of sentence of death.

3. Petitioner was convicted on the following Counts and Verdicts of the jury:

Count One:

“James Lee Jones, Jr., and Harold Devalle Miller ... on the ___ day of February, 1986, ... with force and arms in the county aforesaid, unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, or in the perpetration of or attempt to perpetrate a felony, to wit, robbery, did make an assault upon the body of one Patrick Daniels. And they, the said James Lee Jones, Jr., and Harold Devalle Miller, then and there unlawfully, feloniously, willfully, deliberately, premeditatedly, and out of malice aforethought, or in the perpetration of or attempt to perpetrate a felony, to wit, robbery or murder in the first degree, did kill and murder him, the said Patrick Daniels.”

Verdict on Count One:

“We, the jury, find the defendant, James Lee Jones, Jr., guilty of murder in the first degree by premeditation and while in the perpetration of a felony.”

Count Two:

“James Lee Jones, Jr., and Harold Devalle Miller ... on the ___ day of February, 1985, ... with force and arms, in the county aforesaid, unlawfully feloniously, willfully, deliberately, premeditatedly, and maliciously, did make an assault upon the body of one Norma Jean Norman, with the unlawful and felonious intent

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then and there, she the said Norma Jean Norman, unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought to kill, and upon her to commit the crime and felony of murder in the first degree with bodily injury.”

Verdict on Count Two:

“We, the jury, find the defendant James Lee Jones, Jr., guilty of assault with intent to commit murder in the first degree involving bodily injury.”

Count Three:

“James Lee Jones, Jr., and Harold Devalle Miller ... on the ___ day of February, 1986, with force and arms in the county aforesaid, unlawfully and feloniously did make an assault upon the body of one Patrick Daniels, and him the said Patrick Daniels then and there unlawfully and feloniously, put in fear and danger of his life, and then and there, unlawfully, feloniously, and violently, did steal, take and carry away from the person and against the will of the said Patrick Daniels, certain personal property, to wit, approximately three hundred dollars in good and lawful United States of America currency, and one Anytime Teller First American Bank card, a better description of which being to the grand jurors unknown, of the value of over three hundred dollars, or in the possession of, the property of, the said Patrick Daniels.”

Verdict on Count Three:

“We, the jury, find the defendant, James Lee Jones, Jr., guilty of robbery accomplished by the use of deadly weapon.”

4. Petitioner was sentenced to death upon the conviction for first degree murder, Count One of the Indictment; life imprisonment upon the conviction for assault with the intent to commit first-degree murder with bodily injury, Count Two of the Indictment, to be served consecutively to the death sentence; and life imprisonment upon the conviction for armed robbery, Count Three of the Indictment, to be served consecutively to the life sentence imposed under Count Two of the Indictment.

5. Petitioner pled not guilty to all Counts. Petitioner was tried by a jury.

6. Petitioner did not testify at the penalty stage of the trial. Petitioner did testify at the sentencing stage of the trial.

7. Petitioner filed a direct appeal of his conviction and sentence to the Tennessee Supreme Court. In that appeal, Petitioner raised the following grounds, which Petitioner incorporates herein by reference:

- (1) The selection and composition of the jury which convicted Petitioner deprived him of rights secured by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections Six, Eight and Nine, of the Constitution of the State of Tennessee.

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- (a) The exclusion of jurors opposed to the imposition of the death penalty on religious grounds for cause violated Article I, Sections Six and Eight of the Constitution of the State of Tennessee and the Fifth and Fourteenth Amendments to the United States Constitution.
 - (b) The exclusion of jurors for cause based on their opposition to the imposition of the death penalty, coupled with the State's exercise of its peremptory challenges deprived Petitioner of a fair and impartial jury in violation of Article I, Sections Six and Eight of the constitution of the State of Tennessee and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.
 - (c) The exercise by the State of its peremptory challenges to exclude Black persons from the jury deprived defendant of rights under Article I, Sections Six and Eight of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.
- (2) The proof introduced in Petitioner's case is insufficient to sustain the imposition of the death penalty and, consequently, the death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Eight

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and Sixteen of the Constitution of the State of Tennessee.

- (a) There was no proof from which the jury could conclude beyond a reasonable doubt that defendant committed robbery and his conviction therefore violates Article I, Sections Eight and Sixteen of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and, further, cannot sustain the imposition of the death penalty.
- (b) The proof introduced is insufficient to establish that the murder of Patrick Daniels was especially heinous, atrocious or cruel and, consequently, the predication of the imposition of the death penalty thereon is in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Eight and Sixteen of the Constitution of the State of Tennessee.
- (c) The predication of Petitioner's first degree murder conviction and resulting imposition of the death penalty solely on the testimony of his co-defendant is contrary to the record, fundamentally unfair and violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections

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Eight, Nine and Sixteen of the constitution of the State of Tennessee.

- (d) The trial court erred in overruling Petitioner's objections to questions asked of Norma Norman and Robert Jordan, which questions were irrelevant to any issue before the court and inflammatory thereby depriving Petitioner of a fair trial.
- (3) The conduct of the punishment phase of the trial deprived Petitioner of due process of law and a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Eight of the Constitution of the State of Tennessee.
 - (a) The procedure utilized at the punishment phase for the presentation of the State's proof was fundamentally unfair to Petitioner by effectively requiring him to testify against himself inconsistent with his defense to the merits.
 - (4) The sentences given Petitioner and imposition of the death penalty in this case are void and constitute cruel and inhuman treatment in violation of Article I, Section Sixteen of the Constitution of the State of Tennessee and the Eighth and Fourteenth Amendments to the United States Constitution and deprives Petitioner of due process of law and a fair trial in violation of

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Article I, Section Eight of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

- (a) The trial court erred in not declaring a mistrial when the State passed copies of previous indictment to the jury after assuring the Court they would not be passed, and allowing the State's witness to testify as to the facts of Petitioner's prior convictions, thereby depriving Petitioner of due process of law and a fair trial in violation of Article I, Section Eight of the Constitution of the State of Tennessee and the Fifth and Fourteenth Amendments to the United States Constitution.
- (b) The action of the trial court in failing to make Petitioner's death sentence consecutive to his life sentences renders the life sentences void.
- (c) Petitioner's trial counsel and the trial court erroneously failed to introduce and/or consider proof of Petitioner's mental capacity as a pre-requisite to the punishment phase and subsequent imposition of the death penalty, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section Sixteen of the Tennessee Constitution.

- (d) As applied to the facts of this case, the imposition of the death penalty constitutes a deprivation of due process of law, equal protection of law and cruel and inhuman treatment in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Eight and Sixteen of the Tennessee Constitution and, further, is disproportionate to the sentence imposed in similar cases.

8. The Tennessee Supreme Court denied the appeal pursuant to an opinion issued April 2, 1990. See, 789 S.W.2d 545 (Tenn. 1990), cert. denied, 498 U.S. 908 (1990). According to its opinion, the Tennessee Supreme Court reviewed the trial record “in its entirety.” 789 S.W.2d at 552. A copy of the opinion of the Tennessee Supreme Court is attached hereto as Exhibit A.

9. Petitioner then filed a petition for post-conviction relief with the Criminal Court of Davidson County, Tennessee. The grounds for post-conviction relief were set forth in the Petitioner, a copy of which is attached hereto as Exhibit B and the contents of which are incorporated herein by reference.

10. An evidentiary hearing on the Petition for post-conviction relief was held on May 10-12, 1993. The petition was denied on August 26, 1993, pursuant to an Order of the trial court, a copy of which is attached hereto as Exhibit C. In its opinion the trial court stated that it had “carefully considered all [] matters raised in the first amended petition for post-conviction relief and

the extensive post-trial brief filed by the Petitioner and finds them to be without merit or previously determined on direct appeal.” Id. at 28.

11. The denial of the petition for post-conviction relief was appealed to the Tennessee Court of Criminal Appeals. On February 23, 1995, the Tennessee Court of Criminal Appeals rendered judgment in an unpublished opinion, affirming the denial of relief. James Lee Jones, Jr. v. State of Tennessee, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Cr.App. Nashville, Feb. 23, 1995). A copy of the appellate court’s opinion is attached hereto as Exhibit D. The grounds raised in the post-conviction appeal are outlined in the table of contents to Petitioner’s brief on appeal, a copy of which is attached hereto as Exhibit E, and the contents of which are incorporated herein by reference.

12. The United States Supreme Court denied a petition for writ of certiorari. Jones v. State, ___ U.S. ___ (Feb. ___, 1996).

13. In the early stages of the case, Petitioner was represented by Mr. Neal McAlpin. On information and belief, Petitioner alleges that Mr. McAlpin’s law license was subsequently suspended, and Mr. McAlpin is not currently a practicing attorney.

14. Petitioner’s trial counsel were Mr. Lionel Barrett and Mr. Sumpter Camp of the Nashville, Tennessee bar. Petitioner’s counsel on the direct appeal to the Tennessee Supreme Court was Mr. Richard H. Dinkins, of the Nashville, Tennessee bar.

15. Petitioner’s counsel in his petition for post-conviction relief were Mr. Richard H. Dinkins, Mr.

William Shulman, and Mr. Paul Morrow of the Nashville, Tennessee bar.

16. Petitioner's counsel are investigating this case and reserve the right to further amend this Petition as additional information becomes available.

II. NATURE OF THE CASE.

Petitioner is mentally ill individual. He has suffered from a lifetime of severe abuse. He was physically abused by his father to an unimaginable extent. He was abused by other inmates while incarcerated for fourteen years in the federal system. Petitioner has a lengthy history of psychiatric problems. He has received a variety of psychiatric diagnoses, and at various times he has been administered powerful psychotropic medications.

Because of Petitioner's mental illness and history of abuse, he is unable to cope with the demands and stresses of life in society as normal people are able to cope. Persons with the type of mental illness that Petitioner suffers from, when faced with stress, will be overcome by extreme, primitive forms of emotion and may lapse into dissociative or psychotic episodes.

In 1986 Petitioner was transferred to Nashville after having been separated from his bother, who was his only family contact. This separation severed all ties between Petitioner and his family. Petitioner lacked skills. He was placed in an environment where he had no roots, and where he had no meaningful financial or emotional support.

Petitioner joined and came under the influence of a religious organization called the Southeastern Gospel

Ministry (“SEGM”), and he joined a small paramilitary group within the SEGM. Because of Petitioner’s mental condition, he was vulnerable to the domination of the leaders of this group. The states purpose of the group was to “clean up” the Black neighborhoods of drugs and other evil elements. The members of this group included Alan Boyd, William Beard, and Petitioner’s co-defendants DuValle Miller.

The SEGM determined that it would “clean up” the Black neighborhoods by attempting to “scare” members of the community who engaged in the disfavored activities such as dealing drugs. The victim in this case, Patrick Daniels, was identified as a drug dealer. The SEGM instigated the mission to Daniels’ apartment which resulted in the killing and other occurrences which are the subject of the criminal action brought against Petitioner.

On the evening of February 17, 1986, Petitioner and Miller went to the home of Daniels for the purpose of carrying out the mission instigated by the SEGM. Petitioner carried an unloaded shotgun, and Miller carried an unloaded pistol. They did not carry knives. According to Miller’s pre-trial statement to the District Attorney, which he contradicted in his trial testimony, they intended for the mission to be non-violent. They merely wanted to scare Daniels because he was a drug dealer and was therefore a bad influence in the Black community. Miller also brought with him a roll of duct tape.

When Petitioner and Miller arrived at Daniels’ place, Daniels was there along with his girlfriend, Norma Norman, and Norman’s two children. After Petitioner and Miller entered the apartment, a number

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of events occurred which interfered with the original plan. First, Petitioner noticed the children, which caused extreme stress to Petitioner largely because of Petitioner's own history of childhood abuse. Secondly, Miller "froze," and it appeared to Petitioner that Miller was not able to carry through with the plan. Petitioner felt himself to be dangerously alone and abandoned. Thirdly, dogs in the apartment began to bark, and Miller threatened the dogs. Petitioner's ability to perceive, assimilate, and adapt to the events as they unfolded was impaired by Petitioner's mental illness and his traumatic life history. Given Petitioner's mental state, these events caused Petitioner to experience a peculiar and overwhelming distress.

Based on a careful review of the various statements given by the witnesses in this case, it is not certain exactly what transpired in the apartment after the dogs began to bark. The different versions of what happened given by Miller and Norman in their statement to the police and in their testimony at Petitioner's trial and in other hearings are inconsistent and contradictory on a number of critical issues.

The evidence indicates that Petitioner tied up Daniels and Norman with the duct tape brought by Miller, and that both Daniels and Norman were stabbed with a kitchen knife. Daniels died from the stab wounds; Norman survived.

Petitioner was arrested on February 19, 1986, at his work. Although he had an opportunity, Petitioner made no attempt to flee or avoid the authorities. Miller, who worked at the same place, fled Nashville later that day. William Beard, one of the members of the SEGM, gave Miller some money to enable him to leave Nashville.

Miller stayed on the run until he was arrested in his home town in Pennsylvania more than a year later, in March, 1987. During the early months following Miller's departure from Nashville, the SEGM provided some financial support of Miller's wife until she moved to Pennsylvania to be with Miller. Miller has said that he feared the SEGM might take his life.

After Miller was arrested, he worked out an agreement with the prosecution. Under the agreement, the prosecution would not seek the death penalty against him in exchange for his testimony against Petitioner.

Miller was not tried with Petitioner. Instead, pursuant to his agreement with the prosecution, months after Petitioner's trial Miller pled guilty to second degree murder, and the prosecution did not seek the death penalty against him. Miller testified for the prosecution against the Petitioner in Petitioner's July, 1987, death penalty trial.

As more specifically set out in the Petition, and as will be shown in the hearing on this Petition, there was a consistent and pervasive pattern of constitutional error in the prosecution and defense of this case, which caused an unreliable result and compromised the integrity of the process in both the guilt and sentencing stages of Petitioner's death penalty trial.

The trial and appellate courts committed numerous legal errors. Petitioner was prosecuted pursuant to a death penalty sentencing statute and death penalty appeal statute that was, in specific respects, facially unconstitutional or applied in an unconstitutional way. The indictment, upon which the prosecution was based,

was defective. The trial court allowed a defective and incomplete jury selection process, which required defense counsel to use peremptory challenges to strike jurors who were incompetent to sit, allowed incompetent jurors to sit on this case, and allowed competent jurors to be stricken from this case for unconstitutional reason. The trial court allowed charges in the indictment and aggravating circumstances at the sentencing stage to go to the jury, on which Petitioner was found guilty by the jury, but for which the evidence was insufficient. The Court erroneously instructed the jury in various ways at both the guilt stage and the sentencing stage of this trial in violation of the Constitution and to the Petitioner's prejudice. The trial court unconstitutionally limited the defense proof and allowed aggravating circumstances to be improperly applied to Petitioner in the sentencing stage of the trial. On appeal of this case Petitioner was limited to an inadequate proportionality review and appeal process in general, both on direct appeal from trial and on post-conviction review, though an adequate review is legally required by state statute.

The prosecutors assigned to this case committed illegal acts of omission and commission. The prosecution engaged in a pattern of deception deliberately designed to mislead defense counsel and the jury. The prosecution withheld exculpatory information and other discoverable information material to, and discoverable by, the defense. The prosecution also altered evidence and compromised the reliability and accuracy of testimony and evidence presented to the jury. The prosecution misled defense counsel concerning critical facts about the charges brought against Petitioner in the guilt stage; and the

prosecution further misled defense counsel in connection with aggravating and mitigating circumstances in the sentencing stage. The prosecution made misrepresentations deliberately to induce the defense not to investigate or present evidence on key issues in the case; and defense counsel failed to conduct an independent investigation on those points. The prosecution made improper and prejudicial arguments at both the guilt and sentencing stages of the trial in violation of the Constitution.

Trial counsel totally failed to defend Petitioner or to test the adversarial process.

Trial counsel had a conflict of interest because he had received his fee from uncharged individuals who were members of the SEGM and who had encouraged and assisted Petitioner before and after the commission of the offense. Trial counsel did not investigate, prepare, or present evidence in either stage of the trial concerning the activity of those uncharged individuals in the commission of the offense.

Trial counsel failed to make any effort to collect records and information or to interview individuals about Petitioner. Among other things, trial counsel: (1) failed to gather any records of Petitioner's lengthy history of mental illness except for the MTMHI records, which were received the week before trial, including repeated hospitalizations of Petitioner, the administration of psychotropic medication, and the treatment of Petitioner for his mental disease since his childhood; (2) failed to interview Drs. Craddock or Marshall from MTMHI, who were involved in Petitioner's evaluation at MTMHI, except for speaking to Dr. Marshall briefly in the hall of the courthouse

during the trial; (3) failed to gather any of Petitioner's medical records; (4) failed to gather any of Petitioner's school records; (5) failed to gather any of Petitioner's juvenile court records; (6) failed to gather any of Petitioner's military records; (7) failed to gather any of Petitioner's correctional and prison records; (8) failed to gather any records pertaining to Petitioner's prior convictions, which were used by the prosecution as aggravating circumstances in the sentencing stage of the trial; (9) failed to gather any of Petitioner's jail records, including the Davidson County Metro Jail where Petitioner was being held pending trial in this case.

Trial counsel also failed to perform any other kind of investigation. Trial counsel did not inspect the physical evidence, did not visit the crime scene, did not interview any prosecution witnesses, including witnesses listed on the indictment and in the police reports, and did not interview any individuals who conducted scientific tests for the prosecution. Even though trial counsel's only stated defense at the guilt stage was to shift the blame to the co-defendant DuValle Miller through cross-examination, trial counsel failed to make any attempt to interview DeValle Miller or his counsel. Trial counsel also failed to make any effort to interview Norma Norman, the other key witnesses for the prosecution, or her counsel.

Trial counsel did not seek funds to retain investigative assistance or expert witnesses. Among other things, trial counsel took no steps to retain an investigator, a forensic pathologist, a psychiatrist or psychologist, a mitigation expert, or a jury consultant.

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Although trial counsel had been on this case for less than four months before trial, and although the case had been set for trial only once without any continuances, trial counsel never asked the court for a continuance even though counsel, by their own admission, were obviously not prepared for trial.

Trial counsel developed no theory for the defense at either the guilt or penalty stages of the case; and trial counsel put on no evidence on behalf of the defendant at the guilt stage and only the unprepared and incomplete testimony of Petitioner and his wife at the sentencing stage. Trial counsel never allowed Petitioner to assist in any meaningful way in the preparation of his defense.

The trial court's errors of law and the prosecution's misconduct combined with defense counsel's total failure to investigate or prepare a defense; and this combination of constitutional violations impaired the integrity of the process, denied Petitioner's fundamental right to a fair trial, and created an impermissibly unreliable result. Trial counsel's failures and lack of preparation contributed to the improper and deceitful manner in which the prosecution litigated this case; and the prosecution's misconduct and deceit contributed to defense counsel's failure to investigate and develop a defense. There was, in other words, a synergistic relationship between trial counsel's failures and the prosecution's misconduct.

The synergistic relationship between trial counsel's lack of preparation and the prosecution's misconduct is manifested in a number of occurrences throughout the case. Because of defense counsel's unpreparedness, the prosecution was given free reign to present an

inaccurate version of the facts and of Petitioner's mental state. Because defense counsel developed no theory and presented no proof, the prosecution filled the void with inaccurate, misleading and prejudicial proof in both stages of the trial. For example, in the guilt stage, the prosecution misled the jury about the value of the bank teller card allegedly stolen by Petitioner; and the prosecution deliberately bended Norman's testimony to create the inaccurate impression that the \$300 allegedly stolen by Petitioner belonged to Daniels, as stated in the indictment, instead of Norman, as was alleged by Norman. The prosecution also withheld from the jury the crime lab results indicating that no blood stains were found on Petitioner's clothing, which would have raised doubt about Petitioner's actual involvement in the killing. The prosecution misled MTMHI concerning the facts of the case, which influenced MTMHI's evaluation, and the prosecution withheld from both MTMHI and the defense information indicating that Petitioner in fact did suffer from a severe mental illness.

Because defense counsel had conducted no independent investigation, they were in no position to challenge the prosecutions' improper and misleading presentation of the evidence in the case. The prosecution further took advantage of defense counsel's lack of preparation in the sentencing stage of presenting a false and misleading version of Petitioner's prior convictions as aggravating circumstances; and by cross-examining Petitioner in a manner that chided and ridiculed him and, thus, provoked him.

Because of defense counsel's lack of preparation, the prosecution belittled the uncorroborated, but true, testimony Petitioner offered in his own defense, thus effectively destroying the credibility of the unprepared and mentally unstable Petitioner in the eyes of the jury. During the sentencing hearing, the prosecution exploited Petitioner's mental illness to its advantage, and because defense counsel were unaware of the nature or extent of Petitioner's mental illness, they were in no position to protect Petitioner against this exploitation.

Because defense counsel failed to conduct an investigation into the SEGM and its influence over Petitioner, the prosecution was able to argue to the jury that Petitioner committed the crimes alone and for reasons that the prosecution knew or should have known were untrue. Defense counsel, due to their complete lack of preparation, were in no position to rebut or challenge the prosecution's arguments, and they were in no position to present contrary evidence which they should have uncovered and developed.

The total lack of defense counsel's preparation disabled them from testing the prosecution's case or from meaningfully participating in the adversarial process in either stage of the case. The prosecution improperly took advantage of this situation and presented a misleading and deceitful case to the court and the jury.

III. GROUNDS FOR RELIEF.

A. PETITIONER'S TRIAL COUNSEL DID NOT TEST THE ADVERSARIAL PROCESS, AND PETITIONER THEREFORE WAS DENIED HIS DAY IN COURT.

Petitioner was never given an opportunity to present any kind of case in his defense at either the guilt stage or sentencing stage of the trial. Petitioner's rights were therefore violated under the provisions of the Constitution of the United States cited above, including but not limited to the due process clause of the Fifth Amendment, the jury trial provision of the Sixth Amendment, the confrontation clause of the Sixth Amendment, the assistance of counsel clause of the Sixth Amendment, the cruel and inhuman punishment clause of the Eighth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment. Petitioner's denial of his day in court arose from the complete failure of his trial counsel to provide him with any kind of meaningful assistance, or with any kind of defense. This complete failure of trial counsel was compounded by prosecutorial misconduct and the other Constitutional errors that occurred in this case, as enumerated elsewhere in this Petition. Because of the total failure of the trial counsel, Petitioner did not have his constitutionally guaranteed day in court and suffered extreme prejudice as a result. Further, because Petitioner's trial counsel pervasively failed to test the adversarial process in the trial of this case, prejudice need not be shown for Petitioner to be entitled to a writ of habeas corpus.

1. Petitioner's counsel completely failed to contemplate, investigate, prepare or present any kind of a defense.

Many of the failures of Petitioner's counsel are categorized and outlined in other parts of this Petition. At this point it is sufficient to say that Petitioner's counsel did nothing that a defense attorney must do in any kinds of criminal case, and especially in a capital case. This is not a case where defense counsel raised a defense which was the wrong defense; or where defense counsel raised a defense, but did a poor job in developing or presenting the defense; or where defense counsel did not raise a defense because there was no defense to be raised. Rather, this is a case where there were defenses that should have been raised, but where defense counsel completely failed in making any attempt at discovering or raising any of those defenses. Defense counsel failed to make any effort to discover or develop any defense in this case even though Petitioner tried to alert them to possible defenses that he might have.

Defense counsel's complete failure to develop any kind of defense at either the guilt or resentencing stage is most strongly evidenced by defense counsel's opening statement at each stage of the trial.

The entire text of defense counsel's opening statement at the guilt stage is as follows

“Ladies and gentlemen of the jury, it is often, to try and predict ahead of time, what evidence is going to be, very difficult. For that reason I'm simply going to wait and see what the witnesses testify to. Mr. Camp and I will cross-examine the

witnesses to see where the truth really rests in this matter.

“Based upon the opening statement of Mr. Zimmermann, however, I would submit that the evidence is going to show that, if indeed the scenario that’s been painted came from Mr. Harold Devalle Miller, then most of those details, or at least a substantial number of them, are going to be false, and are simply going to be an effort on the part of Mr. Miller to save himself.

“There is no question that Mr. Miller and Mr. Jones were present at the time the killing occurred. There is no question about that. The real issue throughout this entire trial is going to be how the tragedy happened, why the tragedy happened, what the motivation was, and whether or not Harold Devalle Miller is really giving you an accurate version of what happened. So at this time we’ll simply wait for the witnesses to take the witness stand, since it is from the witnesses that the evidence will come, not from Mr. Zimmermann or myself. Thank you.”

(Tr. 1278-9).

This opening statement failed to offer the jury any description of the proof they were about to hear, any theory of the defense in the case, or any reason why the jury should return a verdict innocence rather than verdict of guilt. Defense counsel had conducted no investigation in the case. At the guilt stage, defense counsel offered no evidence other than the cross

examination of the State's witnesses. During the cross-examination of these witnesses, defense counsel offered no information that had been discovered independently by defense counsel.

The entire text of defense counsel's opening statement at the sentencing stage of the trial is as follows:

"May it please the Court, ladies and gentlemen of the jury, you have now convicted Mr. Jones of murder in the first degree; and although we obviously contested that, we stand by your verdict. That's the purpose of this system and that's why we have you here to decide the case. We now move on to the question of whether or not Mr. Jones should be killed or should be sentenced to life in prison. You will hear proof from both sides of this case on this issue, and I ask you to please reserve judgment, as His Honor will instruct you, until you've heard all the proof on this issue.

"The State has told you what they expect to prove as the aggravating circumstances in this case. Following the State's proof you will hear proof from the defense on what we have already described to you what we have referred to as mitigating circumstances, mitigating factors. In considering that proof, I ask you to bear in mind, and I expect His Honor to charge you, that although there is a limit to the aggravating factors available to the prosecution, the question of whether and what constitutes mitigating factors is not limited by that, and that is up to

your consideration, and your consideration alone.

“I expect that you will hear during this phase of the trial the testimony of James Jones. You will also hear from his wife Susan. You will hear the testimony of several of their friends and acquaintances, people who knew James at work, the minister who married them, I believe, and other testimony about James Jones as a man and as a human being. As you listen to the evidence, ladies and gentlemen, I ask you to remember, keep in mind the instructions that I believe His Honor will give you at the close of the case, the fact that any one mitigating factor can outweigh any number of aggravating factors, if in your mind you feel it should be given such weight; that decision is up to you.

“We thank you for the attention you have paid, during this over a week trial in this case, and ask that you continue to do so, as I know you will. Thank you.”

(Tr. 1806-8).

This opening statement again failed to offer the jury any description of the proof they would hear, any explanation of the defense theory at the sentencing stage, or any reason why the jury should vote for life instead of death.

Despite defense counsel’s promise to the contrary, the defense did not call to the witness stand the minister or any of Petitioner’s other friends. In fact, defense counsel had never spoken to any potential mitigation witnesses. The defense only called

Petitioner and Petitioner's wife as witnesses. Defense counsel offered no proof of Petitioner's life of abuse, neglect and deprivation other than through Petitioner's unprepared testimony. Defense counsel presented no expert testimony to explain and confirm Petitioner's mental illness and how it impaired Petitioner and affected his conduct. The defense did not elicit any information during the sentencing hearing which defense counsel had independently discovered, because they had made no effort to discover any facts relating to this case. Defense counsel spent no time with Petitioner preparing him for his testimony. Petitioner's account, though truthful, was so bizarre, given his psychological limitations, and so unbelievable, given trial counsel's failure to present available corroborative evidence, that it necessarily prejudiced Petitioner in the eyes of the jury.

Defense counsel also spent no time preparing Petitioner's wife for her testimony at the sentencing hearing. Trial counsel used her testimony only in an effort to rebut the State's suggestion raised for the first time in the sentencing hearing that the alleged crimes were motivated by Petitioner's financial problems. Petitioner's wife offered no testimony in support of a mitigation case. Defense counsel's failure even to seek any positive mitigation testimony from Petitioner's wife further prejudiced Petitioner in the eyes of the jury.

The total failure of defense counsel is further evidenced by the Rule 12 form prepared and signed by the trial judge on January 12, 1998. This is a form that Tennessee trial judges must fill out and forward to the Tennessee Supreme Court after the trial of each capital case. Defense counsel have an opportunity to review

the form before it is forwarded to the Tennessee Supreme Court. In response to the question on the form, “Were mitigating circumstances in evidence?”, the trial judge answered “No.” The trial judge also indicated that he had sent the form to defense counsel for their review, and he wrote on the form that defense counsel “failed to respond after numerous requests.”

Defense counsel’s total failure to give Petitioner his day in court is, taken alone, sufficient grounds for habeas relief.

2. Petitioner had available a number of strong defenses at both the guilt stage and sentencing stage of the case.

The evidence to be presented in this habeas proceeding will establish that Petitioner had strong guilt and sentencing stage defenses that should have been but were not discovered by defense counsel and that should have been presented in Petitioner’s trial. These defenses, if properly presented, likely would have changed the result in this case.

a. Guilt stage defenses.

At the guilt stage of the case, Petitioner had a number of strong defenses that should have been developed by trial counsel. These defenses include but are not limited to the following:

(1) Insanity.

Petitioner has an insanity defense. This defense is supported by at least the following: (i) Petitioner suffers from a mental illness that makes him susceptible to psychotic or dissociative episodes

when faced with stress; (ii) Petitioner was faced with a number extremely stressful circumstances at the time of the alleged crimes which could have triggered such a psychotic or dissociative episode; (iii) Miller observed a change in Petitioner's demeanor and appearance at the time of the alleged crimes, which is evidence that Petitioner in fact did experience such an episode at the time; and (iv) Petitioner has no memory of the events giving rise to the criminal charges in this case, which is further evidence supporting an inference that Petitioner experienced such an episode at the time. Under applicable Tennessee law, if a defendant raises a colorable insanity defense, the burden of proof shifts to the State to prove sanity beyond a reasonable doubt.

(2) No premeditation and deliberation.

Petitioner has a defense to the charge that the killing was done with premeditation and deliberation, which are elements of first degree murder. This defense is based partly on Petitioner's mental condition, and on the facts and circumstances surrounding the killing. The evidence that should have been uncovered demonstrates that, if Petitioner performed the stabbings, he did not do so with a cool and dispassionate mind, and he therefore did not act with premeditation and deliberation.

(3) Reasonable doubt about who did the stabbings.

There is reasonable doubt whether Petitioner performed the stabbings in this case. Even if this

doubt only raises a question as to whether Petitioner was the accomplice rather than the perpetrator, this doubt may go to the question of whether the crime is second as opposed to first degree murder and/or assault; and this doubt goes to the question of the appropriate sentence.

Miller is the only witness who testified to Petitioner's having stabbed the victims. Because Miller was an accomplice who had worked out a deal with the State, and because his testimony was internally inconsistent and contradicted earlier statements he made to the prosecution, his testimony on this point must be discounted or, because it was uncorroborated, completely excluded.

Moreover, there is circumstantial evidence raising doubt. Even though the victims splattered substantial blood on the walls and surrounding areas, the State's crime lab results indicated that there were no blood stains on Petitioner's clothes. Miller's clothes were not examined by the State's forensic scientists. In addition, one of Norman's children stated to the police that although she saw little of what happened, she did see someone who fit Miller's description tear pillows off the sofa in the living room where the stabbings took place. The statement directly contradicted Miller's testimony and indicates that Miller had a more direct involvement in what occurred than he explained in his testimony.

(4) No proof of robbery.

There is insufficient evidence to sustain a conviction of robbery in this case. The charge was

that Petitioner and Miller robbed Daniels of \$300 and a First American Bank Anytime Teller card. The State could not carry its burden of proving that either the alleged \$300 or the bank card was taken by Petitioner or Miller.

With respect to the \$300, no witness observed Petitioner take \$300, and no witness saw Petitioner with \$300. The testimony of the only witnesses to the alleged crime scene, Miller and Norman, when carefully analyzed, does not allow for a time when Petitioner would have physically been in a position to take \$300. Furthermore, according to the record, Norman first made the allegation that \$300 was taken when she was in the hospital following the stabbings. This was a time when she had no way of knowing whether or not any money had been taken, because the money allegedly was taken not from the person of Daniels (or, for that matter, Norman), but rather from a container in a remote location in the master bedroom of the apartment. Additionally, when the police first arrived at the alleged crime scene, neighbors were already in the apartment, which raises the possibility that if any money was taken from the premises, it could have been taken by someone else. Moreover, Norman testified that the money allegedly taken by Petitioner was money that belonged to her and was located in the bedroom. This is at variance with the indictment, which charged Petitioner with taking \$300 that was the property of and in the possession of Daniels. Because of this variance between the indictment and the evidence, Petitioner could not be convicted of the crime charged in the indictment.

With respect to Daniels' bank card, the internal documents of the prosecution indicate that, at the time of the alleged robbery, Daniels did not have an active account with First American Bank. The bank card, therefore, could have no value even if it did exist and was taken by Petitioner. A defendant can be convicted of robbery in Tennessee only if the State can prove beyond a reasonable doubt that the defendant took property of value.

(5) No proof of felony murder.

As explained elsewhere in this Petition, the felony murder charge was predicated entirely upon the felony of robbery. Because there was insufficient proof to sustain a robbery conviction, there was insufficient proof to sustain a felony murder conviction.

(6) Other guilt phase defenses.

Petitioner had other guilt stage defenses based upon a number of procedural and constitutional errors committed during the pendency of the case. These include errors arising from the faulty indictments in this case, prosecutorial misconduct, including Brady violations, improper voir dire and jury selection, improper evidence, improper closing argument by the prosecution, and improper jury instructions. Many of these defenses are set forth in the various parts of this Petition below.

b. Sentencing stage defenses.

Petitioner has had a number of sentencing stage defenses.

First, there was a basis upon which Petitioner could have mitigated perhaps the most significant aggravating factor relied upon by the State: Petitioner's prior second degree murder conviction. This prior conviction arose out of the killing of a fellow inmate in federal prison in 1972. There is strong evidence that Petitioner was psychiatrically disturbed at the time of that killing. The federal prison records and the trial transcript in that case also indicate that the victim of that killing was the leader of a gang which had homosexually abused Petitioner. Petitioner killed the victim in a preemptive act of self defense.

Secondly, there were a number of mitigating circumstances that should have been presented to the jury. Petitioner's mitigation case is powerful, and it deals with the following areas: Petitioner's history of extreme childhood abuse and rejection by his family; Petitioner's history of homosexual abuse in the federal prison system; Petitioner's history of psychological and psychiatric problems; because of his mental health problems, Petitioner's inability to cope with stressful situations; because of his mental health problems and the rejection of Petitioner by his family, Petitioner's profound sense of fear and loneliness; the likely extreme mental disturbance experienced by Petitioner at the time of the killing; Petitioner's diminished capacity to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law; the influence and domination of the SEGM over Petitioner's thoughts and actions; the involvement of the SEGM in the crimes alleged; Petitioner's belief, which may have been delusional, that he was

acting according to moral principles, and his actions were morally justified; characteristics about the victims, particularly Daniel who was a cocaine dealer; and the good qualities about Petitioner's character reflected by such things as his adjustment to the federal prison system, the role he played in assisting federal authorities when he was in the federal system, and his work history after he was released from federal prison.

**B. GENERAL DUE PROCESS VIOLATION;
CUMULATIVE EFFECT OF VIOLATIONS.**

Petitioner alleges that all violations of his rights set forth in this Petition are direct violations of his federal constitutional rights. Further, to the extent the State or the State Court violated Petitioner's State-created rights, such a violation also amounts to an unlawful infringement upon Petitioner's liberty interests in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner further alleges that each violation of his constitutional rights set forth in this petition provides a sufficient ground for habeas relief. Moreover, the cumulative effect of the violations set forth in this petition mandate habeas relief. The entire criminal proceeding against Petitioner was infected with constitutional error from the outset through the final outcome.

C. COURT AND OTHER LEGAL ERROR.

From the beginning to the end of the criminal proceeding resulting in Petitioner's conviction and

death sentence, there were constitutional errors committed by both the trial court and the prosecution.

1. Improper Indictments.

a. Count One.

Count One of the Indictment against Petitioner violated Petitioner's rights under the indictment, double jeopardy and due process clauses of the Fifth Amendment, the cruel and inhuman punishment clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment.

Count one of the Indictment charges Petitioner with premeditated murder or felony murder in the alternative. This is an improper and unconstitutional duplicitous indictment because it charges Petitioner for two crimes for the same event. Among other things, this charge exposed Petitioner to double jeopardy, because it gave the jury the opportunity to consider guilt of the same alleged crime (first degree murder) on the basis of two different charges. This is also an improper and unconstitutional indictment because it creates potential confusion in the minds of the jury. This kind of indictment also unconstitutionally infected the sentencing hearing by potentially creating in the minds of the jury the improper idea that a conviction under Count One would carry greater legal significance and weight than a murder conviction based upon a singular charge of either premeditated or felony murder.

Count One of the Complaint, when combined with the verdict relating to this Court, is unconstitutional because there is an unlawful variance between the charge in the indictment and the verdict. The

indictment charged premeditated murder or felony murder, in the disjunctive; the verdict, on the other hand, found Petitioner guilty of both premeditated murder and felony murder, in the conjunctive. In addition to being an unconstitutional variance from the indictment, the verdict of the jury further infected the sentencing hearing, again by potentially creating in the jury's mind the wrong impression that a double murder charge of this sort carries greater legal weight or significance.

b. Count Three.

Count Three violated Petitioner's rights under the indictment, double jeopardy and due process clauses of the Fifth Amendment, the cruel and inhuman punishment clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment.

Count Three is unconstitutionally duplicitous because it contains two charges: that Petitioner robbed Daniels of \$300; and that Petitioner robbed Daniels of a bank teller card. According to the charge and the proof, these were allegedly two distinct acts. There is the potential of reasonable doubt over whether Petitioner took \$300; and there is the potential of reasonable doubt over whether Petitioner took the bank teller card, or whether the bank teller card was valid or had any value. The jury returned a verdict finding Petitioner guilty of robbery, without specifying the property Petitioner took in connection with the robbery. There was no jury instruction that the jury must unanimously find that Petitioner took the \$300, or alternatively that it must unanimously find that Petitioner took the bank card which had some value. Accordingly, based upon the verdict, it cannot be

determined whether the jury was unanimous in its finding that Petitioner took \$300, or alternatively that it was unanimous in its finding that Petitioner took the bank card which had some value.

There is an unconstitutional variance between the robbery charge relating to the \$300 and the only evidence in the case about the \$300. The indictment charged that Petitioner took \$300 that was owned by and in the possession of Daniels. The only evidence on the \$300 was Norman's testimony, which stated that the \$300 was among her possessions and was her money.

There is an unconstitutional variance between the charge in the indictment relating to the bank teller card and the instruction given to the jury on this charge. The indictment charged that Petitioner robbed Daniels of a bank teller card "of the value of over three hundred dollars." The jury instruction, on the other hand, stated that the jury could return a verdict of guilty if the bank teller card had any value. Information in the prosecution's file demonstrates, in fact, that the bank card had no value because Daniels had no bank account from which money could be withdrawn with the card.

2. Constitutional Error in the Jury Selection Process:

There were a number of errors in the jury selection process. These errors, taken individually and cumulatively, violated in a material and prejudicial way Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. These errors include but are not necessarily limited to the following:

(1) The trial court erred in granting the State's motion in limine restricting the types of questions defense counsel could ask in voir dire. Defense counsel sought the right to ask jurors questions concerning their beliefs about parole eligibility in the event of a life sentence, and whether those beliefs might affect their decision on whether to impose the death penalty. Social science research shows that jurors expect parole eligibility and actual parole to come in a substantially shorter period of time than is actually the case. (This is especially true in Petitioner's case, because of the effect of the sentences he received in connection with his prior convictions.) Petitioner has the constitutional right to voir dire jurors on such beliefs in order to ensure that Petitioner is tried by an impartial jury, and in order to ensure the reliability of the jury's decisions on guilt and on whether to impose a life or death sentence.

(2) The exercise by the prosecution of its peremptory challenges to exclude Black persons from the jury deprived Petitioner of rights under the Fourteenth Amendment to the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). From the beginning of jury selection, the prosecution systematically exercised its peremptory challenges to exclude Black persons. After the pattern became apparent, the defense objected to the prosecution's peremptory challenges on the basis of race. It was not until after the defense raised this objection, and the constitutional

violation had already occurred, that the prosecution refrained from exercising its peremptory challenges on some of the remaining Black prospective jurors under consideration. Even then, however, only two Black jurors were selected, and one of those two was merely an alternate. In the State post-conviction hearing in this case, the prosecuting attorney admitted that race was a factor in his decision, although he insisted (contrary to the evidence) that he used race as a factor in favor of retaining certain jurors. In either case, whether to include or to exclude jurors, the use by the State of race as a factor in jury selection is unconstitutional.

(3) The exclusion of jurors opposed to the imposition of the death penalty on religious grounds for cause violated the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The trial court excluded a number of prospective jurors for cause on this ground, including prospective jurors Vivian Langford, Velva Herford, Sharon Woods, Doris Hailey, Mary Majors, Christine Northcutt, and Sandra Smith. The jurors' rights to their religious beliefs are protected by the First and Fourteenth Amendments to the United States Constitution. The inquiry put to the jurors by the Court was more than a test of faith; willingness to give up one's religious beliefs was required as a qualification for jurors.

(4) Twelve of the fifty-two jurors called were successfully challenged for cause by the State based on their opposition to the death penalty. Even if it may be generally permissible to "death qualify" a jury, when such a high percentage (23%) of

prospective jurors are excluded for this reason, the jury no longer adequately represents the community. Such a jury cannot be a jury of the defendant's peers, and it cannot constitutionally be vested with the profound public responsibility of determining the defendant's life or death. Moreover, a jury selected in this fashion not only will be more inclined to impose the death penalty, but it will also be more inclined to convict the defendant of the underlying crimes. The exclusion of jurors for cause based on their opposition to the imposition of the death penalty, coupled with the State's exercise of its peremptory challenges, deprived Petitioner of a fair and impartial jury in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

- (5) The trial erred by not excluding the following jurors for cause:
 - a) Mary Hunter (#76): Ms. Hunter stated her bias in favor of the death penalty. Just as a juror's bias against the death penalty served as cause for the exclusion of other jurors, a juror's bias in favor of the death penalty must also serve as cause for exclusion.
 - b) George Harding (#29): Mr. Harding admitted to being a "slow learner" and that he "might not give [the defendant] a fair and honest trial." The State took no position on this challenge; however, in another contest, the State admitted its reservations about Mr. Harding's intellectual competence. Given the high standard of protection present in a

capital case, it was constitutional error for the trial court to deny defendant's challenge for cause.

c) Billy Smith (#146): Mr. Smith was formerly employed as the hospital superintendent at the Tennessee State Prison and had witnessed four executions. Given the higher standards that should be applied in death penalty cases, and therefore the unique safeguards that should be employed in the jury selection process, it was constitutional error for the trial court to deny defendant's challenge for cause.

3. Insufficiency of the Evidence.

There was insufficient evidence to support Petitioner's convictions for robbery, felony murder, and premeditated murder. Petitioner's convictions for these crimes, and Petitioner's death sentence for the conviction of felony murder and premeditated murder, based on insufficient evidence violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

(1) Robbery.

With regard to the \$300, the evidence was insufficient for two reasons.

First, the indictment charged Petitioner with robbing \$300 owned by and in the possession of Daniels. There was absolutely no evidence that \$300 was taken from Daniels.

Secondly, for reasons set forth above, there was no evidence supporting a finding that Petitioner took \$300 at all. The only witness on the \$300 was Norman. Neither she nor Miller saw Petitioner take \$300; and neither witness saw Petitioner with \$300. Norman claimed that the money was hers, and that it was taken from a container on her dresser in the master bedroom. Neither Norman's nor Miller's account of what happened that night plausibly allows for the possibility that Petitioner entered that bedroom. Norman first made her claim about the \$300 when she was in the hospital, before she could have been in a position even to know whether any money had been taken from the bedroom. When the police first arrived at the crime scene, other people were there, creating the possibility that if money had been taken, it could have been taken by someone else. The police also reported that it did not appear that the dresser in the bedroom, where the \$300 allegedly was kept by Norman, had been searched or disturbed.

The prosecution came close to conceding that there is a sufficiency problem with the \$300. In closing argument during the guilt stage, the prosecution said: "And we don't pretend to tell you that we can prove beyond a shadow of a doubt that he took that three hundred dollars." (Tr. 1670) "And there is no question that they stole while they were there – even if you have an issue about the three hundred dollars, they've still got the bank card. They've still got the bank card." (Tr. 1709)

With regard to the First American bank card, there are also two problems. First, the indictment charged that Petitioner robbed Daniels' bank card "of the value

of over three hundred dollars.” There is no evidence suggesting the bank card had any value, much less a value of over \$300. Secondly, as is clear from Brady information in the prosecution’s own file, which the prosecution never turned over to the defense, in fact Daniels did not have a bank account at First American and the bank card therefore could have no value. Without value, any taking of the bank card cannot support a robbery conviction.

(2) Felony Murder.

The felony murder charge was predicated entirely upon Petitioner’s commission of the felony of robbery. The complete jury instruction in Petitioner’s case on the felony murder charge was as follows:

“For you to find the defendant guilty of murder in the first degree, as charged in this indictment, the State must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was committed during the alleged perpetration, or attempt to perpetrate, the alleged robbery; that is, that the killing was closely connected to the alleged robbery, and was not a separate, distinct and independent event; and

(3) that the defendant specifically intended to commit the alleged robbery. Robbery is the felonious and forcible taking of goods or money of any value from the person or

presence of another, by violence or putting the person in fear.

“If you should find that the above three elements exist beyond a reasonable doubt, it is not necessary that the State prove and intention to kill or that the alleged killing was done, willfully, deliberately, with premeditation and with malice.

“To render the alleged killing murder in the first degree, the alleged killing must have been done in pursuance of the unlawful act of robbery and not collateral to it; that is, the alleged killing must have been closely connected with the alleged robbery and not a separate, distinct, and independent event.”

(Tr. 1726-8).

Because there was insufficient evidence to support the robbery charge, there was also insufficient evidence to support the felony-murder charge.

(3) Premeditated Murder and Assault.

The prosecution’s entire case on premeditation and deliberation, two necessary elements of first degree premeditated murder, rested upon Miller’s uncorroborated testimony, particularly his testimony of what Petitioner allegedly said before they went to Daniels’ place. This testimony was directly contradicted by Miller’s pre-trial statement to the prosecution, and subsequently by Miller’s testimony at his own sentencing hearing. Even if the court could give complete credence to Miller’s testimony, in light of all the circumstances of this case there is insufficient

evidence supporting a finding beyond a reasonable doubt of premeditation and deliberation.

4. Erroneous Guilt Stage Jury Instructions.

The trial court made a number of errors in the guilt stage jury instructions. These errors, individually and cumulatively, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The trial court's errors in connection with the guilt stage jury instructions include but are not necessarily limited to the following:

(1) The trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, or felony murder, or both. This was error because:

(a) The instruction allowed the jury to return a duplicitous verdict, finding the defendant guilty of two crimes for the same act, relating to the same charge in the indictment. Among other things, this instruction unconstitutionally exposed Petitioner to double jeopardy and unconstitutionally created the situation where, in a capital case, the jury could convict Petitioner of two capital crimes for the same alleged wrong.

(b) The instruction allowed the jury to return a verdict at variance with the indictment. The indictment charged Petitioner only with premeditated or

felony murder; but the charge permitted the jury to return a verdict of guilty of premeditated and felony murder.

(c) The instruction was confusing to the jury.

(d) The instruction allowed the jury to return a verdict that would be unduly prejudicial to the defendant in the sentencing phase of the trial. By allowing the jury to find the defendant guilty of both premeditated murder and felony murder, it allowed the jury to make a finding that would heighten in the jury's mind the legal significance and seriousness of the murder for sentencing purposes, and potentially created the false impression that the defendant could be held guilty of two murders for a single act resulting in a single death.

(2) The voir dire, argument and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law. In the beginning of his closing argument, the prosecutor said to the jury:

“I believe the law in Tennessee is that first degree murder is when you kill someone with malice aforethought, when you kill someone and plan to do it – premeditated murder – and each one of you stated that if you were instructed that premeditation could be formed in an

instant that you could follow that instruction. Ladies and gentlemen, it would be for each one of you to decide whether or not these defendants planned to murder the victim in this case.” (Tr. 1669).

Among other things, the jury instructions made the following incorrect and misleading statements about these elements: (i) “Premeditation means the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberated formed in an instant [sic];” (ii) “Passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time;” (iii) “If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited state when the design was carried into effect.” (p. 1725-6)

(3) The trial court erred in instructing the jury that it could consider a lesser offense only if it found that Petitioner was not guilty of the greater offense. The erroneous jury instruction on this point was:

“I will charge you as to certain lesser included offenses of murder in the first degree in Count One and of assault with intent to commit murder in the first degree in Count Two. This, however, means that you only consider the lesser

included offense if, and only if, you find the defendant not guilty of the greater offense. If you so find, you then consider the lesser included offense of murder in the second degree in Count One and assault with intent to commit second degree murder in Count Two.” (Tr. 1721).

Once a homicide has been established it is presumed to be second degree murder, and the burden falls upon the prosecution to prove beyond a reasonable doubt that the homicide is an offense greater than second degree. The jury should have been instructed accordingly, with respect to both Count One relating to the murder charge and Count Two relating to the assault with intent to murder charge.

(4) The trial court erred by failing to instruct the jury that testimony of accomplice must be corroborated by independent evidence. The erroneous jury instruction on this point was:

“An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury.” (Tr. 1717-18).

(5) The trial court gave an erroneous definition of reasonable doubt which improperly made use of the term “moral certainty.” The erroneous instruction on this point was:

“Reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt is a high burden. It is higher than proof by clear and convincing evidence. but it does not mean proof to an absolute certainty. Reasonable doubt does not mean a capricious, possible or imaginary doubt. While absolute certainty of guilt is not demanded by the law to convict of any criminal charge, moral certainty is required as to every proposition of proof requisite to constitute the offense.” (Tr. 1715).

5. Unconstitutional Restriction on What Defense May Prove and/or Argue in the Sentencing Stage.

Tennessee law, and the rule applied in Petitioner’s case, unconstitutionally prohibited Petitioner from proving and/or arguing certain matters that are relevant to the jury’s decision whether to impose life or death. These improper restrictions prohibit the defense from offering any kind of proof or argument on (i) the deterrent effect of capital punishment, (ii) the costs of capital punishment as compared to life sentences, (iii) the parole eligibility of a defendant who receives a life sentence, and (iv) the effects of execution and particularly of electrocution. These restrictions on the defense in the sentencing phase violate the due process and cruel and unusual punishment clauses of the United States Constitution.

6. The Sentencing Stage Jury Instructions are Generally Defective.

The sentencing stage instructions used in this case, taken as a whole, are constitutionally defective in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. The sentencing instructions fail to explain in a clear, accurate and comprehensive manner what the jury is and is not to consider in determining life or death. The jury instructions, taken as a whole, are (i) inaccurate, (ii) incomplete, (iii) misleading, and (iv) incomprehensible to a lay jury.

7. Sentencing Stage Instructions: Specific Defects.

The sentencing stage jury instructions in Petitioner's case were defective in a number of specific respects. These defects, taken individually and cumulatively, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. These defects include but are not necessarily limited to the following:

(1) The trial court erred in its instruction regarding the aggravating circumstance defined in T.C.A. § 39-13-204(i)(4). The court's entire instruction on this aggravating circumstance was as follows:

“No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the

following specific statutory aggravating circumstances:

... ..

(2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;

... ..

“In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful -- causing suffering -- excuse me -- painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or perverse act.”

(Tr. 1990-1).

Among other things, this instruction is unconstitutionally vague and overbroad; and it does not properly narrow the class of death qualified defendants as required by the Eighth Amendment.

This instruction was also constitutionally defective because the evidence in the case did not support a finding beyond a reasonable doubt that the killing was especially heinous, atrocious and cruel justifying the death penalty.

(2) The trial court erred in its instruction regarding the aggravating circumstance defined in T.C.A. § 39-13-204(i)(7). The court's instruction on this aggravating circumstance included the following:

“... ..

(3) the murder was committed while the defendant was engaged in committing or attempting to commit any first degree murder or robbery.

(Tr. 1990).

It was improper to give this instruction in light of the evidence in the case. There was insufficient evidence to support a finding beyond a reasonable doubt that Petitioner committed the underlying crime of robbery. Further the underlying crime of attempting to commit any first degree murder refers to the assault on Norman. There was, however, no evidence to support the finding beyond a reasonable doubt that the murder of Daniels was committed while Petitioner “was engaged in” the assault on Norman. According to the only testimony on the point, the assault on Norman occurred after Daniels was stable to death and was a separate act.

This instruction was improper also because it constitutionally permitted the jury to find the

existence of an aggravating circumstance, robbery, which also served as the predicate for the jury's finding of felony murder. By permitting the jury to use the same circumstance both to find first degree murder and to find the existence of an aggravator justifying the death penalty, the court failed to provide instructions that would properly narrow the discretion of the jury in determining the class of death qualified defendants, as required by the Fifth, Sixth, Eighth and Fourteenth Amendments.

(3) the trial court unconstitutionally defined beyond a reasonable doubt by an improper reference to the term "moral certainty." The trial court's improper instruction on this point was as follows:

"Reasonable doubt is that doubt engendered by and investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your findings. Reasonable doubt does not mean a capricious, possible or imaginary doubt. Absolute certainty is not demanded by the law to determine the certainty of your find, but moral certainty is required as to every proposition of proof, requisite to determine the certainty of your findings, as to the aggravating circumstances or circumstance."

(Tr. 1995).

(4) The trial court gave erroneous, inaccurate and misleading instructions regarding the

requirement of unanimity in their sentencing decision, as follows:

(i) The trial court erroneously instructed the jury that, “Your verdict must be unanimous as to either form of punishment [life or death].” (Tr. 1989). That is an incorrect statement of the law in Tennessee. If a single juror holds out for life, then the result is a life sentence. Accordingly, the jury’s verdict need not be unanimous as to life.

Throughout the sentencing stage instructions, the trial court emphasized in an incorrect and misleading way that the jurors’ decision on sentencing must be unanimous. The court’s instructions erred by failing to make the following points clear: (a) that the jurors must be unanimous in their finding beyond a reasonable doubt of the existence of any aggravating circumstance; (b) that before they can impose the death penalty, the jurors must be unanimous in their finding beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances; (c) that the jurors need not be unanimous in their decision to impose a life sentence; and (d) that if any one juror votes for life, the result is a life sentence.

(ii) The trial court erred by giving instructions which necessarily directed the jurors that their findings regarding the existence of mitigating circumstances must be unanimous, which is not an accurate statement of the law. The trial court also erred by failing to instruct the jurors that although they must unanimously

find the existence of an aggravating circumstance beyond a reasonable doubt, they do not need to unanimously find the existence of any particular mitigating circumstance; and each juror must independently consider and weigh any mitigating circumstance raised by the evidence without finding that such circumstance exists beyond a reasonable doubt.

(iii) The trial court erred by giving the following instruction towards the end of the court's sentencing stage instructions:

“The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

“It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence

solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.”

(Tr. 1996)

This is the so-called “Kersey” charge, which is derived from the non-capital case of Kersey v. State, 525 S.W.2d 139 (Tenn. 1975). This instruction was designed to be used to deal with a potentially hung jury that might be deadlocked in its decision regarding guilt. This instruction is erroneously prejudicial in a capital sentencing hearing, where there is no such thing as a “hung” or “deadlocked” jury. This instruction further misinformed and confused the jury in Petitioner’s case as to the law concerning unanimity as to aggravating circumstances and non-unanimity as to mitigating circumstances.

The foregoing errors in the instructions given by the court regarding unanimity were fatally defective in two respects. First, the court’s instructions falsely explained the law of Tennessee applicable to this case, and therefore violated Petitioner’s procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Second, notwithstanding the law of Tennessee, the instructions inaccurately informed the jurors as to their individual roles in making the life or death sentencing decision in conformance with the requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(5) The trial court improperly and inaccurately instructed the jury that sympathy could not be a factor in its sentencing decision. This is an incorrect restriction on what the jury can take into consideration in determining whether to impose life or death, in violation of the Fifth, Eighth and Fourteenth Amendments. Sympathy is a proper basis for a juror's decision, if based on the evidence given. The improper instruction on this point was as follows:

“You can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict.”

(Tr. 1996).

(6) The jury instructions contained no definition of mitigating circumstances which the jury must consider in accordance with the requirements of the Fifth, Eighth and Fourteenth Amendments.

(7) The jury instructions erroneously failed to explain that the aggravating circumstances that could be relied upon by the State are limited in number and scope, while the mitigating circumstances are not limited in either number or scope.

(8) The jury instructions erroneously failed to adequately explain the quantum of proof of mitigating circumstances that would allow the jury to find the existence of such circumstances and/or determine that such circumstances justify a life instead of death sentence.

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(9) The jury instructions erroneously failed to explain that the “weighing” process, in comparing the aggravating circumstances to the mitigating circumstances, is a qualitative and not a quantitative process.

(10) The jury instructions erroneously failed to inform the jury as to the quantum of proof by which they must determine that the aggravating circumstances outweigh mitigating circumstances.

(11) The jury instructions erroneously failed to explain that statutorily defined or enumerated mitigating circumstances are co-equal to non-enumerated mitigating circumstances.

(12) The jury instructions erroneously failed to give an adequate explanation of the meaning of non-enumerated mitigating circumstances.

(13) The jury instructions erroneously failed to include instructions on several statutorily enumerated mitigating circumstances that were raised by the evidence, and the instructions erroneously failed to explain that the jury must consider these statutorily enumerated mitigating circumstances. These include but are not necessarily limited to the mitigating circumstances enumerated in the following subsections of T.C.A. § 39-13-204(j):

(3) The victim was a participant in the defendant’s conduct or consented to the act;

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(6) The defendant acted under extreme duress or under the substantial domination of another person;

(8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment.

(14) The jury instructions erroneously failed to include instructions on specific non-statutorily enumerated mitigating circumstances; and the instructions further erroneously failed to instruct the jury that they must consider non-statutorily enumerated mitigating circumstances raised by the evidence, and that non-statutorily enumerated mitigating circumstances shall be given the same weight and consideration as the statutorily enumerated mitigating circumstances.

(15) The jury instructions were unconstitutionally misleading by suggesting to the jury that they could consider the defendant's mental conviction as a mitigating circumstance only if "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The Constitution requires that the jury consider as a mitigating circumstance any mental illness or mental disturbance suffered by the defendant, whether or not the illness or disturbance

might be characterized as “extreme.” The effect of the misleading instructions on this point was to prevent the jury from giving effect to mitigating evidence concerning Petitioner’s mental state.

8. The Aggravating Circumstances Were Improperly Applied in this Case.

The aggravating circumstances that the murder was especially heinous, atrocious and cruel, and that the murder was committed while the defendant was engaged in a felony, were improperly and unconstitutionally applied in this case, for the same reasons that the jury instructions on these aggravators were improper as set forth above.

9. Inadequate Proportionality Review.

The Tennessee Supreme Court did not conduct an adequate proportionality Review of Petitioner’s death sentence, as the Tennessee Supreme Court was statutorily required to do. T.C.A. § 39-12-206(c)(1)(D). The Tennessee Supreme Court accordingly disregarded and infringed upon Petitioner’s State-created liberty interest in a proportionality review, in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Tennessee Supreme Court’s failure to properly conduct a proportionality review also violated Petitioner’s rights under the equal protection clause of the Fourteenth Amendment.

Furthermore, any proportionality review by the Tennessee Supreme Court was performed without providing Petitioner with proper notice or a hearing; and any proportionality decision by the Tennessee Supreme Court was rendered without sufficient

reference to findings of fact or legal standards. For these reasons and others, any proportionality review performed by the Tennessee Supreme Court violated Petitioner's right to procedural due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

10. The Death Penalty in Tennessee is Unconstitutional.

The State court erred for not dismissing Petitioner's indictment or enjoining the imposition of the death penalty due to the unconstitutionality of the Tennessee death penalty statutes, including T.C.A. §§ 39-2-203 and 205, and the unconstitutional manner in which the death penalty decision is made in Tennessee. The death penalty in Tennessee violates the due process clauses of the Fifth and Fourteenth Amendments, the equal protection clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. Among other things, death penalty law in Tennessee: (1) provides insufficient guidance to the jury concerning what standard of proof the jury should use in making the determination that the aggravating circumstances outweigh the mitigating circumstances; (2) does not sufficiently narrow the population of defendants convicted of first degree murder who are eligible for a sentence of death; (3) does not sufficiently limit the exercise of the jury's discretion, because once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown; (4) limits the discretion of the jurors to exercise mercy by mandatorily requiring the jury to impose a sentence of death if it finds the aggravating circumstances to

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outweigh the mitigating circumstances; (5) fails to place non-statutory mitigating circumstances on equal footing with statutory mitigating circumstances by not requiring that written instructions on non-statutory factors be given to the jury and by using qualifying language such as “extreme” and “substantial” with reference to evidence of mitigating factors, thus precluding the jury from considering evidence of mitigating circumstances; (6) does not require the jury to make the ultimate determination that death is the appropriate punishment; (7) does not inform the jury of its ability to impose a life sentence out of mercy or sympathy, based on the evidence presented; (8) does not allow the defense to correct misconceptions on the part of juror regarding the meaning of such term as: life imprisonment, parole eligibility, consecutive versus concurrent sentences, the cost of incarceration for life versus the cost of execution, the deterrent effect of the death penalty, and the notion that electrocution is an instantaneous and painless means of causing death; (9) does not require the jury to make a written finding of its decision concerning the mitigating circumstances, thereby preventing effective review; (10) allows the imposition of the death sentence, which is cruel and unusual; (11) allows the imposition of the sentence of death by electrocution, which is cruel and unusual; (12) allows the sentence of death to be unconstitutionally administered in Tennessee because it is being imposed based on arbitrary and discriminatory criteria such as race, sex, geographic region, and the economic and political status of the defendant; (13) allows the proportionality and arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. § 39-2-205 to be constitutionally inadequate and deficient because it

violates due process and equal protection; (14) does not provide uniform standards for the exercise of prosecutorial discretion in the decision to seek the death penalty, which leads to abuses of prosecutorial discretion and the discriminatory, arbitrary, and capricious infliction of the death penalty; (15) does not provide uniform standards for complete and thorough “life/death qualification” of jurors, which results in violation of the equal protection clauses of the State and federal constitutions and results in unreliable sentencing determinations, and the arbitrary and capricious infliction of the death penalty; (16) T.C.A. § 39-2-203(c) excludes the application of the rules of evidence and permits the introduction of hearsay, thus relatively unreliable evidence, in the prosecution’s proof of aggravation or rebuttal or mitigation; (17) T.C.A. § 39-2-203(d) allows the State to make the final closing argument to the jury in the penalty phase; (18) T.C.A. § 39-2-203(b) prohibits the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase; (19) requires the jury to agree to a unanimous verdict in order to impose a life sentence.

D. PROSECUTORIAL MISCONDUCT.

Throughout the course of this case, the prosecution engaged in an unending pattern of misconduct. In commenting on one instance of prosecutorial misconduct, the Tennessee Supreme Court said, “The conduct of the State’s attorney bordered on deception by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was improper.” As the evidence will show in this habeas proceeding,

the prosecution pursued a consistent course of deception, in violation of Petitioner's constitutional rights, not only by deviously getting inadmissible information before the jury, but also by refusing to disclose relevant evidence and by altering or improperly influencing the evidence and testimony that was presented. The corrupting influence of the prosecution's misconduct was, to a certain extent, made possible and exacerbated by the failures of defense counsel.

1. Prosecutorial Misconduct: Brady and Other Discovery Violations.

The prosecution committed misconduct in breaching its obligations under Brady and applicable discovery rules by failing to disclose to the defense exculpatory and other evidence which the prosecution had obtained in this case. The Brady and other discovery violations by the prosecution, taken individually and cumulatively, violated in a material and prejudicial way Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The Brady and other information and material which the prosecution wrongfully withheld from Petitioner includes but is not necessarily limited to the following:

- (1) The transcript of Petitioner's 1972 murder trial, which included the testimony of Dr. Asot M. Masri regarding Petitioner's mental illnesses. Dr. Masri testified that Petitioner suffered from Borderline Personality Disorder and, in his opinion, was insane at the time of the 1972 killing. The

prosecution in the instant case argued that there was no evidence that Petitioner suffered from any extreme emotional disturbance. The prosecution made this argument even though it was aware of Dr. Masri's psychological evaluation in Petitioner's 1972 trial, which it never disclosed to the defense.

(2) Transcription of Miller's pretrial statement. This was treated by the prosecution as Jencks material, not as Brady material. It was not furnished to defense counsel sufficiently in advance of the trial to enable defense counsel to make use of it in preparation of a defense. This transcript contained exculpatory information, relevant in both the guilt and sentencing stages of the case, regarding the circumstances surrounding the alleged offenses. Among other things, this transcript included Miller's observations of Petitioner's change in demeanor and appearance at the time of the alleged offenses. According to the prosecution's notes, these observations and other statements made by Miller raised a question as to whether Petitioner was insane, or as to whether Petitioner acted with premeditation and deliberation. Notwithstanding the prosecution's own concerns about these issues raised by Miller's pretrial statement, the prosecution failed to deliver the transcript of this statement to defense counsel sufficiently in advance of the trial to enable defense counsel to use it in exploring a possible mental health defense.

(3) Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offenses. This information is exculpatory

and would have been relevant in both the guilt and sentencing stages of the case, but it was never disclosed to the defense. This information likely included, but was not limited to, the following facts:

- that Miller and petitioner joined the SEGM, a racial identity religious organization devoted to bettering the Black community;
- that Miller and Petitioner were “brainwashed” by the organization;
- that there was a paramilitary group within the SEGM that consisted of Alan Boyd, William Beard, Miller and Petitioner;
- that William Beard gave Miller a pistol to be used in “operations” to clean up the Black neighborhoods;
- that Petitioner told Miller that he, Petitioner, got his shotgun from Alan Boyd;
- that on the night of the killing, after leaving Daniels’ house, Miller and Petitioner went to Miller’s apartment and Petitioner made a telephone call from a booth; and Alan Boyd showed up a short time later;
- that after leaving the victims’ apartment, Miller heard Boyd say something to the effect of “just be cool and go back to work.”
- that after Petitioner’s arrest, Miller went to Beard who gave him getaway money;

- that Miller intentionally mislead Beard as to where he was going because he feared that Beard, Boyd and the SEGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Holley, all of the SEGM; and
- that members of the SEGM provided Miller's wife, Karen, with financial assistance while Miller was on the run.

(4) Miller's statements to the prosecution in which he changed his story by telling the prosecution that Petitioner had mentioned before they went to Daniels' house that they would have to kill witnesses. The defense had made a discovery request for all inconsistent witness statements. The prosecution, however, never disclosed to the defense the change in Miller's story.

(5) The statements of Norman's children taken by the police within days of the offenses. These statements were never disclosed to the defense. These statements were exculpatory for two reasons. First, in these statement the children made no reference to any threatening remarks made by Petitioner; and this fact would have rebutted contrary testimony by Norman. Secondly, one of the children stated that she observed a man fitting Miller's description, and not Petitioner's description, tearing pillows off the living room sofa; and this fact would have rebutted contrary testimony by Miller.

(6) The redacted portion of Detective Garafola's report. The prosecution produced to the

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defense a hand-written report by the lead detective on this case reflecting his first activities in the case on the day of Petitioner's arrest. A portion of this report, however, was redacted. The redacted portion, which was never disclosed to the defense, contained the following statement:

“... When we returned to our office Det Elmore and myself attempted to interview James Jones. He was in an interview room and when we entered the room Jones was crying. He would not respond to our questions. The only statement he made was “I only killed one man in my life and that was because he was trying to fuck me”. He then started to hit his head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det Elmore was able to control him.”

This statement contains exculpatory material regarding Petitioner's mental condition at the time, which would have been relevant in both the guilt and sentencing stages of the case. This statement also suggests that Petitioner was not competent to waive his Miranda rights before he gave his confession to the police.

(7) Lab reports indicating no blood stains on clothes. Although these reports apparently may have been produced to prior counsel, they were not

produced to Petitioner's trial counsel. The prosecution also deliberately mislead trial counsel about the prior production of these reports. This information is exculpatory and is relevant to the question whether Petitioner actually performed the stabbings. The crime lab results indicate that Petitioner may not have been the person who stabbed the victims in this case.

(8) Other police reports. Several other police reports were not turned over to the defense even though they contained exculpatory information. Among other things, the police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Petitioner actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Petitioner took the \$300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if \$300 was stolen, Petitioner was the one who took the money.

(9) Information regarding the non-existence of a First American bank account in Daniels' name. A memorandum in the prosecution's file dated October 29, 1986, written by District Attorney Zimmerman, described an "Interview with George

Bland, First American Security”. The memorandum said:

“Bland reports that the victim had an account with First American but that it was closed in 1977 and there was no account activity since then. Therefore, Mr. Daniels did not have a current First American debit card. Further, he stated that it would be next to impossible to determine whether or not any one attempted to make a withdrawal using this debit card since a visual search of all the computer printouts would have to be made line-by-line. A check at all other banks produced negative results.”

The information in this memorandum was never disclosed to defense counsel, and it is exculpatory. This information refutes the allegation in Count Three of the Indictment that the bank card allegedly robbed by Petitioner had any value.

(10) Information obtained from an interview with George Daniels, the brother of the victim Patrick Daniels. The prosecution’s files reflect that George Daniels gave the prosecution the following information:

“He also advised that Big Rob told him that Mr. Jones always carried a bible with him. And that Big Rob was the one who introduced Mr. Jones to the victim.”

“George Daniels advised that he would do a little coke every now and then. He stated that he and his brother would

some time do coke together. He stated that his brother some times kept coke at his brother's residence. He also stated that his brother would talk about selling coke every now and then, but did not like to fool with it much because it had too much liability involved with it. Mr. Daniels also advised that his brother probably sold to several people at the Overnight company."

This information was never disclosed to the defense. Throughout the case the prosecution maintained, contrary to this information, that Patrick Daniels did not sell or distribute cocaine. The information provided by George Daniels was exculpatory and would have been relevant in the sentencing stage of the case. Adverse information about the victim of a murder is a mitigating factor that can be considered by the jury. This information also could have been used to impeach the credibility of Norman, who testified that to her knowledge Daniels did not deal in cocaine.

(11) Police and lab reports indicating that Daniels' urine contained cocaine and that white powder (which apparently was never analyzed) was found in Daniels' apartment. This evidence was exculpatory because it corroborates the statement by George Daniels that Patrick Daniels did deal in cocaine.

(12) Misleading information about Petitioner's bank account. The prosecution suggested to the jury during the sentencing hearing that Petitioner was motivated by financial problems, and that his

financial problems were evidenced by this floating or kiting checks drawn on his account. The prosecution, however, had in its possession information about Petitioner's bank account, which it did not turn over to the defense, indicating that no check floating occurred prior to the time of the offense(s).

2. Prosecutorial Misconduct: Altering Evidence.

The prosecution violated in a material and prejudicial way Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by improperly altering or influencing the evidence and witness testimony in the case. Instances of this kind of prosecutorial misconduct include but are not necessarily limited to the following:

(1) The prosecution improperly altered Miller's testimony. There were glaring inconsistencies between the April 23, 1987, statement Miller gave to the prosecution, and Miller's trial testimony. Miller's subsequent testimony at his own sentencing hearing also contradicted his trial testimony in certain material respects. Petitioner alleges that the prosecution improperly influenced Miller's testimony. The evidence supporting this allegation includes but is not necessarily limited to the following: the inconsistencies in Miller's trial testimony favor the prosecution's case; the prosecution's records indicate that the prosecution spent considerable time with Miller between his April 23, 1987, statement at Petitioner's trial; Miller's trial was not scheduled until after Miller testified in Petitioner's

case; the prosecution offered not to seek the death penalty against Miller in exchange for Miller's testimony in Petitioner's case; Miller's use of language in his testimony was suspiciously similar to the legal language supporting the State's case and the language used by Norman (as, for example, in both witnesses' use of the word "gangster" to refer to the coat Petitioner wore on the night of the offenses); and the State demonstrated in other areas a willingness to be deceptive and to alter or improperly influence evidence and testimony.

(2) The prosecution gave false and misleading information to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Petitioner. In his February 10, 1987, letter to Larry Southard, the Director of MTMHI, the District Attorney said:

"[Petitioner] was not associated with a particular religious organization."

"The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville. The victim in this case distributed Marijuana from his home but did not distribute Cocaine. The defendant was wishing to take over his operation and expand it to dealing Cocaine. Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume. The defendant had taken on the name of Scarface in the local drug community and that is all many of

the people knew him by. The defendant's credibility is questionable, at best. He had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-defense to prevent being raped. Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.... Therefore, it appears from the evidence that the defendant was the leader in the commission of this crime and that it was precipitated as a result of the defendant's desire to become a leader in drug activity in Nashville more rapidly than he could have otherwise. Committing such a brutal vicious murder and taking credit for it on the streets would have clearly established him as a force to be reckoned with. This information is supplied in confidence to be used for evaluation purposes only."

This letter is misleading or false in a number of respects. Contrary to the letter, the prosecution in fact knew that Petitioner was a member of SEGM, which was a religious organization, and that Petitioner's work associates reported to the

prosecution that Petitioner would regularly be seen carrying a Bible. The prosecution had no evidence supporting the statement in this letter that Petitioner was attempting to “become entrenched” as a drug distributor. The prosecution had obtained information that, contrary to this letter, the victim did engage in distributing cocaine. There was no evidence supporting the contention in this letter that Petitioner was even known in the “local drug community,” much less that he had assumed the name “Scarface” in that community. With regard to Petitioner’s 1972 conviction, there was no evidence in the record supporting the statement in this letter that Petitioner “was a leader of a prison gang attempting to gain control over the victim’s gang.” In fact, the record of the 1972 case is consistent with the idea that Petitioner was the victim of homosexual abuse perpetrated in the federal prison by the victim of that killing. It is further significant that while the prosecution was attempting to influence the MTMHI psychological evaluation of Petitioner with these false and misleading statements, the prosecution never disclosed to MTMHI the evidence of Petitioner’s psychological problems that did appear in the record of Petitioner’s 1972 conviction. Many of the false and misleading statements contained in this letter were incorporated by MTMHI in its reports on Petitioner, and presumably this false information influenced MTMHI’s evaluation of Petitioner.

(3) The prosecution deliberately attempted to manipulate Norman’s testimony regarding ownership of the \$300 that was allegedly robbed. Although the prosecution knew the facts established

that the \$300, if it ever existed, belonged to Norman and not Daniels, the State attempted to use leading questions at trial to get Norman to say that the money belonged to both her and Daniels. For example, in their trial notes, the prosecutors wrote with regard to this matter, “Items taken - \$300 cash and anytime teller card (leading questions to make her say it was theirs),” and “\$300 and any time teller card (leading questions to say cash was theirs).”

**3. Prosecutorial Misconduct: Mised
Defense Regarding the Nature of the Prior
1972 Conviction.**

The prosecution deliberately misrepresented to defense counsel that Petitioner’s 1972 murder conviction arose out a “turf war” between two gangs over the drug trade in the federal penitentiary. The prosecution further misrepresented that Petitioner’s version of what happened, “casting it in terms of a homosexual retribution,” was false.

The prosecution deliberately gave this false and misleading information to defense counsel to influence defense counsel’s decisions regarding the handling of the trial. As the District Attorney has testified, “We told the defense about potentially damaging and rebuttal evidence and it shut the door on a lot of defense evidence during the sentencing phase.” The prosecution was providing this false and misleading information, in order to “shut the door” on potential defense evidence, at the same time it was withholding Brady material in the form of the 1972 trial transcript. The transcript would have alerted reasonably diligent

defense counsel to the deception being practiced by the prosecution.

Defense counsel relied upon the prosecution's misrepresentations and neither investigated the circumstances surrounding the 1972 murder nor presented any evidence about those circumstances during the sentencing hearing. Petitioner was seriously prejudiced by this wrongful conduct by the prosecution. In deliberating on the death sentence, the jury did not have the benefit of available information that would have mitigated the impact of what was perhaps the most serious aggravating factor supporting the State's case for the death penalty.

The prosecution's misconduct in this regard violated in a material and prejudicial way Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Prosecutorial Misconduct: Improper Questions in the Guilt Stage.

The prosecution improperly pursued at least two lines of questions that were irrelevant, inflammatory and prejudicial to Petitioner. The trial court erred in permitting these lines of questions. These lines of questions violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These lines of questions include the following:

- (1) The prosecution's questions of Norman about what was going through her mind when Petitioner allegedly pointed a gun at her; and the prosecution's questions of Norman about what was

going through her mind when she saw her children come out of their room while Petitioner and Miller were holding guns on Norman and Daniels.

(2) The prosecution's questions of Robert Jordon asking how Petitioner had reacted to seeing the movie Scarface about six months before the killing.

5. Prosecutorial Misconduct: Guilt Stage Closing Argument.

The prosecution made numerous improper, misleading, inaccurate, prejudicial and inflammatory statements to the jury during closing argument in the guilt stage of the trial. These improper and inaccurate statements, individually and cumulatively, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The trial court erred by permitting these arguments to be made to the jury. The improper and inaccurate statements made by the prosecution in closing argument include but are not necessarily limited to the following:

(1) The prosecution improperly stated: "We know Ms. Norman said that three hundred dollars was on her dresser. We know of both men, he [Petitioner] was the only one that went through the bedroom, the defendant, Mr. Jones. Ms. Norman said, he went and rummaged through the room." (Tr. 1669). Ms. Norman never gave such testimony. The prejudice of this statement is palpable. The prosecution had presented no evidence supporting a finding that Petitioner had committed robbery of

the alleged \$300, misrepresented the record in order to compensate for that failure, and successfully persuaded the jury that there was evidence when none was there.

(2) The prosecution improperly argued that Petitioner could be convicted of both premeditated and felony murder and felony murder, when the indictment was only in the alternative. (Tr. 1680).

(3) The prosecution improperly used the word “gangster” in an inflammatory and unduly prejudicial way in describing the coat Petitioner wore on the night of the offense. The prosecution’s improper argument on this point included the following statements: “He had a gangster coat on, is what she called it – a gangster coat.” (Tr. 1672-3) “[H]e changes into his gangster uniform.” (Tr. 1673) “The defendant was there; the defendant had that gun; the defendant had the gangster coat; the defendant participated.” (Tr. 1674)

(4) The prosecution made the improperly inflammatory, inaccurate and prejudicial statements that Petitioner committed the alleged murder for “pure pleasure.” The prosecution’s improper argument on this point included the following statements: “Whoever did that, ladies and gentlemen, enjoyed it, had to have.” (Tr. 1679). “It was all part of a plan. It was all part of the enjoyment that the person who did the stabbing had.” (Tr. 1711).

6. Sentencing Stage Prosecutorial Misconduct: Allowing Inadmissible Information to the Jury.

The prosecution engaged in misconduct in the sentencing hearing, and the trial court should have declared a mistrial, when the prosecution passed copies of previous indictments to the jury after assuring the court that would not happen, and also in allowing a prosecution witness to testify as to the facts of Petitioner's prior convictions. (Tr. 1809-23).

More specifically, Petitioner made a motion in limine prior to the sentencing hearing to prohibit the prosecution from making any mention before the jury that the defendant was on parole at the time of the offense in this case. In the course of arguing the motion, the prosecution stated it would not pass the records of Petitioner's prior murder conviction to the jury since they showed the Petitioner had received a life sentence and described the circumstances of the crime. During the trial, Petitioner's parole officer testified to the fact of Petitioner's two prior convictions, one for second degree murder and another for assault with a deadly weapon. Over defense objection, the court improperly allowed the prosecution to ask the parole officer as to the nature of the deadly weapon, to which he answered it was a knife. The prosecution then passed to the jury the record of Petitioner's conviction for assault with a deadly weapon which included a two count indictment charging him with robbery in addition to the assault. Although the trial court attempted to cure the error with an instruction that the only applicable fact in the record was the fact of the prior conviction, the prosecution had exposed the jury to

inadmissible highly prejudicial information, concerning which it had specifically assured the court and Petitioner that it would not do. Given the facts of this case, the improper admission of the nature of the weapon in the prior offense was particularly prejudicial.

The prosecution's conduct, and the trial court's actions, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Tennessee Supreme Court characterized the prosecution's conduct by saying that it "bordered on deception" and was "improper."

7. Prosecutorial Misconduct and Trial Error: Prosecution's Cross Examination of Petitioner's Sentencing Stage Testimony.

The prosecution's cross examination of Petitioner in the sentencing stage of the trial was improperly inflammatory, irrelevant, and misleading. The cross examination also was an impermissible and unconstitutional attack on Petitioner's decision to invoke his Fifth Amendment privilege against self incrimination at the guilt stage of the trial.

The prosecution cross examined Petitioner not only on the mitigating circumstances Petitioner sought to put before the jury, which was the only relevant inquiry at that stage of the sentencing hearing, but also on the facts relating to Petitioner's guilt or innocence of the crimes for which he had already been convicted. The prosecution's cross examination was also improperly designed to take advantage of Petitioner's mental instability by goading him into an emotional

state which required the court to call a recess so that Petitioner could compose himself. The prosecution's cross examination was also improperly designed to force Petitioner either to deny that he ever had a defense to the alleged crimes or, otherwise, to admit that he had taken a position contrary to what the jury had found. Because defense counsel knew so little about Petitioner's fragile mental state, and because defense counsel were so unable (due to unpreparedness) or unwilling (due to a conflict of interest), they failed to take appropriate action to protect Petitioner's rights. They failed to object or otherwise protect Petitioner on the witness stand; and they failed to bolster, corroborate and defend Petitioner's account from other sources. Nor did defense counsel prepare Petitioner, himself, to testify.

Examples of the prosecution's improper cross examination of Petitioner include the following:

Q. Do you remember your lawyer asking the question in such a way to make Mr. Miller look like he was giving false testimony when he said he carried the tape in the gym bag? Do you remember that?

A. I remember Mr. Barrett asking Mr. Miller the question.

Q. When you sat there in that chair, you knew all along that he had carried the tape in the gym bag. There was no question about that, right?

A. Yes, sir.

Q. But, yet, the questions were trying to make Mr. Miller look like he was lying to this jury, when he said he carried the tape in the gym bag, right?

A. I don't -- the reason why Mr. Barrett asked the question is -- you have to get the answer from him.

(Tr. 1891-2).

Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that was true, didn't you?

(Tr. 1893).

Q. And you want this jury to believe, Mr. Jones, that you don't know -- don't know, if you were trying to kill her or not?

(Tr. 1896).

The entire line of the prosecution's cross examination of Petitioner, and the trial court's failure to prevent such a line of questioning, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

8. Prosecutorial Misconduct: Sentencing Stage Arguments.

The prosecution made numerous improper, misleading, inaccurate, prejudicial and inflammatory statements to the jury during the arguments in the

sentencing stage of the trial. These improper and inaccurate statements, taken individually and cumulatively, violated in a material and prejudicial manner Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The trial court erred by permitting these arguments to be made to the jury. The improper and inaccurate statements made by the prosecution in closing argument include but are not necessarily limited to the following.

(1) The prosecution repeated improper, misleading and inflammatory statements it made in the guilt stage argument to the effect that Petitioner killed for "pure pleasure." The closing argument improperly included such statements as: "Is there any justification or excuse for it that mitigates it, that makes light of it, that says it's all right. ... Is there any reason, as a mitigating factor -- is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except pure pleasure." (Tr. 1942). "And when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands -- at his planning -- at his enjoyment -- and that's depraved." (Tr. 1985). This prejudicial, misleading argument was possible because defense counsel had not presented available evidence of the true basis for Petitioner's conduct and did not ever know enough about their client or Petitioner's available defenses to object to this line of argument.

(2) The prosecution improperly stated that the jury could not take sympathy into consideration in their sentencing decision. The improper

argument on this point included the following statements: “Folks, let me warn you -- when I tell you that passion, prejudice and sympathy, tears -- tears are not mitigating factors.” (Tr. 1935). “So today when defense counsel gets up and argues to you ask yourself: is he asking for passion; is he asking for prejudice; is he asking for sympathy, for me to make my decision,; or, are they asking me to make my decision based upon the law and the facts; ...” (Tr. 1944). In fact, sympathy is a proper basis under the law for a sentence of life instead of death, if based on the evidence presented to the jury.

(3) The prosecution made inappropriate and misleading statements that were implicit comments on Petitioner’s decision not to testify in the guilt stage of the trial. In the same breath, the prosecution improperly referred to matters that the jury “did not know.” The improper statements made by the prosecution on these points include the following: “I was in the courtroom, as you were, when you came back and reported your verdict. There was no doubt in your mind as to your verdict. It was reported. And I watched the defendant, as you did, I’m sure. And a verdict that profound, that we all knew what it would carry us into, there were no tears. And that’s because, ladies and gentlemen, you did not know what we did, and what he did.” (Tr. 1979).

(4) The prosecution improperly made the misleading and inaccurate argument to the jury that the SEGM and its leaders played a diminished role in the commission of the crimes, when the prosecution knew or should have known the true

role of the leadership of the SEGM in the events leading up to and allowing the crimes to occur. (See, e.g., Tr. 1982 and 1799). The prosecution knew that the SEGM played an important role in influencing Petitioner, setting the stage for the offense(s) in this case, and assisting Petitioner's co-counsel flee from the authorities.

(5) The prosecution improperly stated to the jury that there were matters that the prosecution was previously prevented from telling the jury. The prosecution said: "Now, you know, there is a reason why we didn't tell you during the voir dire that this man was a previous convicted murderer, because we couldn't. The Judge won't let us. We couldn't tell that." (Tr. 1979).

(6) The prosecution improperly argued that there were "several other" aggravating circumstances, but the prosecution would rely only on the three statutory aggravators contained in the jury instruction. (Tr. 1805). This argument improperly indicated the existence of additional non-statutory aggravating circumstances in this case.

(7) The prosecution improperly argued the non-statutory aggravating factor of "future dangerousness." Closely related to this, the prosecution also improperly argued the deterrent effect of the death penalty, which is unsupported by facts in evidence and insupportable because it is factually inaccurate. These arguments were beyond the scope of the statutory aggravating factors, which are the only aggravating factors the State can rely upon to support a death penalty. The

prosecution's arguments interjected, in a grossly prejudicial way, elements into the jury's considerations not provided for by the law. Moreover, there was no evidence in the record to support the prosecution's contention of future dangerousness (the record does not reflect any acts of violence for fourteen years prior to the events of this case) or the prosecution's claims about deterrence (for which no such proof is available). The prosecution's improper argument on these points included the following statements: "But at some point in time, ladies and gentlemen, it's got to stop. At some point in time there has to be an end to the murders." (Tr. 1981). "The question here is -- it's about time something final gets done. The question here, ladies and gentlemen, is, under the law, is Norma Norman going to be the last victim." (Tr. 1984)

(8) The prosecution's argument also was improperly directed at the jury's notion that a life sentence might not be for life. This kind of argument is closely related to, and in fact embodies, the impermissible "future dangerousness" argument described above. There can be no room for this kind of argument by the State, especially in light of the rule applied in this case prohibiting the defense during voir dire and during all other stages of the trial from addressing the issue of parole eligibility. The prosecution's improper argument on this point included the following statements: "And when I say, ladies and gentlemen, to the defendant, you were afraid you'd never see the light of day, and that's why you were trying to make plans to get out of the country, it wasn't for a life sentence, so he can walk

around in the prison, it was so he could be on death row before he got executed. That's when you never see the light of day." (Tr. 1984). "And four victims have looked at him, and four victims have suffered from him. And I'm not ashamed to say, ladies and gentlemen, that four is enough -- enough is enough. Don't give him the chance to kill again. Enough is enough." (Tr. 1985).

E. TRIAL COUNSEL ERROR.

1. Conflict of Interest.

Trial counsel had an irreconcilable conflict of interest in representing Petitioner in this case. This conflict of interest adversely affected trial counsel's handling of the case. Trial counsel's conflict of interest deprived Petitioner of his right to counsel guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Trial counsel was paid a \$5,000 retainer to handle Petitioner's case, and trial counsel was promised an additional \$5,000 retainer which was never paid. The \$5,000 retainer that was paid came from Alan Boyd or other members of the SEGM. The \$5,000 retainer that was promised was expected to come from Alan Boyd of the SEGM.

Participants in the SEGM encouraged, provoked, and assisted the charged parties in the commission of the alleged crimes before and after their alleged commission. The SEGM should have been investigated by Petitioner's trial counsel. Trial counsel should have presented evidence which corroborate Petitioner's accurate account in this regard, but trial counsel failed to do so. The fact that the SEGM paid trial counsel's

original retainer, and that the SEGM was expected to pay the additional retainer, created a fatal conflict of interest.

Trial counsel knew or should have known that his initial retainer was paid by Alan Boyd or other members of the SEGM; and trial counsel knew or should have known that the balance of the fee was also to be paid by the SEGM. Trial counsel's failure to provide any meaningful representation to Petitioner, and specifically trial counsel's failure to conduct any kind of investigation of the SEGM, indicates that trial counsel knew that his fee was paid by the SEGM.

The fact that the SEGM paid the initial retainer and was expected to pay the balance improperly influenced trial counsel's failure to conduct a proper investigation of SEGM and its members, their influence over Petitioner, and their role(s) in the offenses that were the subject of criminal prosecution against Petitioner. Information about the SEGM was crucial to Petitioner's defenses in both the guilt and sentencing stages of the case. The fact that the SEGM was involved in trial counsel's retainer also improperly influenced trial counsel's decision not to declare Petitioner indigent and not to seek the court's authorization to employ investigative and expert services to assist in the defense.

The fact that trial counsel never received the second retainer, with created a financial hardship on trial counsel, also improperly influenced trial counsel's failure to conduct a proper investigation of SEGM and its members. By allowing himself to be placed in the position of being paid at the discretion of the SEGM, Petitioner's trial counsel allowed himself to be placed

in a position where the decisions of the SEGM or its members, on whether to pay and how much, influenced the manner in which trial counsel represented Petitioner in this case.

Petitioner's trial counsel was experiencing financial difficulty while he was representing Petitioner. This financial difficulty adversely affected his representation of Petitioner. Given those circumstances, it was trial counsel's duty to ascertain the source of his retainer to determine whether it would be paid and whether payment by such source would create a conflict of interest. If trial counsel never did ascertain the source of his retainer, he violated his duty to Petitioner, and he exposed himself to an impermissible influence in the case which in fact adversely affected his handling of the case.

This situation involving the relationship between the SEGM and trial counsel's fees for handling Petitioner's case mandates that the conviction and sentence against Petitioner be set aside, and actual prejudice, though it is clearly present in this case, need not be proved for such relief to be granted.

2. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In every respect, during the entire course of his engagement in this case, trial counsel failed to perform in accordance with the standards required of counsel in a case of this nature, and trial counsel's failure caused prejudice to Petitioner at both the guilt stage and the sentencing stage of this case. Accordingly, the ineffective assistance of trial counsel violated Petitioner's rights under the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution.

The areas in which trial counsel was ineffective include but are not limited to the following:

a. Trial Counsel Failed to Develop Any Kind of Defense.

As pointed out in Part III. A. of this Petition above, trial counsel failed to consider, contemplate, investigate, develop or present any kind of defense for Petitioner at either the guilt or sentencing stages of this case.

b. Trial Counsel Failed to Assert Petitioner's Fundamental Rights in Connection with the Preparation of the Case.

Trial counsel failed to assert Petitioner's fundamental rights in connection with the preparation of this case in a number of ways, including but not limited to the following:

(1) Trial counsel failed to have Petitioner declared indigent and to obtain funds for attorneys fees and expert assistance.

(2) Trial counsel failed to assert Petitioner's constitutional right to have a psychiatrist and/or psychologist assist in the preparation of Petitioner's case.

(3) Trial counsel failed to assert Petitioner's constitutional right to employ an investigator, a mitigation expert, a jury expert, a forensic

pathologist, and other experts necessary to the preparation of Petitioner's case.

(4) Trial counsel failed to request a continuance of the trial on the grounds that trial counsel lacked resources and had insufficient time to prepare the case for trial, and further on the grounds that trial counsel in fact was not prepared for trial for whatever reason. The trial in this case was held on the first setting, which is unusual and normally unexpected in a capital case.

c. Trial Counsel Failed to Provide Necessary Information to MTMHI and the Court When Requested.

Trial counsel was requested to provide information about Petitioner to MTMHI in connection with MTMHI's evaluation of Petitioner. Trial counsel failed to provide any such information, primarily because trial counsel took no time to investigate Petitioner's background or to employ psychiatric assistance in the case. Consequently, MTMHI performed its evaluation under the influence of the prosecution's misleading and deceptive description of Petitioner and the facts of the case, without any counter-balancing information from the defense.

Trial counsel also failed to the trial court's repeated requests to comment on the trial court's Rule 12 form that was submitted to the Tennessee Supreme Court. Although this occurred after the trial, it evidenced trial counsel's total failure to represent Petitioner's interest in this case. It also deprived the Tennessee Supreme Court of information it needs to conduct its statutorily mandated proportionality review in every capital case.

d. Trial Counsel Failed to Permit Petitioner to Participate in the Preparation of his Defense.

Before trial, counsel failed to consult with Petitioner in a meaningful way or at critical times in the case. Thus, trial counsel failed to obtain important information from Petitioner that might have been useful in Petitioner's defense, and trial counsel failed to explain to Petitioner what the evidence showed or what types of defenses might be available.

During trial, counsel failed to consult with Petitioner regarding what was happening in the trial and what trial strategy should be pursued.

Most significantly, trial counsel took no time to try to prepare either Petitioner or Petitioner's wife for their testimony at the sentencing stage of the trial.

e. Trial Counsel Failed to Investigate, Prepare or Present Evidence on Any of Petitioner's Potential Guilt or Sentencing Stage Defenses.

Among other things, trial counsel failed to: (1) investigate the crime scene; (2) interview any of the witnesses in the case; (3) discuss the case in any meaningful way with Petitioner's trial counsel; (4) view any of the physical evidence in the case; (5) review any of the documentary evidence in the case, such as the police reports; (6) investigate the backgrounds of the victims; (7) investigate the background or any other matters relating to Petitioner's co-defendant Miller; (8) investigate the SEGM or its members, the influence they may have had over Petitioner, or the role they may have played in the alleged crimes; (9) investigate

Petitioner's background; (10) interview any witnesses; (11) prepare Petitioner or Petitioner's wife for their testimony at the sentencing stage; (12) investigate into any of the facts or circumstances that might have been relevant to guilt stage defenses; or (13) investigate into any of the facts or circumstances relevant to the prosecution's proof of aggravating circumstances; (14) or investigate into and of the facts or circumstances that might have been relevant to the defense proof of mitigating circumstances or other sentencing stage defenses.

f. Trial Counsel Failed to Conduct an Effective Voir Dire.

Trial counsel failed to conduct an effective jury voir dire which would have uncovered unfavorable biases and would have anticipated both guilt stage and sentencing stage defenses. Trial counsel failed to adequately "life/death qualify" the jury. Trial counsel failed to adequately voir dire jurors concerning their understanding of and willingness to follow the constitutional requirements relating to consideration of mitigation and other sentencing stage defenses. Among other things, trial counsel in voir dire failed to: (1) identify and eliminate "automatic death penalty" jurors; (2) rehabilitate jurors for whom there was leeway for rehabilitation; (3) voir dire jurors on their understanding of mitigation and their willingness to consider mitigating circumstances in accordance with constitutional requirements; (4) voir dire the jurors on matters concerning the possible defenses and mitigating circumstances that the defense should have raised in the trial; (5) voir dire the jurors on the burdens of proof on the aggravating circumstances

versus the burden of proof on the mitigating circumstances; (6) voir dire the jurors on the “weighing” process that the jurors must conduct in considering aggravating and mitigating circumstances, among other things to the effect that the “weighing” process is qualitative and not quantitative and must consider only the statutorily defined aggravating circumstances and any and all mitigating circumstances indicated by the evidence; (7) voir dire the jurors on the different “unanimity” and non-unanimity” requirements relating to the determination of aggravating and mitigating circumstances, the weighing process, and the final decision of life versus death to be made by the jury in the event of a conviction; or (8) voir dire the jurors on other matters relevant to the proper selection of a jury in a death penalty case.

g. Trial Counsel Failed to Exercise Petitioner’s Fundamental Rights During the Trial.

Trial counsel failed to exercise Petitioner’s fundamental rights during the course of the trial. Among other things, during the trial counsel failed to: (1) object to the various incidents of prosecutorial misconduct which has been outlined in this Petition above; (2) timely object to improper questioning of witnesses by the prosecution which has been outlined in this Petition above; (3) object to erroneous jury instructions at both the guilt and sentencing stages which have been outlined in this Petition above; or (4) request jury instructions that should have been made at the guilt and sentencing stages which have been outlined in this Petition above.

F. APPELLATE COUNSEL ERROR.

Petitioner's appellate counsel was ineffective in his representation of Petitioner on the direct appeal of Petitioner's conviction and death sentence to the Tennessee Supreme Court in failing to raise on appeal and/or properly brief the issues which Petitioner has been compelled to raise in this habeas proceeding. Such ineffective assistance of appellate counsel, in addition to denying Petitioner substantive rights, deprived Petitioner of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

IV. PRAYER FOR RELIEF.

WHEREFORE, Petitioner prays fro the following relief:

1. Issue a writ of habeas corpus to have Petitioner brought before the Court to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Permit Petitioner, who is indigent, to proceed without further prepayment of costs and fees, and grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts supporting this Petition;

3. Grant Petitioner, who is indigent, additional funds to secure expert testimony and to conduct further investigation as necessary, and as will be further specified in supplemental motion for funds, to prove the facts supporting this Petition;

4. Permit Petitioner a reasonable opportunity within which to amend this Petition to include claims which become apparent from further investigation and to fully investigate and develop the facts and law of the claims raised herein;

5. Conduct a hearing at which proof may be offered concerning the allegations in this Petition and the facts supporting this Petition;

6. Upon final review of the Petition, order that Petitioner's convictions and sentences be set aside; and

7. Provide such other and further relief at the Court may find appropriate in the interests of justice.

Respectfully submitted,

/s/Bradley A. MacLean
Bradley A. MacLean
FARRIS, WARFIELD & KANADAY
Nineteenth Floor, SunTrust Center
424 Church Street
Nashville, Tennessee 37219
Ph. (615) 244-5200
FAX (615) 726-3185

/s/William P. Redick, Jr.
William P. Redick, Jr.
P.O. Box 187
6750 Old Hickory Blvd
Whites Creek, Tennessee 37189
Ph. (615) 876-6670

Counsel for Petitioner

App. 103

VERIFICATION

I declare under penalty of perjury that the foregoing
is true and correct.

Date: 11/29/96

/s/Abu-Ali Abdur'Rahman
Abu-Ali Abdur'Rahman, Petitioner
Formerly, James Jones

* * *

*[Certificate of Service Omitted in the
Printing of this Appendix.]*

APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**No. 3:96-0380
Judge Campbell**

[Filed March 12, 2013]

ABU-ALI ABDUR'RAHMAN,)
)
 Petitioner,)
)
 vs.)
)
 STANTON HEIDLE, Warden,)
)
 Respondent.)

MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Fed.R.Civ.P. 60(b), 60(b)(6) and 60(d)(1), 28 U.S.C. §2243, Article I §9, Article III and the Fifth and Fourteenth Amendments to the Constitution, Petitioner Abu-Ali Abdur' Rahman moves this Court for relief from judgment, requesting that the Court reopen its judgment denying habeas corpus relief on claims previously found procedurally defaulted. Such claims are subject to plenary federal review given the Supreme Court's intervening decision in Martinez v. Ryan, 566 U.S. ___ (2012). They include claims that:

(1) Abdur'Rahman was denied due process, effective assistance of counsel, and a fair sentencing hearing given the cumulative error arising from counsel's ineffective assistance at sentencing and prosecutorial misconduct, including the prosecution's withholding of exculpatory evidence (Amended Petition ¶¶B, D & E); and

2) Abdur'Rahman was denied due process, effective assistance of counsel, and a fair sentencing hearing because the jury convicted him of murder and sentenced him to death without being properly instructed that DeValle Miller's accomplice testimony had to be corroborated, and counsel was ineffective for failing to raise this claim on direct appeal (Amended Petition ¶¶C4(4) & F).

Abdur'Rahman's motion is a proper Rule 60 motion under Gonzalez v. Crosby, 545 U.S. 524 (2005), and he is entitled to equitable relief given all the equities: This is a capital case where Abdur'Rahman is entitled to habeas relief, the federal courts have no interest in enforcing a judgment now shown to be predicated on non-existent procedural defaults, and the Supreme Court's recent equitable decision in Martinez v. Ryan, 566 U.S. ___ (2012) recalibrates the equities in Abdur'Rahman's favor. See e.g., In Re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004)(en banc) (granting 60(b) relief in capital case), *vacated* 545 U.S. 1151 (2005), *Rule 60(b) relief granted on remand*, Abdur'Rahman v. Bell, 2008 U.S. Dist. Lexis 37863 (M.D. Tenn. 2008); Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007)(granting 60(b) relief in capital case); Landrum v. Anderson, 2012

U.S. Dist. Lexis 171777 (S.D. Ohio 2012)(granting *Martinez* 60(b) motion in capital case), *adopting Landrum v. Anderson*, 2012 U.S. Dist. Lexis 118501 (S.D. Ohio 2012).

This Court should therefore grant Abdur’Rahman equitable relief and reopen the habeas proceedings. Afterwards, this Court should decide his previously defaulted claims on the merits and grant him habeas corpus relief.

I. Abdur’Rahman Properly Seeks Equitable Relief Under Fed.R.Civ.P. 60(b)

A. Under *Gonzalez v. Crosby*, 545 U.S. 524 (2005),
A Federal Habeas Petitioner May Seek Relief
From Judgment Under Fed.R.Civ.P. 60(b)

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the United States Supreme Court acknowledged that in federal habeas corpus proceedings, a petitioner may seek relief from judgment under Fed.R.Civ.P. 60(b) if he challenges a “defect in the integrity of the federal habeas proceedings,” and does not seek to relitigate the merits of a claim previously decided on the merits. *Gonzalez*, 545 U.S. at 532. Such defects in the habeas proceedings may include assertions “that a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Id.* at 532 n. 4. That is precisely the case here.

B. Abdur'Rahman Was Denied A Merits Review Of His Constitutional Claims, And His Rule 60(b) Motion Is Thus Proper Under *Gonzalez*

Abu-Ali Abdur'Rahman has raised a number of claims alleging that the trial court committed constitutional error, including a claim that the trial court failed to provide a necessary instruction requiring the corroboration of accomplice testimony. When initially considering Abdur' Rahman's habeas petition, this Court concluded that this (and other) claims were procedurally defaulted because they had not been presented to the Tennessee state courts. Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1079-1081 & n.5 (M.D.Tenn. 1998). Although Abdur'Rahman asserted that he had "cause and prejudice" for such defaults because direct appeal counsel had been ineffective, this Court held that Abdur'Rahman had not "presented to the state courts" a claim of ineffectiveness of appellate counsel, and therefore he could not rely on the ineffectiveness of appellate counsel as "cause" for these particular defaults. Id. at 1084. Compare Edwards v. Carpenter, 529 U.S. 446 (2000).

In addition, Abdur'Rahman alleged that he was denied due process because of the cumulative error occurring at trial, and this claim was ultimately deemed procedurally defaulted as well because it had not been presented as an independent constitutional claim to the Tennessee state courts – either on direct appeal or during post-conviction proceedings. Abdur'Rahman v. Bell, 649 F.3d 468, 472-473 (6th Cir. 2011). Consequently, no federal court has ever decided Abdur'Rahman's claim that he was denied due process

and a fair sentencing hearing given the cumulative effect of both: (1) counsel's ineffectiveness in failing to investigate and present mitigating evidence (which this Court earlier found to constitute a constitutional violation); and (2) the prosecution's withholding of exculpatory evidence and misconduct which misled the sentencing jury into imposing the death sentence. Id. at 472-473.

Given the Supreme Court's intervening decision in Martinez v. Ryan, 566 U.S. ____ (2012), however, these claims are no longer procedurally defaulted, as Abdur'Rahman more fully explains *infra*. Suffice it to say, Abdur'Rahman's Rule 60 motion is predicated on a procedural defect in the initial habeas proceedings which prevented a merits review of his constitutional claims. Consequently, under Gonzalez, he may properly proceed under Rule 60 to seek relief from judgment because a "previous ruling which precluded a merits determination was in error." Gonzalez, 545 U.S. at 532 n. 4.

II. This Court Should Grant Abdur'Rahman Equitable Relief From Judgment And Reopen Proceedings On His Previously Defaulted Claims

With Abdur'Rahman's motion being a proper Rule 60 motion, this Court should grant relief from judgment and reopen the proceedings in this case, given the intervening equitable decision in Martinez v. Ryan, 566 U.S. ____ (2012) and all of the equities in this capital case.

A. Martinez v. Ryan, 566 U.S. ____ (2012)

Martinez v. Ryan, 566 U.S. ____ (2012) is a decision predicated on principles of equity, equity which

Abdur'Rahman now invokes in this Court. In essence, *Martinez* provides that the combination of the ineffectiveness of post-conviction counsel and a substantial claim of ineffectiveness of trial and/or appellate counsel overcomes a procedural default. Under *Martinez*, Abdur'Rahman overcomes the procedural default of his previously-defaulted constitutional claims, which are themselves meritorious.

In *Martinez*, the Supreme Court held that, in federal habeas corpus proceedings, a petitioner who contends that he was denied the effective assistance of trial counsel can establish "cause" for defaulting such a claim by establishing that his post-conviction counsel was ineffective in failing to raise the claim in state court. As the Supreme Court explained, when an ineffective-assistance-of-trial-counsel claim can only be raised for the first time in post-conviction proceedings, counsel is necessary for "vindicating a substantial ineffective-assistance-of-trial-counsel claim." *Martinez*, 556 U.S. at ___ (slip op. at 8). "To present a claim of ineffective assistance at trial . . . a prisoner likely needs an effective attorney." *Id.* at ___ (slip op. at 9). Thus, "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." *Id.* at ___ (slip op. at 10).

This conclusion derives from principles of equity. In other words, equity demands that the federal habeas petitioner not be prevented from making a substantial ineffective assistance of counsel argument when, in state court, he had to rely on post-conviction counsel to properly raise the claim in the first instance. It is inequitable to thus deny a habeas petitioner (like

Abdur'Rahman) a meaningful opportunity to have his ineffectiveness claim heard if, in fact, it is the fault of post-conviction counsel (not the petitioner) that the claim was not properly raised in state court in the first instance:

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, *as an equitable matter*, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

Id. at ___ (slip op. at 11)(emphasis supplied).

Under *Martinez*, a petitioner may thus use the ineffectiveness of post-conviction counsel to establish "cause" for the alleged default of a claim of ineffective-assistance-of-trial-counsel. To show "cause," a habeas petitioner must show the following:

[A] prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner

must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez, 566 U.S. at ___ (slip op. at 11). In other words, *Martinez* holds that post-conviction counsel's deficient performance in failing to raise a substantial ineffectiveness claim provides "cause" for a procedural default.

B. Consistent With *Martinez*, Abdur'Rahman Can Establish "Cause" For The Default Of The Constitutional Claims At Issue Here

While *Martinez* by its terms applied to a claim of ineffective-assistance-of-trial-counsel, its equitable principles apply to Abdur'Rahman's cumulative error claim as well as his claim that appellate counsel was ineffective for failing to challenge the defective jury instructions regarding accomplice liability.

First, a claim of ineffectiveness of appellate counsel can only be raised for the first time in post-conviction proceedings, because it does not exist until the direct appeal has concluded, and even so, appellate counsel cannot, by definition, allege his own ineffectiveness. See Frazier v. State, 303 S.W.3d 674, 683 (Tenn. 2010)(an attorney "can hardly be expected to objectively evaluate his or her own performance."). As Justice Scalia acknowledges, therefore, *Martinez* applies to Abdur'Rahman's ineffective-assistance-of-appellate-counsel claim, allowing him to overcome his procedurally defaulted ineffective-assistance-of-appellate-counsel claim by showing that post-conviction

counsel was ineffective in failing to challenge the deficient jury instruction in state court. Martinez, 566 U.S. at ___ (slip op. at 2)(Scalia, J., dissenting)(*Martinez* applies to claims of ineffective assistance of appellate counsel). See also Williams v. Alabama, 2012 U.S.Dist.Lexis 51850 *183-184 (N.D.Ala. 2012)(applying *Martinez* to claim of ineffective assistance of appellate counsel).

Accordingly, under *Martinez*, to the extent that Abdur'Rahman shows that post-conviction counsel was ineffective in failing to claim that direct appeal counsel was ineffective for failing to challenge the jury instruction, the ineffectiveness of post-conviction counsel provides Abdur'Rahman "cause" for the default of his ineffective-assistance-of-appellate-counsel claim, which in turn provides "cause" for the default of his substantive challenges to the jury instruction. See Promotor v. Pollard, 628 F.3d 878, 887 (7th Cir. 2010) (otherwise defaulted claim of ineffective assistance of counsel can still provide "cause" if petitioner can show "cause and prejudice" for the default of the ineffectiveness claim itself). *Martinez* thus effectively abrogates this Court's prior conclusion that Abdur'Rahman could not overcome his procedural default of his challenge to the accomplice testimony instructions.

Martinez also establishes that Abdur'Rahman can now establish that his "cumulative error" claim was erroneously found to be defaulted. The prior conclusion that the claim is defaulted does not survive:

First, under *Martinez*, a petitioner is entitled to the effective assistance of post-conviction counsel when post-conviction provides the "first opportunity

for a particular claim to be raised.” *Martinez*, 566 U.S. at ___ (Scalia, J., dissenting)(slip op. at 2). Abdur’Rahman’s cumulative error claim is itself based upon individual claims of ineffective assistance of counsel and withholding of evidence that were not available until post-conviction. Consequently, his cumulative error claim falls within the ambit of *Martinez*, which entitled him to the effective assistance of counsel to raise his cumulative error claim at the first point it was available – in post-conviction proceedings.

Second, while *Edwards v. Carpenter*, 529 U.S. 446 (2000) held that the ineffective assistance of counsel cannot provide “cause” for a procedural default of a claim unless the petitioner separately exhausts a related ineffectiveness claim in state court, *Edwards* also held that any default of an ineffectiveness claim is “excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that [ineffectiveness] claim.” *Id.* at 453. *Martinez* now allows the ineffectiveness of post-conviction counsel to supply “cause” for the failure of state post-conviction counsel to exhaust a separate claim that trial and/or appellate counsel were ineffective for failing to raise a cumulative error claim – which in turn, would likewise provide “cause” for the default of the cumulative error claim.

Either way, however, provides a way for Abdur’Rahman to overcome the default of his cumulative error claim under *Martinez*.

What this all means is that to secure relief under *Martinez*, Abdur’Rahman must establish:

(1) Abdur'Rahman's underlying cumulative error and ineffective assistance of counsel claims are substantial and were first available during post-conviction proceedings; (2) post-conviction counsel was ineffective for failing to allege a claim that Abdur'Rahman was denied due process given cumulative error and/or for failing to otherwise allege that trial or appellate counsel were ineffective for failing to raise the cumulative error claim; and (3) post-conviction counsel was ineffective for failing to allege that appellate counsel was ineffective for failing to raise his challenge to the accomplice jury instruction. He now makes that showing.

C. Under *Martinez*, Abdur'Rahman Establishes "Cause And Prejudice" For The Default Of His Constitutional Claims: His Claims Are Substantial And Post-Conviction Counsel Was Ineffective

Under *Martinez*, Abdur'Rahman overcomes the previously-imposed procedural defaults in this case, because both of Abdur'Rahman's claims (cumulative error and improper jury instruction) are substantial, and post-conviction counsel was, in fact, ineffective under *Strickland* and *Martinez* for failing to properly raise such claims.

1. Abdur'Rahman's Cumulative Error Claim Is Not Procedurally Defaulted Under *Martinez*

Under *Martinez*, Abdur'Rahman's cumulative error claim is not defaulted because it is quite substantial – in fact, meritorious – and post-conviction counsel was ineffective for failing to present this winning claim during the state post-conviction process. Consequently,

Abdur'Rahman establishes not only his right to federal review of his cumulative error claim, but also his entitlement to relief on the merits of that claim.

a. The Cumulative Error Claim Is Meritorious, And Thus Substantial Under *Martinez*

When one considers the totality of the prejudice flowing both from counsel's ineffectiveness at sentencing and the prosecution's misconduct, it quite clearly appears that Abdur'Rahman presents not just a substantial cumulative error claim, but a meritorious one on which he is entitled to habeas relief. See Cargle v. Mullin, 317 F.3d 1196, 1224-1225 (10th Cir. 2003) (granting habeas relief as to death sentence based upon cumulative errors involving counsel's failure to present mitigating evidence, challenge prosecution's case, and prosecutor's improper argument to the jury).

This conclusion is evident when one considers the fact that two of the four judges who reviewed Abdur'Rahman's ineffective assistance at sentencing claim (Your Honor and Judge Cole) both agree that the ineffectiveness claim alone should entitle Abdur'Rahman to a new sentencing proceeding. When one adds in the effects of the prosecutor's misconduct and withholding of exculpatory evidence, there is no question that Abdur'Rahman is entitled to a new sentencing proceeding.

As aptly explained by Judge Cole – the only judge to ever consider the cumulative error claim on the merits – Abdur'Rahman's cumulative error claim is meritorious because: “The *Brady* violations and *Strickland* ineffective assistance fed off each other at

trial in a perverse symbiosis that infected the verdict with constitutional error.” Abdur’Rahman, 469 F.3d at 483 (Cole, J., dissenting). In other words, had defense counsel not failed in their responsibilities at sentencing *and* had the prosecution not withheld exculpatory evidence *and* had the prosecution not engaged in misconduct that affected the sentencing hearing, there is a reasonable probability that “at least one juror’s assessment of the appropriate penalty” would have been different, with that juror voting for life. Cone v. Bell, 556 U.S. 449, 452 (2009); Wiggins v. Smith, 539 U.S. 510, 537 (2003)(death sentence vacated where, absent error, reasonable probability at least one juror would have voted for life and thus Wiggins’ life would have been spared); Harries v. Bell, 417 F.3d 631 (6th Cir. 2005)(same).

Judge Cole’s assessment is undoubtedly correct, when one undertakes a holistic assessment of the prejudice flowing from counsel’s ineffective assistance, the prejudice from the prosecution’s misconduct, and their overall total effect in leading to a death verdict that, without such error, would have undoubtedly been life. Before making that overall assessment, however, Abdur’Rahman will explicate the prejudice arising from the individual constitutional components of his cumulative error claim, namely ineffective assistance and prosecutorial misconduct.

1) The Ineffective Assistance Component
Of Abdur’Rahman’s Cumulative Error
Claim Is Itself Substantial

By itself, defense counsel’s ineffective assistance clearly indicates that Abdur’Rahman’s sentencing was constitutionally unfair. As this Court held on initial

submission, defense counsel's mitigation investigation "was wholly inadequate." Abdur'Rahman v. Bell, 999 F.Supp. at 1094. Counsel never obtained Abdur'Rahman's "mental health records, or his educational, prison, or military records," a "serious failure" on counsel's part. Id. Defense counsel also failed to "consult or hire a mental health expert to perform an independent mental evaluation of his client," another "grave omission." Id. Counsel never interviewed family members who could have provided mitigating testimony at sentencing, nor did counsel investigate Abdur'Rahman's prior conviction. Id. Counsel's performance was thus deficient within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), a conclusion that no judge on any court has ever disputed.

Was Abdur'Rahman prejudiced by counsel's deficient performance? The answer to that question has, to this point, been a stalemate. Half of the federal judges to review that question have concluded that Abdur'Rahman was prejudiced (Your Honor and Judge Cole), while the other half (Judges Batchelder and Siler) have concluded otherwise. Suffice it to say, this equipoise establishes that in and of themselves, the errors made by sentencing counsel and their effect upon the fairness of Abdur'Rahman's sentencing proceeding were at least significant or substantial (under *Martinez*), when considered as part of the prejudice resulting from cumulative error.

As this Court emphasized on initial submission when it found the sentencing proceeding to have been constitutionally unfair, the jury never heard that Abdur'Rahman was mercilessly abused and tortured by

his father and ran away from home at an early age. Abdur'Rahman, 999 F.Supp. at 1097-1098. The jury also never heard that Abdur'Rahman comes from a family with significant mental illness, and he himself has been mentally "very sick" and "highly disturbed" from an early age, exhibiting paranoia, suffering extreme emotional swings, and engaging in self-mutilating behavior and attempting suicide on numerous occasions. Id. at 1098. In addition, counsel never explained to the sentencing jury that, "despite his mental health problems, Petitioner had functioned as a productive member of society." Id. at 1099.

Nor, as a result of counsel's failures, did the jury hear the mitigating facts surrounding Abdur'Rahman's prior conviction, where an expert at the time testified that Abdur'Rahman was, in fact, mentally ill, schizoid, and stabbed the victim to thwart a homosexual attack – not as part of a drug "turf war" as the prosecution falsely claimed at sentencing. Id. at 1099-1100. As this Court succinctly stated:

[T]he Court is 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 only takes one juror to decide that mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution (Tenn. Code Ann. §39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in

favor of the death penalty.

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

Id. at 1101.

Judge Cole fully agrees: “[H]ad Abdur’Rahman’s lawyer unearthed the breathtaking deprivations and serious mental impairments that shaped Abdur’Rahman and used those events and disabilities to paint a human portrait, at least one penalty-phase juror would have voted to spare his life.” Abdur’Rahman, 649 F.3d at 478 (Cole, J., dissenting). See also Abdur’Rahman, 226 F.3d at ___ (Cole, J., dissenting).

It is thus a toss-up whether sentencing counsel’s errors, by themselves, require a new sentencing hearing. For purposes of assessing Abdur’Rahman’s cumulative error claim, however, we must also add into the mix the prejudice flowing from prosecutorial misconduct and the withholding of exculpatory evidence. That additional prejudice ultimately tips the balance in Abdur’Rahman’s favor and requires relief, where “The *Brady* violations and *Strickland* ineffective assistance fed off each other at trial in a perverse symbiosis that infected the verdict with constitutional error.” Abdur’Rahman, 469 F.3d at 483 (Cole, J., dissenting).

2) The Misconduct And Withholding Of Evidence Components Of Abdur'Rahman's Cumulative Error Claim Are Likewise Substantial

Indeed, as counsel fell down on the job with grave consequences to Abdur'Rahman, the prosecution simultaneously engaged in significant misconduct that further undermined the fundamental fairness of the sentencing hearing. The sentencing hearing was tainted by no fewer than seven (7) types of prosecutorial malfeasance perpetrated by a prosecutor who has repeatedly engaged in unethical conduct.¹ This pervasive misconduct included:

(1) The prosecution withheld from defense counsel the transcript of Abdur'Rahman's 1972 trial, while deceiving defense counsel, the jury, and mental health evaluators into believing that Abdur'Rahman suffered no history of mental illness;

(2) The prosecution withheld information contained in a report from Detective Garafola which showed that Abdur'Rahman was severely mentally

¹ See e.g., State v. Jones, 789 S.W.2d 545, 551-552 (Tenn. 1990)(noting Zimmermann's deceptive conduct in ignoring motion *in limine*); Garrett v. State, 2001 Tenn.Crim.App.Lexis 206 (2001)(Zimmermann committed *Brady* violation); In Re Zimmermann, 1986 WL 8586 (Tenn.Cr.App. 1986)(Zimmermann failed to disclose evidence required by court rule); Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989) (sanctioned for inappropriate comments about case); State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999)(Zimmermann made improper arguments which may have been made in blatant disregard for longstanding precedent).

disturbed upon arrest and was banging his head against the wall;

(3) The prosecution withheld evidence it had in its possession that the murder was orchestrated by the Southeast Gospel Ministry, especially as shown by a withheld pretrial statement given by DeValle Miller to the prosecutor;

(4) The prosecutor lied to the court about Abdur'Rahman's mental illness;

(5) The prosecutor intentionally lied to defense counsel about the circumstances of Abdur'Rahman's 1972 conviction;

(6) The prosecutor then capitalized on his withholding of evidence and lying to defense counsel to proceed to lie to the jury about Abdur'Rahman's culpability.

(7) In an unethical act which the Tennessee Supreme Court recognized as "improper" and "border[ing] on deception," the prosecutor also tainted the sentencing jury by deliberately violating a court order and showing the jury an indictment containing highly prejudicial information, *viz.*, a robbery charge on which Abdur'Rahman was never convicted).

To get a better sense of the overall unethical behavior of the prosecutor in this case and its ultimate effect – along with counsel's ineffectiveness – on the outcome of the sentencing hearing, Abdur'Rahman will now describe the prosecution's malfeasance in greater detail. This detail is necessary, as it demonstrates that the prosecution's actions were deliberate and pervasive,

and together with the ineffective assistance of counsel, led to a constitutionally unfair sentencing hearing.

a) The Prosecution's Extensive Misconduct

Prosecutor John Zimmermann knew that to get the jury to convict Abu-Ali Abdur'Rahman of first-degree murder he had to convince the jury that Abdur'Rahman (not co-defendant DeValle Miller) actually stabbed and killed Patrick Daniels,² and that Abdur'Rahman was not insane at the time.³ Zimmermann also knew that if he was to secure a death sentence, he had to further convince the jury that there were no mitigating circumstances about Abdur'Rahman, his history, or this offense warranting leniency.⁴

With Abdur'Rahman having previously been convicted of a federal reformatory killing in 1972⁵ (a statutory aggravating circumstance under Tennessee law),⁶ Zimmermann didn't want the jury to hear that the prior murder was mitigated, that Abdur'Rahman suffered mental illness at the time of the 1986 killing, or that there were other mitigating reasons why Abdur'Rahman ought not be executed.

² E.H.Tr. 908 (John Zimmermann).

³ Pet.E.H.Ex. 15.

⁴ Id.

⁵ *United States v. Jones*, E.D.Va. No. CR 57-72-R (1972).

⁶ See Tenn. Code Ann. §39-2-203(i)(2)(1986).

Zimmermann achieved his goal through deception, lies, and withholding of evidence, something he has done not only here, but in numerous other cases. Zimmermann orchestrated an ongoing scheme to manipulate the truthfinding process, which successfully hid from the jury the truth about Abdur'Rahman and his mental state, his 1972 conviction, and the true circumstances of the 1986 killing.

b) Zimmermann Withheld Exculpatory Evidence And Deceived Defense Counsel And Mental Health Evaluators About Abdur'Rahman's History Of Mental Illness And His 1972 Trial

Zimmermann was well aware that the circumstances of the 1972 conviction were critical to Abdur'Rahman's culpability for the killing of Patrick Daniels in 1986. In Zimmermann's own words, it was "imperative that we obtain information regarding the facts of the [1972] case and be prepared to offer them during the penalty phase of the trial."⁷ But when Zimmermann learned facts about that case which he didn't like, he proceeded to hide them.

Zimmermann obtained the transcript of the 1972 proceedings⁸ and learned early on that Abdur'Rahman's mental state and mental illness were critical issues. Zimmermann learned that when

⁷ Pet. E.H.Ex. 45.

⁸ *United States v. James Lee Jones, Jr.*, E.D.Va. No. CR 57-72-R.

Abdur'Rahman was earlier charged with assault in 1969, the United States Attorney sought a psychiatric examination, because he had a history of suicide attempts and, following his arrest, he "repeatedly struck his head on the window of the police car, burned the bed sheet in his jail and attempted to asphyxiate himself."⁹

Zimmermann also learned that at the 1972 trial, Abdur'Rahman raised a viable insanity defense, with Dr. Asot Masri, M.D. testifying that Abdur'Rahman was insane because he was schizoid and suffered borderline personality disorder, was "a sick man," and was unable to control himself.¹⁰ According to Dr. Masri, Abdur'Rahman suffered mental disease whereby he "cannot control himself when he panics," and suffers "periodic decompensation with loss of control."¹¹ Even the Government psychiatrist, Dr. Jack Eardley, acknowledged that Abdur'Rahman may not have realized what he was doing at the time.¹² Zimmermann further learned that Abdur'Rahman attacked the victim after a scuffle to thwart the victim's sexual assaults.¹³

⁹ Pet. E.H.Ex. 131, p. 713 (*United States v. James Lee Jones, Jr.*, Motion For Psychiatric Examination, D.Md. May 13, 1969).

¹⁰ Pet. E.H.Ex. 131, *United States v. James Lee Jones, Jr.*, E.D.Va. No. CR 57-72-R, Trial Tr. 47, 49-50.

¹¹ *Id.*, Trial Tr. 52-53.

¹² *Id.*, Trial Tr. 61 (Jack Eardley, M.D.).

¹³ Pet.E.H.Ex. 131, Trial Tr. 13, 21-22 (Agent William Simms).

Knowing this information, however, Zimmermann then deliberately lied to mental health professionals who were evaluating Abdur'Rahman at Middle Tennessee Mental Health Institute (MTMHI). In response to MTMHI's request that Zimmermann provide relevant information concerning Abdur'Rahman,¹⁴ Zimmermann proceeded to deliberately lie to MTMHI, saying that there was "no evidence" showing that Abdur'Rahman "relied upon an insanity defense at trial"¹⁵ in 1972. That this was a deliberate lie designed to undermine MTMHI's evaluation is evident, because months earlier, Zimmermann had clearly written Abdur'Rahman's parole officer (Lewis Trammell) explaining that Abdur'Rahman had "attempted to raise an insanity defense" at the trial and that his "mental status" was "of utmost importance."¹⁶ Zimmermann also falsely told MTMHI that the 1972 killing was part of a "gang war," when the transcript (including testimony from various F.B.I. agents) proved otherwise.¹⁷

¹⁴ E.H.Tr. 966-967 (John Zimmermann).

¹⁵ Pet.E.H.Ex. 34.

¹⁶ Pet.E.H.Ex. 15.

¹⁷ Zimmermann's letter to MTMHI was replete with still other falsehoods, including false statements that: Abdur'Rahman was not involved with any particular religious organization (he was, the SGM, *See infra*); Abdur'Rahman was trying to become "entrenched" as a drug distributor (that wasn't true); and the victim here (Patrick Daniels) did not distribute cocaine (when he did). Zimmermann appears to have been fixated on the belief that both the 1972 and 1986 offenses involved drug turf wars, but as explained *infra*, there was no evidence from the 1972 trial to

Zimmermann's lies had their intended effect by undermining the MTMHI evaluation. MTMHI never sought out or took into account Drs. Masri's and Eardley's 1972 testimony and diagnoses of Abdur'Rahman,¹⁸ and MTMHI's report makes no mention of this critical evidence. Without that critical information, MTMHI declined to give him a diagnosis, while also concluding that he was not insane during the 1986 offense.¹⁹ Yet, had MTMHI not been deceived by Zimmermann's outright lies, it clearly appears that Abdur'Rahman's mental problems and the mitigating circumstances of the 1972 offense (including the psychiatric diagnoses) would have come to light and been heard by the jury.

Indeed, like Dr. Masri, Dr. Robert Sadoff has concluded that Abdur'Rahman suffers post-traumatic stress disorder and borderline personality disorder,²⁰ which would have led Abdur'Rahman at the time of the offense to dissociate under stress and become

support this assertion. Nor does any proof from the 1986 offense support such a contention.

¹⁸ E.H.Tr. 969 (Zimmermann did not provide the transcript to MTMHI). MTMHI also did not consider Abdur'Rahman's suicide attempts and self-mutilating behavior from 1969.

¹⁹ Interestingly, MTMHI asserted that even though Abdur'Rahman "was comparing himself to individuals such as Moses, Abraham, Martin Luther King," he was not delusional (See E.H.Tr. 87 (Sam Craddock, Ph.D.)).

²⁰ E.H.Tr. 455 (Robert Sadoff, M.D.)

psychotic.²¹ Dr. Diana McCoy, Ph.D., has likewise concluded that Abdur'Rahman suffers borderline personality disorder²² which can cause transient psychotic episodes. And even Dr. Sam Craddock, Ph.D. (who evaluated Abdur'Rahman at MTMHI and was the state's lead mental health professional in this matter) did not disagree with such a diagnosis,²³ admitted that Dr. Masri's prior diagnosis of borderline personality disorder (which MTMHI didn't know) was consistent with Abdur'Rahman's history, and acknowledged that someone diagnosed as borderline can "lapse into psychotic states."²⁴ Had Zimmermann not lied to MTMHI, therefore, Craddock and his team (which reached no diagnosis) would likely have concluded that Abdur'Rahman suffers this form of mental illness and did so at the time of the offense.²⁵

And while Zimmermann misled MTMHI about the circumstances of the 1972 offense, Zimmermann also failed to disclose to defense counsel the 1972 transcript,²⁶ claiming (completely contrary to his

²¹ E.H.Tr. 517 (Robert Sadoff, M.D.). This testimony was un rebutted.

²² E.H.Tr. 656 (Diana McCoy).

²³ E.H.Tr. 140 (Sam Craddock, Ph.D.).

²⁴ E.H.Tr. 120-133 (Sam Craddock, Ph.D.).

²⁵ Craddock has admitted that the type of head-banging exhibited by Abdur'Rahman was also highly unusual behavior. E.H.Tr. 125 (Sam Craddock, Ph.D.).

²⁶ E.H.Tr. 956 (John Zimmermann).

professed need for information about the 1972 trial when he thought it could support his 1986 prosecution),²⁷ that the 1972 transcript was not exculpatory and had no bearing on Abdur'Rahman's mental state during the 1986 offense.²⁸

c) Zimmermann Deliberately
Withheld Exculpatory Evidence
Showing Abdur'Rahman Was
Mentally Disturbed When Arrested

Zimmermann also withheld from the defense a police report from Chief Detective and arresting officer Mark Garafola which establishes proof that Abdur'Rahman was mentally ill and suffering from severe emotional disturbance, thus establishing mitigating circumstances in support of a life sentence. Detective Garafola's report clearly shows that when arrested shortly after the murder, Abdur'Rahman was in the throes of serious mental disturbance, while at the same time revealing mitigating circumstances about the 1972 offense. In his report, Garafola not only recounts Abdur'Rahman's description of how he killed in 1972 to avoid being raped, Garafola also describes how Abdur'Rahman was violently banging his head against the wall – much like the same seriously disturbed behavior he manifested in 1969. See p. 19, *supra*. Abdur'Rahman's disturbance was so serious that he was promptly placed in a padded cell for two days:²⁹

²⁷ See Pet. E.H.Ex. 45; p. 3 n.4, *supra*.

²⁸ E.H.Tr. 1015 (John Zimmermann).

²⁹ Pet. E.H.Ex. 8.

When we returned to our office, Det[ective] Elmore and myself attempted to interview [Abdur'Rahman]. He was in an interview room and when we entered the room [Abdur'Rahman] was crying. He would not respond to our questions. The only statement he made was 'I only killed one man in my life and that was because he was trying to fuck me' He then started to hit his head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again.³⁰

Again, though Zimmermann knew the significance of such clear signs of mental disturbance, he refused to disclose this exculpatory evidence. Rather, when required to disclose the statement as *Jencks* material before Garafola's cross-examination, Zimmermann went out of his way to redact these very portions of the report showing the circumstances of the prior murder and Abdur'Rahman's self-destructive behavior. Zimmermann thus deceitfully insulated Garafola, a key prosecution witness, from being cross-examined about Abdur'Rahman's mental disturbance following his arrest.

³⁰ Pet. E.H.Ex.7.

d) Zimmermann Withheld
Exculpatory Evidence Confirming
That This Killing Was Organized
And Implemented By Higher-Ups
At The Southeastern Gospel
Ministry (SGM)

While Zimmermann withheld exculpatory evidence about Abdur'Rahman's mental state, he also withheld exculpatory, mitigating evidence showing that the offense here was instigated by higher-ups at the Southeastern Gospel Ministry (SGM), a religious community organization led by Allen Boyd. Indeed, over the course of four (4) pretrial meetings spanning at least thirteen (13) hours,³¹ co-defendant DeValle Miller informed Zimmermann that the killing of Patrick Daniels was orchestrated by the SGM. Miller specifically told Zimmermann that the killing occurred while he and Abdur'Rahman were working for the Southeastern Gospel Ministry (SGM),³² a paramilitary/religious group organized by Allen Boyd and his associates William Beard and Mitch Hollie³³ and dedicated "to drive drug dealers out of the

³¹ E.H.Tr. 1035-1037 (Ross Alderman). During those meetings, Zimmermann carefully prepared Miller for his testimony, even to the point of informing him about other witnesses' proposed testimony. Id.

³² P.C.Tr. Vol. III, p. 35 (Zimmerman, his assistant, and Alderman were present at meetings with Miller, and Miller told them about involvement in the Southeast Gospel Ministry and getting gun from William Beard, another principal in the SGM, which was used by Miller).

³³ E.H.Tr. 1040 (Ross Alderman).

community” through intimidation.³⁴ Miller told Zimmermann in detail about the SGM’s involvement and motive in seeking to intimidate, not kill, Daniels,³⁵ and how Miller and Abdur’Rahman had been brainwashed by the SGM.³⁶

When he called Miller to testify, however, Zimmermann allowed Miller to claim that his and Abdur’Rahman’s motive in going to Patrick Daniels’ home was to rob him of his marijuana.³⁷ Miller mentioned *nothing* about the real motive about which Zimmermann was fully aware – the SGM’s plan (of which Miller and Abdur’Rahman were foot soldiers) to intimidate drug dealers into stopping the degradation of the community. And Zimmermann was silent.³⁸

With Zimmermann having hidden the truth during Miller’s testimony, Abdur’Rahman sought to set the record straight in his own testimony at sentencing, in which he informed the jury that his actions were part of his work with the SGM. Abdur’Rahman described the SGM and explained that the SGM’s Allen Boyd

³⁴ E.H.Tr. 1039 (Ross Alderman).

³⁵ P.C.Tr. 15, 16, 17, 19, 26 (DeValle Miller).

³⁶ P.C.Tr. 37 (DeValle Miller).

³⁷ Trial Tr. 1450, 1458 (DeValle Miller).

³⁸ Additional inconsistencies of Miller’s differing versions of events over the course of those numerous interviews also could have been used to impeach Miller.

even provided him the weapon he carried to Patrick Daniels' house.³⁹

Though Miller's pre-trial admissions to Zimmermann confirmed Abdur'Rahman's testimony about the SGM's role in instigating the murder and contradicted Miller's claim that Abdur'Rahman sought to rob Daniels,⁴⁰ Zimmermann then deliberately lied to the jury by telling them that Abdur'Rahman's testimony about the SGM's involvement was "bunk,"⁴¹ though Zimmermann was well aware from his discussions with Miller that it was Abdur'Rahman (not Miller) who was telling the truth about why they went into Patrick Daniels' apartment.⁴² By withholding Miller's pretrial admissions about the SGM's involvement and then allowing Miller to mislead the jury about the motive for the killing, Zimmermann

³⁹ Trial Tr. 1838-1843, 1844-1848, 1855-1856 (Allen Boyd gave Abdur'Rahman the shotgun he took to Patrick Daniels' house, and William Beard gave pistol to DeValle Miller). The evidence indicates that the firearms were not loaded, were not fired, and only intended to intimidate.

⁴⁰ Zimmermann was also aware from Abdur'Rahman's federal parole officer, Lewis Trammell, that Abdur'Rahman had told Trammell about the SGM's involvement. Pet.E.H.Ex. 15.

⁴¹ Trial Tr. 1983.

⁴² That the SGM was indeed the driving force behind this killing is also evident from Miller's own testimony at his sentencing hearing describing the "individuals that were over" Abdur'Rahman and who gave orders to Abdur'Rahman, a proffers for which Zimmermann vouched. Pet. E.H.Ex. 93, p. 28 (Harold DeValle Miller). See also *Id.*, p. 21 (Karen Miller)(describing Miller's involvement with SGM).

successfully misled the jury about the role of the SGM in this killing while undermining to the jury Abdur'Rahman's truthful testimony which truly mitigates Abdur'Rahman's culpability.

- e) Zimmermann Deliberately Lied To The Court About Abdur'Rahman's Mental Illness And Deliberately Violated A Court Order In Order To Place Prejudicial Evidence Before The Sentencing Jury

Zimmermann even lied to, and showed utter contempt for, the trial court in his quest to secure the death sentence at any cost. When defense counsel informed that he might raise an insanity defense, Zimmermann averred in a motion *in limine* that the report of MTMHI reflected no diagnosis of "mental disease, defect, emotional disturbance or even a personality disorder," and then lied to the court and defense counsel by stating that "the State's attorneys have interviewed the co-defendant and he has no evidence of the same either."⁴³ In fact, Zimmermann had in his possession a statement from Miller describing Abdur'Rahman as behaving like a "maniac" at the crime scene, a statement which Zimmermann himself recognized as showing possible insanity. Indeed, Zimmermann's handwritten notes in the margin of Miller's statement make clear that he knew that Abdur'Rahman's behaving like a "maniac" was relevant to Abdur'Rahman's "insanity + mitigating

⁴³ Pet.E.H.Ex. 73 (motion *in limine*).

factor.”⁴⁴ Yet falsely he told the Court and defense counsel that no such evidence existed. And in that *in limine* motion, Zimmermann clearly implied that no such evidence of mental existed elsewhere, which we know is not true either: Zimmermann knew from the 1972 transcript and from Detective Garafola’s report that Abdur’Rahman suffered serious mental disturbance.

Moreover, during the sentencing hearing, Zimmermann intentionally ignored a court ruling to place before the jury highly prejudicial evidence. The trial court had ruled that he could not present to the jury information contained on an indictment which showed that Abdur’Rahman had been charged with (but never convicted of) a separate robbery. What did Zimmermann proceed to do? Show the jury the prejudicial indictment. Even the Tennessee Supreme Court stated that this misbehavior “bordered on deception.” The Court was a bit too kind. It *was* deception, pure and simple, designed to prejudice the jury to get them to order Abdur’Rahman’s execution.

f) Zimmermann Intentionally Deceived Defense Counsel About The Circumstances Of The 1972 Killing To Prevent The Jury From Hearing About The Mitigating Circumstances Surrounding That Offense

Zimmermann’s lies continued. Before the capital sentencing hearing, he then lied to defense counsel

⁴⁴ Pet.E.H.Ex. 51, p.000171.

about the circumstances of the 1972 conviction. Zimmermann boldly and pointedly told defense counsel that should Abdur'Rahman testify that the 1972 killing was to avoid sexual advances from the victim, F.B.I. Agent William DeLaGrange (who was present in Nashville) would counter with proof that Abdur'Rahman stabbed the victim as part of a "drug turf war."

Zimmermann lied (again). DeLaGrange has testified that he had absolutely *no* proof about any drugs in the institution let alone a "drug turf war" involving Abdur'Rahman.⁴⁵ And DeLagrange has further testified that he possessed no information inconsistent with the scenario that: Stein (the victim) had been "spreading false rumors of abnormal homosexual activity between Jones and Stein,"⁴⁶ Abdur'Rahman tried more than once to get Stein to stop; he confronted Stein yet again; and Stein pushed Abdur'Rahman and laughed at him, after which Abdur'Rahman "just lost his temper" and stabbed him.⁴⁷

In fact, Zimmermann himself now admits the truth: He had no admissible evidence "that could have gone before the jury to indicate that this was a drug turf war."⁴⁸ But Zimmerman's lie – which he frankly conceded was but a "tactic" to "hopefully keep from

⁴⁵ Pet.E.H.Ex. 136, pp. 17-18.

⁴⁶ Pet.E.H.Ex. 136, p. 18.

⁴⁷ Id. at 19.

⁴⁸ P.C.Trans. Vol. III, p. 187.

getting into this 1972 murder” before the jury⁴⁹ – worked, preventing the jury from hearing the real truth about the 1972 offense. Having been intimidated by Zimmermann’s lie, defense counsel presented (and the jury heard) no evidence to explain and thereby mitigate the 1972 murder. Zimmermann’s unethical behavior paid off, paving the way for the death sentence.

g) Zimmermann Then Capitalized On His Deceit And His Withholding Of Evidence By Misleading The Sentencing Jury In Closing Argument

Zimmermann’s *coup de grace* came in his closing argument, in which he capitalized on his deception and withholding of evidence to persuade all twelve jurors to vote for death. He was able to make his argument for death precisely because he had prevented the jury from hearing critical evidence showing Abdur’Rahman’s mental illness, the mitigated nature of the 1972 prison killing, and the involvement of the SGM in the 1986 murder.

In closing argument, Zimmermann proceeded to tell the jury that Abdur’Rahman should be executed, because he suffered no mental illness, had

⁴⁹ P.C.Trans. Vol. III, p. 170, 171 (describing the use of this tactic in a prior capital sentencing proceeding).

“deliberately”⁵⁰ killed before (which wasn’t true),⁵¹ and was fully responsible for the killing here. Despite knowing about Abdur’Rahman’s 1972 insanity defense, and his clear signs of mental illness in the 1970s and upon his arrest in Nashville in 1986, Zimmermann boldly proclaimed that what was “going on in this man’s background” was that “you’re looking at a depraved man *not someone suffering from a severe emotional disturbance*, a depraved man.”⁵² He reiterated that Abdur’Rahman suffered no emotional disturbance.⁵³ In placing the blame for the crime squarely on Abdur’Rahman, Zimmermann then denigrated Abdur’Rahman’s testimony that the killing was driven by the Southeast Gospel Ministry. Even Abdur’Rahman “knew,” Zimmermann argued, that his testimony about the involvement of the SGM would “be rejected by you as bunk.”⁵⁴ Zimmermann further emphasized that Abdur’Rahman should be executed because he had committed the 1972 killing, hadn’t

⁵⁰ Trial Tr. 1979.

⁵¹ Abdur’Rahman had, in fact been convicted of second-degree murder under federal law, with the jury having found that he killed “with malice aforethought.” 18 U.S.C. §1111(a). The jury specifically rejected the greater charge of first-degree murder, which required proof of a “willful, deliberate, malicious, and premeditated killing.” *Id.* Zimmermann thus misled the jury by characterizing the 1972 offense as a deliberate murder. The jury found that it wasn’t.

⁵² Trial Tr. 1981 (emphasis supplied).

⁵³ Trial Tr. 1982.

⁵⁴ Trial Tr. 1983.

learned from that experience,⁵⁵ and would kill again,⁵⁶ though the jury heard nothing of the extenuating and mitigating circumstances surrounding the 1972 offense, thanks to Zimmermann's lies to MTMHI and his deliberate deception of defense counsel.

It is thus not surprising that all twelve jurors voted for death. As a result of Zimmermann's dishonesty and withholding of evidence, jurors thought that Abdur'Rahman had no mental illness, had no provocation for the 1972 killing, and was lying when he testified that the SGM was behind the murder. But none of that was true: Abdur'Rahman *did* suffer mental illness, the 1972 killing *was* provoked and mitigated (and not found by the jury to have been "deliberate"), and the killing here *was* directed by the SGM. It is precisely *because* the 1972 killing was mitigated by Abdur'Rahman's mental disturbance and the sexual assaults of the victim, and *because* the murder here (directed by the SGM) also involved a mentally ill Abdur'Rahman suffering a similar dissociative blackout and loss of control, that one reasonable juror could have voted for life – had Zimmermann not engaged in his extensive misconduct.

h) Under *Martinez*, Abdur'Rahman's
Misconduct Claim Is Substantial

No Court has ever considered the effect of *all* of Zimmermann's misconduct on the fairness of the sentencing hearing. This Court initially only considered

⁵⁵ Trial Tr. 1981.

⁵⁶ Trial Tr. 1981, 1982, 1984, 1985 ("Don't give him the chance to kill again. Enough is enough.")

the fairness of Zimmermann withholding the 1972 transcript and found no prejudice. A Sixth Circuit majority has only considered the cumulative effect of three acts of misconduct, and found no prejudice: (1) the withholding of the 1972 transcript; (2) the withholding of the Garafola report; and (3) the withholding of DeValle Miller's pretrial statements (which the majority said was not improperly withheld).

On the other hand, Judge Cole did consider all of the misconduct and concluded that, by itself, the prosecution's misconduct should warrant habeas relief: "A fair look at the suppressed *Brady* evidence, in the context of the penalty-phase trial that actually took place, undermines confidence in the verdict and demands issuance of the writ." Abdur'Rahman, 649 F.3d at 480. As Judge Cole recognized, the prosecutor engaged in "mayhem": He lied to defense counsel and MTMHI about the circumstances of the prior offense, he deliberately redacted Garafola's observation of Abdur'Rahman upon his arrest, he withheld statements from DeValle Miller, and then "had the gall to taint the jury by showing them indictments from Abdur'Rahman's prior crimes, in direct contravention of the trial court's order." Id. at 480-482. The "sum of these parts" of the prosecutor's "discrete but mutually-reinforcing acts of malfeasance" "invalidate[] the verdict." Id. at 482.

Suffice it to say, based upon the recitation of the scope and nature of the prosecution's extensive misconduct, this aspect of Abdur'Rahman's cumulative error claim is, like the ineffective assistance aspect of his claim, substantial. This is especially true in light of Judge Cole's conclusions.

3) Conclusion: Abdur'Rahman's
Cumulative Error Claim Is Not
Simply Substantial: It Is Meritorious

Given the substantiality of both the ineffectiveness and misconduct aspects of Abdur'Rahman's cumulative error claim, Abdur'Rahman's cumulative error claim is substantial as well. But it is so much more. It is meritorious and entitles Abdur'Rahman to habeas corpus relief, because taken together, sentencing counsel's ineffective assistance at sentencing and the prosecution's additional misdeeds deprived Abdur'Rahman of a fundamentally fair sentencing proceeding.

That is, but for the cumulative prejudice arising from counsel's failures *and* the prosecution's misconduct, there is a reasonable probability that one juror would have voted for life, and Abdur'Rahman would have been spared. To reiterate Judge Cole's conclusion:

The *Brady* violations and *Strickland* ineffective assistance fed off each other at trial in a perverse symbiosis that infected the verdict with constitutional error.

Abdur'Rahman, 469 F.3d at 483 (Cole, J., dissenting). This Court should confirm Judge Cole's conclusion, and, when considering the cumulative error claim on the merits, ultimately grant relief.

There is little question that the sum of the prejudice occurring at sentencing is greater than the prejudice from the individual parts, ineffectiveness and misconduct. Given all the errors that occurred at sentencing, the sentencing jury's decisionmaking

process was completely distorted in favor of death, such that had the jury actually heard the truth, Abdur'Rahman would never have been sent to death row. See Cargle v. Mullin, 317 F.3d 1196, 1224-1225 (10th Cir. 2003)(granting habeas relief as to death sentence based upon cumulative errors at capital sentencing).

On the one hand, all twelve jurors voted to sentence Abdur'Rahman to death because they believed, based upon the prosecution's argument, that Abdur'Rahman never suffered mental illness, had no excuse for the 1972 killing, killed in 1972 for drugs, committed this murder to get money, did so for his own personal gain, and had been charged with other robberies. On the other hand, at least one juror would have voted for life had s/he known that Abdur'Rahman was tortured by his father, ran away from home, suffered a long history of mental illness, came from a family with mental illness, was arguably insane when he killed in 1972, killed to avoid being raped, only went to Patrick Daniels' house at the direction of the SGM, showed clear signs of mental illness upon being arrested (consistent with his history of self-mutilation), and had redeeming qualities that would enable to live productively in prison (as he has).

At least one juror who knew the whole truth would have seen the falsity in the prosecution's argument that Abdur'Rahman was not mentally ill, had no excuse for his actions, acted on his own volition, and deliberately killed before to protect drug turf. Rather, that same juror would have seen that Abdur'Rahman, given his mental illness and the culpability, deserves to live.

In other words, had counsel performed effectively and the prosecution not lied to defense counsel and not deceived the jury about who Abdur'Rahman was, there is a reasonable probability that one juror would have voted for life. As Judge Cole recognizes, on the basis of a claim of cumulative error, Abdur'Rahman is entitled to habeas corpus relief. *A fortiori*, Abdur'Rahman presents a cumulative error claim is more than substantial enough to satisfy the requirements of *Martinez* for establishing "cause." Abdur'Rahman thus easily satisfies this prong of the *Martinez* test.

c. Post-Conviction Counsel Ineffectively Failed To Properly Raise Abdur'Rahman's Meritorious Cumulative Error Claim

Because Abdur'Rahman's cumulative error claim is substantial and meritorious, Abdur'Rahman overcomes the default of this claim upon showing that post-conviction counsel was ineffective for failing to raise such a claim. He makes that showing as well. Indeed, post-conviction counsel had no reason *not* to raise a cumulative error claim and support it with all of the evidence now presented in federal court to support that claim. Indeed, where post-conviction counsel raised both ineffectiveness and misconduct claims in post-conviction, there was no reason not to also argue their cumulative effect upon the fairness of Abdur'Rahman's trial and sentence. Post-Conviction counsel thus acted out of ignorance, not for any strategic tactical reason. As a result, counsel was ineffective.

d. Conclusion: Abdur'Rahman's Cumulative Error Claim Is Not Procedurally Defaulted Under *Martinez* And It Is Meritorious

Thus, Abdur'Rahman's meritorious cumulative error claim is not procedurally defaulted under *Martinez*. Post-Conviction counsel was ineffective and failed to properly raise the claim in post-conviction, which was Abdur'Rahman's first chance to raise the claim. In addition, the claim is not simply substantial. It is meritorious. Abdur'Rahman has a winning cumulative error claim under *Martinez*.

2. Under *Martinez*, Abdur'Rahman Also Overcomes Any Default Of His Claim That The Jury Was Not Properly Instructed That Accomplice Testimony Had To Be Independently Corroborated

Abdur'Rahman also presents meritorious claims that the trial court failed to properly instruct the jury that accomplice testimony had to be corroborated and appellate counsel were ineffective for failing to raise this challenge on direct appeal. Under *Martinez*, such claims are substantial, and post-conviction counsel was ineffective in failing to make such challenges.

For decades, and at the time of Abdur'Rahman's trial, it was a fundamental principle of Tennessee law that Abdur'Rahman could not be convicted based upon the uncorroborated testimony of an accomplice. Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811 (1959); Monts v. State, 379 S.W.2d 34, 43 (Tenn. 1964). To give effect to this requirement of Tennessee law, when an accomplice testifies, the trial judge "should . . . define[]

an accomplice . . . recite[] the rule requiring corroborative evidence, then instruct[] the jury to factually determine whether [the witness] me[e]t[s] the definition. If so, the jury should . . . then determine[] whether other evidence corroborated his testimony.” State v. Perkinson, 867 S.W.2d 1, 8 (Tenn. Crim. App. 1992).⁵⁷

When an accomplice testifies, as DeValle Miller did here, such an instruction is absolutely imperative, because the question “whether a witness’ testimony has been sufficiently corroborated is entrusted to the jury as the trier of fact.” State v. Bigbee, 885 S.W.2d 797,1 803 (Tenn. 1994). Without such an instruction, the jury cannot do its job. Without such an instruction, a defendant can be convicted based on uncorroborated accomplice testimony, thus permitting an unjust conviction.

Here, however, the trial judge completely failed to provide necessary instruction to require the corroboration of the testimony from of the prosecution’s key witness DeValle Miller, even though Miller – who was indicted along with Abdur’Rahman – was unquestionably an accomplice under Tennessee law. Id. at 7 (individual indicted for the same offense as a

⁵⁷ In Abdur’Rahman’s case, the jury should have been instructed as follows: “[I]t is a question for the jury to determine whether the witness DeValle Miller was an accomplice in this alleged crime. If you find from the proof that the witness was an accomplice, then the defendant cannot be convicted upon the uncorroborated testimony of the witness. If you find that the witness was not an accomplice, then you will judge the weight to be given to his testimony just as you do that of the other witnesses in the case.” Perkinson, 867 S.W.2d at 7-8.

defendant is, in fact, an accomplice). The instruction on “accomplices” actually given to the jury neither required the jury to consider Miller an accomplice nor required Miller’s testimony be corroborated before Abdur’Rahman could be convicted. The wholly inadequate instruction provided to the jury stated, in full:

An accomplice is one who unites with another in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

Tr. 1717-1718.

Because this instruction *did not* require Miller’s testimony to be corroborated, there is no question that this jury instruction was erroneous. In fact, this instruction was highly prejudicial, because it allowed the jury to convict Abdur’Rahman and then sentence him to death by giving great – if not controlling – weight to Miller’s wholly uncorroborated testimony.

For purposes of *Martinez*, the underlying challenge to the jury instruction is thus substantial, as is Abdur’Rahman’s assertion that appellate counsel was ineffective for failing to object to this inadequate and inaccurate instruction. Indeed, appellate counsel raised all claims that he thought were available, and he made

no tactical decision not to raise the claim. He merely failed to recognize the claim as being potentially meritorious. Under *Strickland*, therefore, appellate counsel's ignorance of the issue means that appellate counsel's failure to raise the issue constituted deficient performance.

Similarly, under *Martinez*, it quite clearly appears that post-conviction counsel was ineffective in failing to claim that appellate counsel was ineffective for failing to challenge this inadequate jury instruction. Like appellate counsel, post-conviction counsel overlooked this claim, which establishes the deficient performance of post-conviction counsel. Where this claim is meritorious, the failure of post-conviction counsel was prejudicial to Abdur'Rahman, because there is a reasonable probability he would have secured post-conviction relief had counsel properly raised the claim.

D. *Martinez* Conclusion: Abdur'Rahman Overcomes The Procedural Default And Is Entitled To Habeas Corpus Relief On His Constitutional Claims

In sum, therefore, Abdur'Rahman presents not merely substantial, but meritorious, constitutional claims that were first available during post-conviction proceedings: Cumulative error, and ineffective assistance of appellate counsel for failing to challenge inadequate instructions concerning accomplice testimony. Because these claims are substantial and because Abdur'Rahman establishes that post-conviction counsel was ineffective for failing to raise such claims in initial review post-conviction proceedings, Abdur'Rahman overcomes the default of these claims under *Martinez*, and he ultimately establishes his

entitlement to habeas corpus relief because his claims are meritorious.

As he now demonstrates, this Court should therefore grant equitable relief under Rule 60, reopen proceeding on these claims, and then (after additional proceedings as necessary) ultimately grant him habeas corpus relief.

E. Under The Unique Circumstances Of This Capital Case, This Court Should Grant Equitable Relief, Reopen The Habeas Proceedings On Abdur'Rahman's Claims, And Ultimately Grant Abdur'Rahman Habeas Corpus Relief

In a capital case such as Abdur'Rahman's, where he has never received a merits ruling on a substantial constitutional claim, equity demands that the judgment be reopened once it is clear (as it is here) that a previously-imposed procedural bar is no longer valid. Indeed, under such circumstances, a state cannot invoke principles of "comity and federalism" as a bar to having the federal court decide a federal question, because comity and federalism are not served by a federal court refusing to consider a federal claim when such a claim (as here) is *not* subject to any valid state procedural bar. Indeed, only injustice is served when a federal petitioner like Abdur'Rahman receives *no* consideration of his valid constitutional claims because of a procedural default ruling which is later shown to be erroneous.

It is for this reason that the Sixth Circuit (and this Court on remand) granted Rule 60(b) equitable relief in this case in In Re Abdur'Rahman, 392 F.3d 174 (6th Cir.

2004)(en banc), *vacated* 545 U.S. 1151 (2005), *Rule 60(b) relief granted on remand, Abdur'Rahman v. Bell*, 2008 U.S. Dist. Lexis 37863 (M.D. Tenn. 2008). There, an intervening legal development – the passage of Tenn.S.Ct.R. 39 which provided that a petitioner exhausted his claims if he presented them to the state intermediate appellate court – meant that a previously-imposed procedural default was not, in fact, valid. Abdur'Rahman, 392 F.3d at 185-187. Where Rule 39 made clear that Abdur'Rahman's *Brady* claims were not, as a matter of law, procedurally defaulted, both the Sixth Circuit and this Court ultimately concluded that Abdur'Rahman was entitled to equitable relief from judgment under Rule 60(b): He was entitled to have his *Brady* claim decided on the merits.

As the Sixth Circuit explained, under Fed.R.Civ.P. 60(b)(6), Abdur'Rahman's case presented "extraordinary circumstances" warranting equitable relief because, first, Rule 39 did not change the "decisional law" underlying his *Brady* claim, but instead "clarified the law underlying the district court's decision not even to reach the merits of Abdur'Rahman's constitutional claim." Abdur'Rahman, 392 F.3d at 185.

Second, following the promulgation of Rule 39 in Abdur'Rahman's case, the reasoning "supporting the district court's default finding [had] crumble[d]." Abdur'Rahman, 392 F.3d at 187. In other words, as a matter of federalism and comity, in light of Rule 39, the federal courts no longer had any valid reason for enforcing a non-existent procedural default and refusing to decide Abdur'Rahman's federal claim on the merits. As the Sixth Circuit explained, it "becomes

impossible to see how the State of Tennessee [or] the federal court . . . has any interest in upholding the district court's ruling in this case" Abdur'Rahman, 392 F.3d at 187. The very same thing same can be said here: In light of the decision in *Martinez*, the *federal* court has no valid grounds for refusing to decide the merits of Abdur'Rahman's *federal* claims where *Martinez* makes clear that as a matter of *equity*, Abdur'Rahman cannot be faulted in habeas for the failures of his post-conviction counsel.

Exactly as in earlier proceedings in *Abdur'Rahman*, therefore, there are extraordinary circumstances warranting equitable relief where the equities underlying this habeas proceeding have now dramatically shifted. See also Abdur'Rahman v. Bell, 2008 U.S. Dist. Lexis 37863 (M.D. Tenn. 2008)(granting 60(b) relief on remand and reopening habeas proceedings).

Similarly, in the capital case of Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007), the Fifth Circuit granted Rule 60(b) relief under nearly identical circumstances as those presented here. There, the federal court found Ruiz's ineffective assistance of counsel claim to be procedurally defaulted, but Ruiz then presented his claims to the state court, only to have the state court deny him relief – but without clearly and expressly imposing a state procedural bar to his claims (exactly as occurred here). Ruiz, 504 F.3d at 527-528. The ambiguous intervening decision of the Texas state court meant that Ruiz's claim was *not* ultimately subject to a procedural bar under Michigan v. Long, 463 U.S. 1032 (1983), and the Fifth Circuit thus granted equitable relief and reopened the habeas

proceedings, where Ruiz's claim was "significant, [and] potentially meritorious," and because the primary purpose of Rule 60(b) is to allow consideration of "those cases in which the true merits of a case might never be considered" absent equitable relief. Ruiz, 504 F.3d at 530, 531-532.

Judge Higginbotham aptly explained the equities in Ruiz's capital case, which required the reopening of his capital habeas petition once the procedural bar was lifted – and which apply with equal force to Abdur'Rahman's claims in this capital case:

[A]s we have explained, no federal court has considered the merits of Ruiz's constitutional claims. We say only that a procedural hurdle was erroneously placed in Ruiz's path, that courts universally favor judgment on the merits, and that the underlying case is sufficiently 'significant and potentially meritorious' that it should not be cut off at the knees. Equity would not deny Ruiz a hearing on the merits.

Ruiz, 504 F.3d at 532.

Indeed, exactly as in *Ruiz*, Abdur'Rahman has received no merits ruling on his apparently meritorious claims, an erroneous procedural hurdle which prevented their consideration has now been removed both by the Tennessee Supreme Court and by *Martinez*, and Abdur'Rahman's claims are so significant that they should not be "cut off at the knees," especially where his life is at stake. Id. Where Abdur'Rahman's claims are apparently meritorious, Abdur'Rahman is entitled to equitable relief, just as Ruiz was. He is entitled to at least be heard on the merits of his claims. With his life

on the line, this case presents the truly extraordinary circumstances that, as a matter of equity, demand that Abdur'Rahman finally be heard on the merits of his claims.

Indeed, this Court's prior judgment was based on the premises underlying the procedural default doctrine, *viz.*, that Abdur'Rahman was not entitled to a merits review of his federal claims because comity and federalism would be undermined if the federal court reviewed his claims on the merits. That foundation "supporting the district court's default finding" has now "crumble[d]" (Abdur'Rahman, 392 F.3d at 187) where *Martinez* establishes *as a matter of equity* that it is the state – not Abdur'Rahman – who in federal habeas proceedings must bear the cost of ineffective post-conviction counsel who failed to raise Abdur'Rahman's appellate ineffectiveness claims in state court.

Thus the recalibrated equities quite clearly favor Abdur'Rahman: (1) He will lose his life absent equitable relief; (2) As held in prior 60(b) proceedings in this case, the federal court and the state have no valid interest in the federal courts enforcing non-existent procedural bars; (3) As previously-occurred in this case and in *Ruiz*, Abdur'Rahman has never received a merits ruling on his substantial federal claims, even though Rule 60(b) relief is appropriate when "the true merits of a case might never be considered" absent equitable relief (Ruiz, 504 F.3d at 531-532); and (4) the newly-decided equitably-based decision in *Martinez* makes clear that the ineffectiveness of Abdur'Rahman's post-conviction counsel is an equitable consideration that weighs in his

favor, such that he personally must not be denied a hearing on his claims because of the errors of his post-conviction counsel.

Given all of these circumstances – including the Supreme Court’s equitable decision in *Martinez* – “Equity would not deny [Abdur’Rahman] a hearing on the merits.” Ruiz, 504 F.3d at 532. This Court should so conclude in this capital case, and thus reopen the proceedings. In fact, when faced with a similar situation post-*Martinez*, the United States District Court for the Southern District of Ohio has granted Rule 60 relief and reopened proceedings in light of *Martinez*. Landrum v. Anderson, 2012 U.S. Dist. Lexis 171777 (S.D. Ohio 2012)(granting *Martinez* 60(b) motion in capital case), *adopting Landrum v. Anderson*, 2012 U.S. Dist. Lexis 118501 (S.D. Ohio 2012). This Court should do the same. And after reopening proceedings and conducting further proceedings, this Court should grant Abu-Ali Abdur’Rahman habeas corpus relief on the merits of his constitutional claims.⁵⁸

⁵⁸ Abdur’Rahman is likewise entitled to the reopening of the judgment under 28 U.S.C. §2243, Article III of the United States Constitution, the Fifth and Fourteenth Amendments, and Article I §9 of the Constitution. Because this is a capital case, and because Abdur’Rahman’s constitutional rights were violated, he cannot be denied relief and executed *in spite of* the violation of his constitutional rights. Rather, “law and justice” require that he be granted relief. 28 U.S.C. §2243. Under Article III, this Court also has inherent power to do justice, regardless of statutory law or rules, and therefore has the power and duty to grant Abdur’Rahman relief under the circumstances directly under the Constitution. To the extent that Rule 60 or federal habeas statutes (e.g., 28 U.S.C. §2254) might otherwise preclude Abdur’Rahman

CONCLUSION

In light of *Martinez* and all the equities, this Court should grant Abu-Ali Abdur'Rahman relief from judgment. The Court should reopen proceedings on his cumulative error claim and his claim that the jury was improperly instructed on accomplice testimony and appellate counsel was ineffective for failing to raise the claim. Both claims are not just substantial: They are meritorious. After reopening proceedings, this Court should then grant Abdur'Rahman habeas corpus relief on the merits of his claims, vacating his convictions and death sentence, and ordering a new trial and sentencing proceeding within a reasonable period of time.

from securing relief, they are unconstitutional as a matter of due process under the Fifth and Fourteenth Amendments. Under the balancing test of due process, nothing outweighs the value of Abdur'Rahman's life combined with the violation of his rights. No unfair state court judgment can possibly outweigh those interests, and no federal statute or rule can alter that balance without violating due process. Further, to deny Abdur'Rahman relief in spite of the violation of his constitutional rights and when it was not his fault (but his attorneys' faults) that his claims were not properly raised, is inequitable and suspends the writ of habeas corpus in violation of Article I §9 of the United States Constitution. Abdur'Rahman's habeas rights cannot be waived or interfered with or abrogated by the actions of his prior counsel. They are personal to him. Of course, by granting Rule 60 relief, this Court would pretermit these various constitutional challenges to any denial of relief.

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Respectfully Submitted,

Bradley A. MacLean
Office Of The Post-Conviction Defender
530 Church Street, Suite 600
P. O. Box 198068
Nashville, Tennessee 37219-8068
(615) 741-9331

Henry A. Martin
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: /s/ *Bradley A. MacLean*

* * *

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the Printing of this Appendix]*

exculpatory evidence (Amended Petition ¶¶ B, D & E); and

(2) Abdur'Rahman was denied due process, effective assistance of counsel and a fair sentencing hearing because the jury convicted him of murder and sentenced him to death without being properly instructed that DeValle Miller's accomplice testimony had to be corroborated, and counsel was ineffective for failing to raise this claim on direct appeal (Amended Petition ¶¶ C4(4) & F).

(Docket No. 351, at 1).

This case was originally filed in 1996, and the Court's rulings on procedural default were issued over 15 years ago. In order to adequately analyze Petitioner's current arguments, the claims for which he seeks relief must be stated with specificity. Accordingly, on or before July 23, 2013, Petitioner shall supplement the pending Motion with a filing that states each claim for which he seeks relief from judgment, along with a citation to where that claim appears in the Amended Petition, and a citation to the decision of the Court dismissing the claim on procedural grounds.

It is so ORDERED.

/s/Todd Campbell

TODD J. CAMPBELL

UNITED STATES DISTRICT JUDGE

- (1) Abdur'Rahman's cumulative error claim; and
- (2) Abdur'Rahman's claim that the jury was not instructed about the need for independent corroboration of DeValle Miller's accomplice testimony and counsel was ineffective for failing to raise this challenge.

I.

Abdur'Rahman's Cumulative Error Claim

The Cumulative Error Claim: Abdur'Rahman raised his cumulative error claim as Claim B in his Amended Petition For Writ Of Habeas Corpus, R. 42, p. 27. For purposes of the Motion For Relief From Judgment, Abdur'Rahman maintains that he is entitled to relief from judgment on this claim, and that he is ultimately entitled to habeas relief as to his death sentence given the cumulative effect of (a) the numerous instances of prosecutorial misconduct identified in Amended Petition Claim D, ¶¶D1-D8, pp. 53-75, inclusive (R. 42, pp. 53-75); and (b) numerous instances of ineffective assistance of counsel which prejudiced Petitioner at the sentencing phase of trial, more specifically those errors outlined and identified in Amended Petition Claim E, ¶¶E2a, E2b, E2c, E2e, E2g1. See R. 42, pp. 77-82.

Abdur'Rahman's Cumulative Error Claim Has Been Found Procedurally Defaulted: In its most recent opinion, the Sixth Circuit made clear that Abdur'Rahman's cumulative error claim was never presented to the state courts and therefore procedurally defaulted. Specifically, the Sixth Circuit found Abdur'Rahman's cumulative error claim – based upon ineffectiveness of sentencing counsel and the withholding of evidence/prosecutorial misconduct at sentencing – to be procedurally defaulted:

In addition to his individual *Brady* claims, Abdur'Rahman argues that these claims should be cumulated with the prosecutorial misconduct or *Strickland* claims he raised in his initial § 2254 petition. Even if these errors do not deny him due process when considered in isolation, Abdur'Rahman argues that the prejudice resulting from either cumulation makes his death-sentence unfair.

Because Abdur'Rahman raised these cumulative error arguments for the first time on habeas review, we may not consider them here. He suggests that we follow *Derden v. McNeel*, 978 F.2d 1453, 1456-57 (5th Cir. 1992), where an en banc Fifth Circuit permitted a habeas petitioner to raise a cumulative error argument without first making that argument before the state court below. **Under our own circuit's precedent, however, cumulative error arguments must be raised separately in the state court and are subject to procedural default on habeas review.** See *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006)(citing *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002)). **Abdur'Rahman failed to raise these cumulative error claims on direct appeal or during post-conviction relief in state court. Instead, he only raised a generalized cumulative error argument for the first time in his habeas petition.** Because we are bound by this circuit's prior precedents, see *Sandusky Mall Co. v. N.L.R.B.*, 242 F.3d 682, 692 (6th Cir. 2001),

Abdur' Rahman cannot raise either cumulative error argument here.

Abdur'Rahman v. Colson, 649 F.3d 468, 472-473 (6th Cir. 2011)(emphasis supplied). With the Sixth Circuit having found the cumulative error claim to be procedurally defaulted, it is therefore subject to *Martinez*, where the issue first became available in post-conviction proceedings.

II.

The Jury Was Not Properly Instructed On The Need For Corroboration Of DeValle Miller's Accomplice Testimony And Counsel Were Ineffective For Failing To Challenge The Inadequate Instructions

Abdur'Rahman's Challenge To The Lack Of Instruction On Corroboration Of Accomplice Testimony And Related Ineffective Assistance Counsel Claims: In Claim C4(4) of his amended habeas petition, Abdur'Rahman has alleged that in violation of the Sixth, Eighth, and Fourteenth Amendments, the jury instructions unconstitutionally failed to require independent corroboration of DeValle Miller's accomplice testimony. R. 42, ¶C4(4), pp. 39-40. In Claim E2g of his amended petition, he further asserted that trial counsel was ineffective for failing to challenge all improper jury instructions identified in the habeas petition. R. 42, ¶E2g, p. 82. In addition, in Claim F of his amended petition, he also asserted his entitlement to relief under the Sixth Amendment given the ineffective assistance of appellate counsel for failing to raise any and all claims (including the jury instruction claim) on direct appeal. R. 42, ¶F, p. 82. For purposes of the Motion For Relief From Judgment, Abu-Ali

Abdur'Rahman maintains that he is entitled to relief from judgment on his claims ¶¶C4(4), and ineffectiveness Claims ¶¶E2g and F, as they embrace the substantive jury instruction error identified in Amended Petition ¶C4(4).

The Jury Instruction Claim And Related Ineffective Assistance Of Counsel Claims Have Been Found Procedurally Defaulted: Abdur'Rahman has maintained that even though the substantive challenge to the jury instructions was not raised on appeal, the Tennessee Supreme Court reviewed the claim. Abdur'Rahman, 999 F.Supp. at 1079 & n.5 (citing Claim C4(4)). This Court rejected that argument, concluding that Abdur'Rahman's challenge to the absence of appropriate accomplice corroboration instructions was not exhausted and thus procedurally defaulted. Id. at 1080. This Court held that this particular claim "was not fairly presented to the state courts, and has not been exhausted." Id. at 1081. This Court further concluded that Abdur'Rahman's ineffective assistance of appellate counsel claim was likewise unexhausted and procedurally defaulted (Id. at 1080 & n.7) and as such, ineffective assistance of appellate counsel could not provide "cause" for the procedural default of the substantive jury instruction claim. See Id. at 1084 & n. 13.

Again, because the substantive claim and its related ineffectiveness claims were not exhausted and deemed procedurally defaulted, they are subject to *Martinez*, which provides "cause" for the default and enables this Court to now decide such claims on the merits.

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Respectfully Submitted,

Bradley A. MacLean
Office Of The Post-Conviction Defender
530 Church Street, Suite 600
P. O. Box 198068
Nashville, Tennessee 37219-8068
(615) 741-9331

Henry A. Martin
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: /s/ *Bradley A. MacLean*

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the Printing of this Appendix]*