IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT NASHVILLE

ABU-ALI ABDUR'RAHMAN,	)	
	)	**M2019-01708-CCA-R3-PD**
Appellee,	)	**Davidson County**
	)	
v.	)	
	)	**CAPITAL CASE**
STATE OF TENNESSEE,	)	**4/16/2020 execution stayed**
	)	**pending this appeal**
Appellant.	)	
	)	

ON APPEAL FROM THE JUDGMENT OF THE
DAVIDSON COUNTY CRIMINAL COURT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE APPELLEE

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STATEMENT OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

ARGUMENT AND POSITION OF AMICUS CURIAE

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a conflict between a locally elected District Attorney General, who facilitated a post-conviction settlement agreement that was signed by all the parties and the Judge, and the State Attorney General, who now seeks to undo the deal. This case threatens the certainty of plea-bargain agreements that local district attorneys make with defense counsel. The criminal justice system will collapse if plea bargaining becomes infected with too much unreliability. Settlement "is not some adjunct to the criminal justice system, it is the criminal justice system." *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992).

On June 24, 2016, relying on the newly decided Supreme Court case of *Foster v. Chatman*, 136 S. Ct. 1737 (May 23, 2016), Mr. Abdur'Rahman moved to re-open his post-conviction petition. TR Vol. 1, pp. 22-56. Mr. Abdur'Rahman's petition asserted a constitutional error based on the prosecutor's troubling race-based strikes during juror selection. TR Vol. 1, pp. 22-56. On October 5, 2016, The Davidson County Criminal Court granted Mr. Abdur'Rahman's motion to re-open his post-conviction case in part. TR Vol. 3, pp. 419-431. Instead of a costly and time-consuming post-conviction litigation, the parties negotiated and agreed to settle Mr. Abdur'Rahman's case, agreeing to vacate the death sentence in favor of three consecutive life sentences. TE Vol. 5, pp. 3-26 (transcript of 8/28/19 hearing). Mr. Abdur'Rahman, his attorney, and District Attorney General Funk signed the settlement order, instantiating the agreement,

and on August 29, 2019, Judge Monte Watkins signed the order (the "Agreed Order"). TR Vol. 4, pp. 578-80. The Attorney General then filed a Notice of Appeal, disputing the validity of the Agreed Order. TR Vol. 4, p. 581-83.

The State's attempt to overturn the Agreed Order violates Mr. Abdur'Rahman's due process and equal protection rights. The State's position also threatens the stability of the plea-bargaining process and undermines the authority of the local prosecutor, two integral aspects of the criminal justice system. After addressing threshold issues of jurisdiction and the inherent power of post-conviction courts to enter agreements like the Agreed Order, this amicus curiae brief will focus on four issues most relevant to the national criminal defense bar.

First, from a due process, contractual, and policy perspective, the Agreed Order must be specifically enforced. Once a settlement agreement has been signed by the district attorney, defense counsel, and the judge, the State's refusal to enforce the agreement violates the due process clause. *Santobello v. New York*, 404 U.S. 257, 258 (1971). After all parties sign a settlement agreement, it becomes irrevocable. *State v. Bobo*, No. W2015-00930-CCA-R3-CD, 2016 WL 7799284, at *4–5 (Tenn. Crim. App. Mar. 2, 2016). Post-conviction settlements should be encouraged because they reduce expenses and free up scarce resources within the justice system.

Second, agency principles provide that duly elected local District Attorneys General must and should have broad authority to manage their cases. Relatedly, principles of waiver prohibit the State from

agreeing to one thing at the trial level and then reversing position at the appellate level. Third, locally elected District Attorney Generals must be given deference to manage their cases because they are in the best position to carry out the democratic will of the community. Fifth and finally, if the State's position prevails, some post-conviction agreed orders will stand, others, based on the State Attorney General's decision to appeal, will fall. This level of instability conflicts with the Equal Protection Clause.

The substantial Due Process and Equal Protection issues raised in this case are all the more troubling in a capital case, where Constitutional scrutiny is heightened. *Furman v. Georgia*, 408 U.S. 238, 286-87 (1972) (Brennan, J., Concurring) ("[C]apital offenses are granted special considerations."). In capital cases, courts have an obligation not to apply the law "sparsely, selectively, and spottily to unpopular groups." *Id.* at 256. This Court should take these principles to heart and protect Mr. Abdur'Rahman's Constitutional rights and enforce the Agreed Order that he signed and relied upon.

I. The Davidson County Criminal Court had jurisdiction to evaluate Mr. Abdur'Rahman's motion to re-open his post-conviction petition, which gave it the inherent power to preside over a settlement of his post-conviction case.

The Davidson County Criminal Court had the power to hear appellee's case. *See Dishmon v. Shelby State Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999) ("[S]ubject matter jurisdiction involves a court's power to adjudicate a particular type of controversy."); *United States v. Cotton*, 535 U.S. 625, 630 (2002) (Subject matter jurisdiction involves "the courts' statutory or constitutional power to adjudicate the case.") Relying on an arguably new constitutional standard and new evidence of bias, pursuant to Section 40-30-117 of Tennessee's post-conviction statute, Mr. Abdur'Rahman successfully moved to re-open his post-conviction petition, challenging the prosecutor's troubling conduct during voir dire, which removed all but one black juror from Mr. Abdur'Rahman's panel. TR Vol. 1, pp. 22-56.

A. The trial court had jurisdiction pursuant to the plain language of the Post-Conviction Procedure Act.

Mr. Abdur'Rahman's motion met the statutory standards for re-opening his post-conviction case. First, appellee's motion was "*based upon* a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial." Tenn. Code Ann § 40-30-117 (emphasis added). Second, the contentions in Mr. Abdur'Rahman's motion "*appear*[ed] . . . [to] establish by clear and convincing evidence that the petitioner [was] entitled to have the conviction set aside or the sentence reduced." *Id.* (emphasis added).

Here, the statutory phrases "based upon" and "appear" plainly mean that the motion to re-open the petition must merely be colorable. In other words, for jurisdiction to attach, there is no requirement that there be a likelihood of success on the merits. While our research has revealed no Tennessee case law construing the meaning of "based upon," a well-reasoned Sixth Circuit case culled various authorities to find that "based upon" means "supported by." *Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998). In its holding, the *Jones* court held that the broad phrase "based upon" barred a *qui tam* whistleblower claim because the claim was "based upon" prior public disclosures, even though the prior disclosures formed only part of the new claim. *Id.* Applying that reasoning here, because Mr. Abdur'Rahman's motion was *supported by* the Supreme Court's decision in *Foster v. Chapman*, his motion was "based upon" that decision. Tenn. Code Ann § 40-30-117.

The word "appear" also carries a broad and inclusive meaning. Again, our research has not revealed any Tennessee precedents that construe the meaning of the word "appear." In a lengthy analysis of the word "appear" in an I.R.S. statute, the United States Court of Federal Claims opined that the primary meaning of the word centers on what is "in sight," "visible," or "plain." *Cinergy Corp. v. United States*, 55 Fed. Cl. 489, 502 (2003) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 84, 85 (4th ed. 2000); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 56 (10th ed. 1998)). The *Cinergy* court noted, however, that a strong secondary meaning of the word "appear" centers on the concept of "seeming." *Id.* Thus, the inclusive meaning of "appear"

does not require that a thing be unequivocally true or factually valid. *Id.* Rather, it must "seem" to be true. Based on this meaning, Mr. Abdur'Rahman's motion certainly met the language of "appearing" to "establish by clear and convincing that the petitioner [was] entitled to have the conviction set aside or the sentence reduced." *See* Tenn. Code Ann § 40-30-117.

Further, other language within the Post-Conviction Procedure Act gives post-conviction courts broad authority to craft remedies necessary for adjudicating the case. The statute provides that once a court finds a denial or infringement of the petitioner's rights that would render the original judgment void or voidable, a court can vacate and set aside a judgment, order a delayed appeal, and enter "an appropriate order and any supplementary orders that may be necessary and proper." Tenn. Code Ann. § 4-30-111. This language is consistent with a court having broad powers to fashion relief and remedies appropriate to each case.

B. Jurisdiction to preside over settlement negotiations and enter the Agreed Order is further supported by the trial court's inherent power to issue orders reasonably necessary to decide cases in its jurisdiction.

In addition to subject matter jurisdiction, the Criminal Court also had the power to preside over and enter the Agreed Order, which settled Mr. Abdur'Rahman's post-conviction case. Once jurisdiction attaches, the doctrine of inherent powers allows a trial court to do all things necessary and reasonable to decide the case within its jurisdiction, as long as its actions are consistent with applicable constitutional principles, statutory law, and procedural rules. *Anderson Co. Quarterly Ct. v. Judges of the*

28th Judicial Circuit, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978) (Inherent powers refers to acts "essential to the existence of the court and necessary to the orderly exercise of its jurisdiction."). Inherent powers are included in the scope of a court's jurisdiction regardless of whether they have been granted by the legislature or the constitution. *Church v. Church*, No. 02A01-9312-CH-00266, 1994 WL 34177, *3 (Tenn. Ct. App. 1994); *see also*, *Love v. Woods*, No. E2009–02385–COA–R3–CV, 2010 WL 4366072 *5 (Tenn. Ct. App. 2010) (holding that courts have the inherent powers to enforce settlement agreements well after a case has been dismissed from the docket).

When an appellate court or a post-conviction court vacates a sentence and enters a new one, it does not conflict with the Governor's authority to commute sentences pursuant to his clemency power. The two mechanisms are founded on markedly different legal theories. When a court vacates a sentence and issues a new, lesser sentence, it does so as a matter of law, based on Constitutional and statutory standards. When a local prosecutor and defense counsel agree to settle a case, the decision is based on legal and practical considerations, which indicate that continued litigation would not be in the interest of justice. When the Executive commutes a sentence, it "is a vehicle for mercy." *Workman v. State*, 22 S.W.3d 807, 812 (Tenn. 2000) (internal citation omitted) ("The executive is not required to confine his or her clemency determination to those facts contained in the record.")

Finally, entrenched post-conviction practice reinforces the existence of a trial court's inherent power to enter these orders. Across

the state, myriad post-conviction courts have entered orders modifying capital sentences as agreed upon by the parties. Notably, we have not located any instance where the State Attorney General has appealed such an agreed order. As set forth more fully in Part V of this brief, the lack of any coherent standard for when the State Attorney General might decide to appeal a post-conviction Agreed Order raises serious Equal Protection concerns.

While the State will argue that Judge Watkins did not include a formal finding that Mr. Abdur'Rahman's rights were violated, such a finding is implicit within the language of the Agreed Order and what was said on the record in both August 2019 hearings. Moreover, Tennessee's Post Conviction Procedure Act does not require a court make findings of fact or conclusions of law related to its authority to consider a case. For written post-conviction orders, the only directives within the Act compel a court to record the facts and reasons for *dismissing* a petition. *See* Tenn. Code Ann. § 40-30-106 (b) (If a court dismisses a post-conviction petition as untimely, it must "state the reason for the dismissal and the facts requiring dismissal"); §40-30-106 (f) (If a court dismisses the petition during preliminary consideration, "[t]he order of dismissal shall set forth the court's conclusions of law."). There is no specific requirement for what a court must write if it is granting a petition or vacating a underlying judgment. As a matter of statutory interpretation, the principle of *expressio unius est exclusion alterius* applies. If the legislature had intended to require a post-conviction court to include findings of facts and conclusions of law at some earlier stage in the post-

conviction proceedings, then it would have included that language. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013) (applying the principle of *expressio unius est exclusion alterius* to a felony burglary statute). Accordingly, when Mr. Abdur'Rahman filed his motion to re-open his post-conviction petition, the Davidson County Criminal Court had jurisdiction over the resolution of Mr. Abdur'Rahman's post-conviction claims.

It would elevate form over substance to insist that a post-conviction trial judge draft all of the legal and factual findings required for a full merits review, when a case settles before a re-trial or delayed appeal that will never occur. Requiring trial judges to draft findings of fact and conclusions of law as a condition for pre-trial settlement would weigh down dockets and clog the criminal justice system, compromising judicial efficiency, the core policy goal for settling criminal cases.

II. Due process, principles of contract law, and economic efficiency require Mr. Abdur'Rahman's settlement agreement to be specifically enforced.

A. Due Process requires that the Agreed Order be specifically enforced.

Once Judge Watkins signed the Agreed Order, it became irrevocable. Accordingly, the State's attempt to overturn it must fail. In *Santobello v. New York*, the Supreme Court held that a defendant is entitled to relief when a prosecutor breaches a promise in a plea bargain. 404 U.S. 257, 262 (1971). In *Santobello*, the prosecutor initially promised that he would make no recommendation for the defendant's sentence if the defendant pled guilty to a lesser-included offense. *Id.* at 258. There

was a personnel change in the local district attorney's office which caused the original plea bargain promise to be forgotten. *Id.* at 258. Instead of keeping the promise not to recommend a sentence at the defendant's sentencing, the prosecution advocated for the maximum sentence possible. *Id.* at 259. The Supreme Court held that the defendant was entitled to relief for the prosecutor's breach, including options of specific performance, resentencing, or withdrawal of the plea. *Id.* at 263.

In his concurring opinion, Justice Douglas emphasized the due process concerns surrounding breached plea agreements, stating that the Court's rule should be considered a "constitutional rule." *Id.* at 367. Due process implications are raised in plea-bargaining because a defendant gives up a right protected by due process—the right to a trial, or, in a post-conviction case, the right to raise constitutional challenges to the original conviction. When the State reneges on a plea bargain, the defendant's bargained-away right is taken away in a unilateral, summary way. This is the unfairness that encroaches upon the Constitution. *See Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (explaining that due process requires fair dealing between the State and persons dealing with the State).

From *Santobello*, a principle emerged that "guarantees specific performance of the agreement made by the prosecution during plea negotiations." *State v. Hodges*, 815 S.W.2d 151, 160 (Tenn. 1991); *State v. Mellon*, 118 S.W.3d 340, 346 (Tenn. 2003) (interpreting *Santobello*, and stating that "a defendant may not, consonant with due process guarantees, be held to his negotiated plea of guilty when the promises

upon which it was based remain unperformed by the prosecution.").

The State heavily relies upon *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Ct. Crim. App. Knoxville 2019) to argue that the trial court lacked the jurisdiction to enter the Agreed Order. In the *Nichols* case, the Judge declined to accept the agreed settlement order because the defendant-petitioner had not demonstrated grounds for post-conviction relief. *Id.* at *13. Mr. Abdur'Rahman's case markedly differs from Nichols in that Judge Watkins (1) considered and granted Mr. Abdur'Rahman's motion to re-open his petition; and (2) signed the Agreed Order. Overturning the Agreed Order would take away rights that Mr. Abdur'Rahman bargained away, a violation of his due process rights. In this situation, *Santobello* requires specific enforcement of the Agreed Order. 404 U.S. at 262.

B. Contract law principles require specific enforcement of the Agreed Order.

The State's position that it can overturn the Agreed Order is also undercut by black-letter contract law concepts that govern the plea-bargaining process. "[A]n agreement between a prosecutor and a defendant is contractual in nature and is enforceable under the law of contracts." *State v. Howington*, 907 S.W.2d 403, 408 (Tenn. 1995); *see also United States v. Ligon*, 937 F.3d 714, 718–19 (6th Cir. 2019) (stating that courts apply traditional principles of contract law to the enforcement of plea agreements). Bargains signed by the parties have been described as "about the most binding of agreements that can be made." *Lovlace v. Copley*, 418 S.W.3d 1, 20 (Tenn. 2013) (internal citation omitted). Binding

plea agreements signed by the parties become irrevocable when signed by the presiding judge. *State v. Bobo*, No. W2015-00930-CCA-R3-CD, 2016 WL 7799284, at *4–5 (Tenn. Crim. App. Mar. 2, 2016) (holding that a plea agreement that has been accepted by the trial court is irrevocable). Thus, when a judge has signed a post-conviction settlement agreement (as is the case here), the adhesive that binds the agreement together becomes superglue.

The State's position conflicts with the established contract law principle that an agreement becomes binding and irrevocable once it has been signed by all the parties and the judge. Therefore, the State should not be allowed to go back on its word and overturn the Agreed Order.

C. Enforcing the Agreed Order promotes economy and efficiency in the justice system.

Beyond contract and due process concerns, enforcing plea bargains advances the policies of efficiency and economy. Plea bargaining is "an essential component of the administration of justice." *Santobello*, 404 U.S. at 260. Pleas account for 97 percent of federal convictions and 94 percent of state convictions. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf); *see also*, United States Department of Justice, *Plea and Charge Bargaining Research Summary* (January 24, 2011), available at https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf ("Scholars estimate that about 90 to 95

percent of both federal and state court cases are resolved through [plea bargaining]"). Thus, the United States criminal justice system is a "system of pleas, not a system of trials." *Frye*, 566 U.S. at 143. Given these numbers, without plea bargaining, the U.S. criminal justice system would crumble. *See Santobello*, 404 U.S. at 260 ("[I]f every criminal charge was subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). Plea bargaining allows prosecutors and defense counsel to conserve valuable resources in a system that cannot handle a trial in every case. *Frye*, 566 U.S. at 144.

The policy goals that support the enforcement of plea-bargaining agreements apply even more so to death penalty post-conviction cases, which are prohibitively time-consuming and expensive. For death penalty cases, post-conviction litigation can cost the state millions of dollars. *See* Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 408–09 (2013) (noting that hundreds of millions of dollars are spent on post-conviction litigation and other costs associated with death penalty cases). One study indicated that one death penalty case increases spending in a county by two million dollars, a cost borne by increasing local taxes. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 541–42 (2013) (citing Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, 4 ADVANCES ECON. ANALYSIS & POL'Y 1, 10 (2004)). Local prosecutors are, more and more, electing not to seek the death penalty or settling post-conviction capital cases, because of these exorbitant costs. Lain, *The Virtues of Thinking*

Small, 67 U. MIAMI L. REV. at 409 (discussing prosecutorial choices not to seek the death penalty in Texas and Virginia). Because local counties must bear the expense of litigating capital cases, local District Attorneys General should have the authority and discretion to staunch the flow of these costs.

III. Under agency law principles, the District Attorney General had the actual and apparent authority to settle Mr. Abdur'Rahman's post-conviction case.

Principles of agency law provide a helpful starting point for evaluating whether the State is bound by the actions of District Attorney General Funk. These principles compel the conclusion that General Funk and other District Attorney Generals in his position, have the authority to negotiate and enter into settlement agreements, at the trial stage and at the post-conviction stage.

One of the fundamental principles of agency law is that a principal is not bound by the actions of a person who is not his agent, nor by a contract made by an agent who acted beyond the scope of the agent's authority. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269–270 (Tenn. 2001). Some analogical reasoning is required to apply this agency principle to the situation of a State Attorney General and a District Attorney General. Here, the State Attorney General would be considered the principal and the District Attorney General would be considered the agent.

"There are two bases under which the common law attributes the legal consequences of an agent's actions to the principal: actual authority and apparent authority." *Savage v. City of Memphis*, 464 S.W.3d 326,

332–33 (Tenn. Ct. App. 2015) (citing *Milliken Grp. Inc. v. Hays Nissan, Inc.*, 86 S.W.3d 564, 567 (Tenn. Ct. App. 2001)). "An agent's actual authority "consists of the powers which a principal directly confers upon an agent or causes or permits him to believe himself to possess." *Id.* (citing 2A C.J.S. Agency § 147 (1972)). Here, District Attorney General Funk had the actual and apparent authority to negotiate and enter into the Agreed Order.

A. District Attorney Glenn Funk had actual authority to settle the case with Mr. Abdur'Rahman's defense counsel.

In this case, the actual authority of the State Attorney General and the District Attorney General are established by the Tennessee Constitution and by statute. Article 6, Section 5 of the Tennessee Constitution establishes the office of both the State Attorney General and Reporter and the District Attorney General. Tenn. Const. Article VI, §5 Both are executive officers of the State. *See State v. Superior Oil, Inc.*, 875 S.W.2d 658, 659–61 (Tenn. 1994) (explaining the how District Attorneys General evolved from the common law Attorney General in England, who represented the crown); Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AMERICAN JOURNAL OF LEGAL HISTORY 304, 311 (1958) (explaining how District Attorneys General evolved as deputies of the State Attorney General).

Only when the District Attorney General "fails or refuses to attend and prosecute according to law," can the District Attorney General be superseded by an attorney pro tempore that the Supreme Court appoints.

Tenn. Const. Article VI, §5. The Tennessee code provides that the State Attorney General shall "attend to all business of the state, both civil and criminal in the Court of Appeals, Court of Criminal Appeals and the Supreme Court of Tennessee." Tenn. Code Ann. § 8-6-109. The Tennessee legislature has defined the duties of the District Attorney General as "to attend the circuit courts in the district, and every other court therein having criminal jurisdiction." Tenn. Code. Ann. § 8-7-103. Because General Funk was overseeing a case in the Davidson County Criminal Court, by statute, he had the actual authority to enter into the Agreed Order.

Further evidence of General Funk's actual authority to enter into the Agreed Order derives from the Post-Conviction Procedure Act. This statute plainly states that "the District Attorney General shall represent the state. . ." Tenn. Code Ann. § 40-30-108. And finally, Rule 11 of Tennessee Criminal Procedure strongly supports the conclusion that General Funk had actual authority to negotiate the Agreed Order. Tenn. R. Crim. P. 11(c) ("[T]he District Attorney General and the defendant's attorney . . . may discuss and reach a plea agreement.").

B. General Funk also had the apparent authority to negotiate the Agreed Order.

"Apparent authority is essentially agency by estoppel, in that its creation and existence depend on some conduct by the principal that will preclude him from denying liability for the acts of the agent." *Savage v. City of Memphis*, 464 S.W.3d 326, 332–33 (Tenn. Ct. App. 2015) (citing *Boren ex rel. Boren v. Weeks*, 251 S.W.3d 426, 432 (Tenn. 2008)).

It is power held by the agent "to affect a principal's legal relations with third parties when a third party reasonably believes the [agent] has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* (citing *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007–00517–COA–R3–CV, 2008 WL 4615858, at *6 (Tenn. Ct. App. Oct. 20, 2008) (citing Restatement (Third) of Agency § 2.03 (2006))).

Here, Mr. Abdur'Rahman and his defense counsel reasonably believed that General Funk had the authority to negotiate the Agreed Order. This reasonable belief derived from the Constitution and statutes referenced above, which give the District Attorney General authority over trials, post-conviction litigation, and plea bargaining. The reasonable belief of General Funk's authority also emanated from the longstanding practice and custom of local District Attorneys General striking plea bargains during post-conviction litigation. Based on these common-sense agency principles, General Funk (and other District Attorneys General in his position) must be deemed to have the authority to negotiate and enter into these kinds of settlement agreements. And, in the role of principal, the State Attorney General must abide by the decisions of his/her deputies.

C. Where there is a conflict between the State Attorney General and the Elected District Attorney General and the conflict impinges on a defendant's Constitutional rights, the State Attorney General should be bound by the decision of the District Attorney General.

As Mr. Abdur'Rahman's case illustrates, one wrinkle in the agency relationship between the State Attorney General and District Attorneys General occurs when the two offices have a dispute. In a situation like Mr. Abdur'Rahman's case, when a District Attorney General settles a post-conviction petition at the trial level and then the State Attorney General disagrees with the wisdom of that settlement and attempts to appeal, the State must abide by the decision of the District Attorney General. *See State v. Watkins*, 804 S.W.2d 884, 884-885 (Tenn. 1991). In *Watkins*, the State negotiated a plea agreement that sentenced the defendant pursuant to Range I guidelines even though Range II guidelines were the correct guidelines. *Id.* The Tennessee Supreme Court held that when the District Attorney General entered into the negotiated plea/sentencing agreement, the State waived the right to argue, on appeal, that the sentence was in the "wrong" range. *Id.* at 886. In applying the waiver doctrine to the State, the *Watkins* Court noted that "proverbially speaking, what is applicable to the goose ought to be applied to the gander." *Id.* In this case, the State Attorney General argued that it could not be bound by the actions of the local District Attorney's office because "it [is] more than a mere extension of the local District Attorney's

office." *Id.* The court considered the point but concluded that while

> [t]he Attorney General undoubtedly has a role to play ensuring that errors in the trial court prejudicial to the state are corrected on appeal, . . .there is a difference between seeking to correct errors in the trial court not deliberately out of the state's making, and second guessing the judgment of the local prosecutor in settling a case.

Id.

Watkins is markedly similar to Mr. Abdur'Rahman's case. The state entered into a bargain with Mr. Abdur'Rahman which it now seeks to appeal. Based on the reasoning of *Watkins*, the State's appeal of the Agreed Order should be denied based on waiver principles.

IV. District Attorneys General, duly elected by the public in their district, are in a superior position to broker settlements in post-conviction capital cases.

In a case like this, a conflict between a District Attorney General and a State Attorney General is best resolved by giving deference to the locally elected district attorney. As set forth below, local District Attorneys are in the best position to handle post-conviction capital cases for three reasons. First, in a death penalty case, giving deference to the local District Attorney General allows the conscience of the community to be voiced. Second, in comparison with the State Attorney General, locally elected District Attorneys General are in a better position to carry out the democratic will of the local community. And third, conflicts between the State Attorney General and District Attorneys General

undermine the prosecutorial discretion that is necessary for the efficient operation of the criminal justice system, especially at the trial level.

A. In a death penalty case, giving deference to the local District Attorney General enables the conscience of the community to play a role in the decision.

The decision to sentence a defendant to death has long been recognized as emanating from the conscience of the local community. *See State v. Black*, 815 S.W.2d 166, 194 (Tenn. 1991) (Reid, J. & Daughtrey, J., concurring in part). In evaluating the sentence in a capital case, the fact-finder must evaluate the defendant's moral and personal responsibility and measure it "against the conscience of the community." *Id.* (citing *Caldwell v. Mississippi*, 472 U.S.320, 333 (1985).

As a locally elected official, the District Attorney General is much closer to the conscience of the community and is in a superior position to carry out the community's conscience. This is especially true in Tennessee where the State Attorney General is not an elected official, but is instead appointed by the Supreme Court. Tennessee is the only State where the State Attorney General is appointed by the State Supreme Court. *See* Earl H. De Long, *Powers and Duties of the State Attorney General in State Prosecutions*, 25 J. CRIM. L. & CRIMINOLOGY 358, 359 (1934). Moreover, the State Attorney General's eight-year term of service is the longest term of any state in the United States. *Id.* Most states have a term of two to four years. *Id.*

General Funk's decision to settle Mr. Abdur'Rahman's post-conviction case represents the conscience of the Davidson County community. The last time a Davidson County jury sentenced a defendant

to death was twenty-eight years ago in 1992. Tennessee Dept. of Correction, *Death Row Offenders*, available at https://www.tn.gov/content/tn/correction/statistics-and-information/death-row-facts/death-row-offenders.html.

B. The locally elected District Attorney General is best suited to enact decisions that connect to the democratic will of the populace.

Giving deference to the duly elected local prosecutor also makes sense from an allocation of powers standpoint. The locally elected District Attorney General enacts decisions that connects to and responds to the needs of the community. Local governance is "more sensitive to the needs of a heterogeneous society . . . and enables greater citizen involvement in democratic processes." *Bond v. United States*, 564 U.S. 211, 221-22 (2011) (lauding the positives of local governance). In discussing federalism principles, when the Supreme Court has commented on the value of local decision-making, it has often done so in the context of local governments. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2018 (2018) (citing *Printz v. United States*, 521 U.S. 898, 904 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 836 (1976), overruled in other part by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). In calibrating the authority and power between the State Attorney General and the local District Attorney General, common-sense allocation of power principles require that deference be given to the local District Attorney General. If the local community does not favor the actions of General Funk, they have the ability to vote him out of office. There is no

such political option for opposing the actions of the appointed State Attorney General.

C. Conflicts between the State Attorney General and local District Attorneys General have the potential to interfere with prosecutorial discretion.

Third and finally, the State's position interferes with the discretion that local prosecutors have in making decisions about whether and how to prosecute their cases. As the Tennessee Supreme Court concluded in 1994, prosecutors have

> unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with [his/her] discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very real sense this is the most powerful office in Tennessee today.

State v. Superior Oil, Inc., 875 S.W. 658, 660 (Tenn. 1994). The prosecutor's wide discretion is justified, in part, by his/her duty to "seek justice rather than to be just an advocate for the State's victory at any cost." *Id.* at 661; *see also*, Tenn. Rule. Prof'l Resp. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely advocate for the state's victory at any cost."). In *Superior Oil*, the Tennessee Supreme Court struck down a statute that required the local District Attorney to obtain written permission from an agency before seeking an indictment for a criminal violation of the Water Quality Control Act of 1977. *Id.* at 661. The Court held that the statute was unconstitutional because it "imped[ed] the

inherent discretion and responsibilities of the office of District Attorney General [in a way that violated Article VI, §6 of Tennessee Constitution]." Id. (Article VI, §6 establishes and describes the office of the District Attorney General).

Although this case is not perfectly analogous to *Superior Oil*, there are important parallels. The Notice of Appeal filed in this case is, in effect, a supersession of General Funk's discretionary decision not to litigate Mr. Abdur'Rahman's post-conviction appeal. While other state statutes and constitutions sometimes allow a State Attorney General to supersede a District Attorney General, this is not the case in Tennessee. *See* Wayne LaFave et al., 4 CRIM. PROC. §13.3(e) notes 50–52 (4d Ed. Dec. 2019). The Tennessee Constitution allows a District Attorney General to be replaced with an attorney pro tempore only if he/she "fails or refuses to attend and prosecute according to law." Tenn. Const. Article VI, §5. And even in this situation, it is not the State Attorney General who appoints the attorney pro tempore, but the Tennessee Supreme Court. *Id.* The broad discretion that the prosecutor enjoys is at the trial level. It follows that this discretion transfers to post-conviction proceedings, which the Tennessee legislature has placed in the trial court. See Tenn. Code. Ann. § 40-30-104 and § 40-30-117.

Although it has been criticized, broad prosecutorial discretion is necessary so that cases can be screened and disposed of when the defendant is innocent, when prosecution would be futile, or when prosecution would not lead to substantial justice. *See* The NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE

GENERAL, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL (October 1977).

Prosecutorial discretion also plays a crucial role in first-degree murder cases, where the death penalty is a possible sentence. The decision to seek the death penalty is vested exclusively with the District Attorney General. *State v. Banks*, 271 S.W.3d 90, 154 (Tenn. 2008). While a District Attorney's sentencing choice is limited by the statutory framework within Tennessee's criminal code, the final choice is the District Attorney's. *Id.* Vesting the choice exclusively with the local District Attorney "provides a vehicle for individualized justice." *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). "No one else is in a better position to make charging decisions which reflect community values as accurately and effectively as the prosecutor." *Id.* at 155 (internal quotes and citation omitted). The same policy reasons that support the District Attorney's exclusive authority to seek the death penalty apply to his/her authority to consider post-conviction settlement agreements in death penalty cases, including the decision to take death off the table.

Affording the prosecutor broad discretion allows the prosecutor to carry out his/her duty to "seek justice." Tenn. Rule. Prof'l Resp. 3.8, cmt. 1. General Funk, in his discretion, determined that Mr. Zimmermann, the prosecutor in Mr. Abdur'Rahman's trial, conducted the trial in a racially biased way. General Funk based his decision in part on the troubling, bigoted comments that Mr. Zimmermann made during a 2015 CLE, when he opined that prosecutors should use racial stereotypes as a proxy for juror decision-making when selecting jurors. Deference must be

given to General Funk's determination that further opposing Mr. Abdur'Rahman's post-conviction case would not serve justice.

V. Troubling equal protection issues are raised in a system where the State Attorney General can appeal some post-conviction settlements but allow others to stand.

Settlement of post-conviction petitions routinely occurs in Tennessee, even in capital cases. This is evident in numerous Agreed Orders over the past three decades, a selection of which are appended to Mr. Abdur'Rahman's Appellee's Brief. In at least seven instances, the local District Attorney General, defense counsel, and the post-conviction trial judge have agreed to modify a petitioner's sentence from death to life. Presumably, the State Attorney General has had notice of these settlements, but has never sought to appeal them, except in this case. Often, the courts entering the agreements said very little, or nothing at all, about the claims underlying the agreement. The settlement documents in these cases are appended within a collective exhibit attached to Mr. Abdur'Rahman's brief. As detailed below, in many of these settlements, the post-conviction court either summarily made a finding of constitutional error or granted the relief on other grounds:

- Agreed Order of Settlement, *Taylor v. State*, Case 86-03704, No. P – 7864 (Shelby County Crim. Ct. Div. 4, April 2008). In the middle of the post-conviction hearing, the local District Attorney agreed to settle the case and modify sentence from death to life. In one sentence, the court stated that the sentence was void due to a constitutional violation pursuant to *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

- Agreed Disposition of Post-Conviction Case, *Hester v. State*, Case No. 11-CR-276 (McMinn Co. Circuit Court, May 20, 2013). The court found that the sentence of death was void and ordered it to be set aside due to an unspecified constitutional error that occurred during petitioner's sentencing.

- Agreed Disposition of Post-Conviction Case, *Schmeiderer v. State*, Case No. 14488 (Maury Co. Circuit Ct., Dec. 22, 2014). In three sentences of text, the court found that petitioner's counsel's ineffectiveness rose to the level of constitutional error, which justified the sentence modification.

- Order Granting Post-Conviction in Part and Denying Post-Conviction in Part, *Freeland v. State*, C-15-217 (Madison Co. Circuit Ct., January 26, 2017). The court modified petitioner's sentence to life and noted that defendant was waiving his right to a post-conviction hearing. Otherwise, the Order does not recite a constitutional violation that occurred at the petitioner's trial.

- Agreed Order Allowing Amended Judgment, *Coleman v. State*, No. P-11326 (Crim. Ct. Shelby Co. Division IX, Sept. 2, 2011). In the narrative portion of the order, the court accepts the State's decision that further post-conviction litigation would "not be necessary" even though the State declined to concede a Constitutional error. Based on the State's

agreement not to contest the case further, the Court found the death sentence void and substituted a life sentence in its place.

- Agreed Order of Settlement, *Hurley v. State*, No 23,049 (Cocke Co. Circuit Ct., May 27, 1997). The court approved the parties' settlement agreement that petitioner would withdraw his post-conviction claims in exchange for a vacation of his death sentence and re-sentencing. This order did not recite any constitutional errors occurring at petitioner's trial.

- Consent Order Granting Post-Conviction Relief as to the Death Penalty and Denying Relief as to Guilt, *Keough v. State*, Case No. P24323 (Crim. Ct. 13th Jud. Dist. Memphis Div. IX Dec. 14, 2015). Petitioner had alleged mental incapacity rendering him incompetent to stand trial. The court approved the settlement agreement to vacate petitioner's death sentence and convert it to life, based on "the interest of justice under the totality of the circumstances of the case." There was no finding of a constitutional error in petitioner's case.

In addition to the parties agreeing to settle post-conviction litigation, local District Attorneys routinely make agreements to reduce sentences post-conviction and to strike a bargain for cooperating witnesses who now agree to turn evidence in the State's favor. The State Attorney General should not be able to ratify the agreements that local

District Attorneys enter into in some cases, but not in others, based merely on the fact the Attorney General approves of the District Attorneys' exercise of discretion in some cases, but not in others.

Despite the entrenched practice of local District Attorneys settling post-conviction capital cases, the State Attorney General has decided to appeal this Agreed Order. A lottery environment is created when the State Attorney General can decide to appeal some post-conviction settlements but let others stand, without any clear process for doing so outlined by statute or rule. Such standard-less and arbitrary decision-making violates the Constitution's Equal Protection clause.

The Equal Protection clause is designed to redress "disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable." *Evitts*, 469 U.S. at 405. While most equal protection cases revolve around the constitutionality of a particular statute, as a state actor, a prosecutor's actions must also satisfy equal protection standards. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 85 (1986). Further, because this situation involves capital sentencing, heightened scrutiny applies to the process. *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter and Stephens concurring) (concluding that a "heightened standard for reliability in the determination that death is the appropriate punishment in a specific case) (internal citations and quotes omitted).

Equal protection analysis requires a court to engage in a means/ends analysis and evaluate whether the government's action "furthers a legitimate, articulated state purpose." *San Antonio Indep.*

School Dist. v. Rodriquez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). Here, the practice of appealing some post-conviction orders but allowing others to stand cannot survive the analysis. All of the decision-making occurs in a black box; there is simply no method to determine what means are employed to decide which agreed orders might survive and which ones will not. Accordingly, the State's appeal of the agreed order violates Mr. Abdur'Rahman's right to be treated equally with other individuals in his situation, individuals who have benefited from settling their capital cases.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully asks this Court to deny the State's appeal.

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CERTIFICATE OF COMPLIANCE

I, Lucille A. Jewel, hereby certify that the foregoing brief complies with the requirements of Tenn. Supreme Court Rule 46 governing e-filing of Amicus Briefs. It has been prepared in 14-point Century Schoolbook font and contains a total of 7,248 words in the main text (excluding tables and certification.). This word count is based on the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing brief was mailed via U.S. first class mail, postage prepaid, this 14th day of February, 2020, to:

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