IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN, Appellee, v. STATE OF TENNESSEE, Appellant.	)	DAVIDSON COUNTY No. M2019-01708-SC-RDM-PD

ABDUR'RAHMAN'S RESPONSE TO ATTORNEY GENERAL'S MOTION TO ASSUME JURISDICTION

The State of Tennessee is a single entity. No party—not even the sovereign—may speak with two voices in this State's courts. The Attorney General's Motion before this Court obscures a simple fact: the State has been spoken for in this matter. The Attorney General cannot manufacture a case or controversy when he disagrees with a resolution between the parties made by another independent actor for the State: the District Attorney General.

In this case, the District Attorney General exercised his statutory and constitutional authority to negotiate the settlement of a post-conviction proceeding in the trial court. This is not unusual in post-conviction litigation. Here, the trial court granted a motion to re-open the post-conviction petition and set the matter for hearing. Each side made concessions, and the judge approved an agreed order that resolved the

dispute. Because agreed orders are not appealable, and because the State is a party to that order, the Attorney General's appeal is a nullity.

The Motion casts the hearing below as baseless and its actors, including a judge of this State, as lawless. This is doublespeak. The rogue prosecutor in this case is the one who struck black jurors because of their race, misrepresented evidence to Mr. Abdur'Rahman's counsel and State psychologists, and snuck inadmissible evidence past the judge to the jury, not the prosecutor who did his job as mandated by statute, the Constitution, and his ethical duty.

Mr. Abdur'Rahman and the Attorney General are in agreement about one thing: under TENN. CODE ANN. § 16–3–201(d)(1), this is a case of public importance with an element of expediency. If the Court hears the case, it should resolve the following questions presented for review:

ALTERNATIVE QUESTIONS PRESENTED FOR REVIEW

1) Whether the appeal by the Attorney General is a nullity because:
    a) The post-conviction statute, and the statute creating the District Attorney General's authority, assign the District Attorney sole responsibility for representing the State in the trial court; and
    b) The District Attorney's responsibility is not quasi- or disempowered—the task of representing the State in the trial court necessarily includes the power to bind the State to a settlement.

2) Whether the Attorney General has violated the principles of separation of powers and exceeded his statutory authority by intruding into arenas explicitly delegated by the General Assembly to the District Attorney.

3) Whether the State has standing to appeal an agreed order submitted by the District Attorney, whom the General Assembly authorized as the State's sole representative in the post-conviction trial court.

4) Whether principles of due process, equal protection, and fair dealing under the Tennessee and federal Constitutions permit the State to renege on a contractual promise when a different representative of the State disagrees with the terms of the agreement.

5) Whether the Attorney General's interference with the exercise of the District Attorney General's authority violates the prohibition against cruel and unusual punishment.

Though Mr. Abdur'Rahman does not oppose the Court hearing this case, he would submit that while constitutional questions are at issue, this appeal can be decided on statutory grounds alone. Mr. Abdur'Rahman further submits that by filing this Response, he neither waives nor concedes the argument that this Court lacks jurisdiction to consider the appeal because it is a nullity and the State lacks standing to pursue it.

> *A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost.*[1]

The Attorney General's Motion claims that the criminal court and District Attorney General overstepped, suggesting that the proceeding below subverted and nullified the case's history. Far from it. *See, e.g.*, *Abdur'Rahman v. Colson*, 649 F.3d 468, 483 (6th Cir. 2011) ("Whatever

[1] Commentary to Tenn. R. Sup. Ct. 8, RPC 3.8.

your take on the merits of Mr. Abdur'Rahman's claims, one thing about this case is undeniable: the prosecutor desecrated his noble role.") (Cole, J., dissenting). What happened here is not complicated or out of the ordinary.

District Attorneys bind the State to non-reviewable actions every day in decisions not to charge, to offer pleas, and to *nolle* indictments. *Pace v. State*, 566 S.W.2d 861, 867 (Tenn. 1978) (Henry, C.J., concurring). The agreement General Funk reached here is no different than a plea or charge agreement. *Cf. State v. Howington*, 907 S.W.2d 403, 407–08 (Tenn. 1995) ("Both agreements enhance the State's efforts to prosecute crime. Both types of agreements may require a defendant to give up important rights. . ."). Parties enter into, and courts accept, settlements in the normal course. The consequences of these agreements—where a defendant might walk free based on what a prosecutor thinks—bespeak the extent of his authority. The District Attorney's action here, to correct an injustice, comports with the law and is consistent with the established practice of post-conviction courts accepting settlements where the parties agree.

The Attorney General's mistaken view of the statutory authority of the elected District Attorney General is at odds with the basic principles of the office as articulated by this Court.

> [The District Attorney General] is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with [the] 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.

Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978) (quoting *Pace v. State,* 566 S.W.2d 861, 867 (Tenn.1978) (Henry, C.J., concurring)). Applying these principles, the Attorney General cannot appeal a proceeding in which a different—and, according to this Court, more powerful—State officer acted in accordance with his exclusive authority to represent the State in the post-conviction trial court.

The Post-conviction Procedure Act mandates that the original office that prosecuted a defendant shall defend his petition for post-conviction relief. TENN. CODE ANN. § 40–30–108(a). The District Attorney is bound to fulfill his constitutional and ethical duties in the performance of this statutory assignment. In this case, General Funk was required to respond to Mr. Abdur'Rahman's claims and represent the State in the course of that response. In performing that duty, the General, in consultation with his staff, attorneys for Mr. Abdur'Rahman, and the victims and victims' family members, made a decision to bind the State to an agreed resolution. In that agreement, Mr. Abdur'Rahman gave up substantive rights, and the General mitigated risk in the State's position. Their agreement was endorsed by the Court.

General Funk's exercise of his authority in a manner disfavored by the Attorney General does not violate separation of powers or mean he has appropriated powers he does not hold. Neither has Judge Watkins done so by reviewing the parties' agreement and entering an appropriate order. Far from the Attorney General's disrespectful and erroneous claim that General Funk and Judge Watkins acted "at will" (Motion at 2), these court officers—duly elected to carry out the duties of their offices by the

people of Davison County—carefully considered the merits of the post-conviction claims and the risks attendant to the resolution of those claims in an adversarial proceeding and decided that settlement was the proper resolution. The criminal court did not grant clemency. He amended the judgment of his Court on agreement of the parties.

Coupled with the fact that a District Attorney has unique powers on his home turf—by virtue of the post-conviction structure established by the General Assembly—the notion that a District Attorney cannot enter an agreed resolution based on his reasoned judgment is utterly alien to basic principles of due process, statutory interpretation, and local power. TENN. CONST. art. IV, § 5; *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999). The nature of a consent order is finality. It is binding. It is not appealable. It is not subject to the whims or prejudices of later-looking eyes:

> The judicial system favors the resolution of disputes by agreement between the parties. A consent decree is a contract made final and binding upon the parties by the approval of the court. An agreed order signed by the parties involved has been described as about the most binding of agreements that can be made.

Lovelace v. Copley, 418 S.W.3d 1, 29–30 (Tenn. 2013) (internal quotation marks and citations omitted).

Having bound itself, the State cannot appeal, even if a different representative of the State considers the order ill-advised. It is a cardinal principle that he who consents to what is done cannot complaint of it. *See, e.g.*, *Gardiner v. Word*, 731 S.W.2d 889, 893 (Tenn. 1987). If consent orders could be appealed by another lawyer for the party who already

agreed to be bound by the order, the adversarial system would cease to function. And the law favors compromise. *Lovelace*, 418 S.W.3d at 29–30. No rule of law says that the State is above the fray of civil litigation, or that it cannot step away from the risk of further litigation. For that reason, state organs have long been recognized as capable of signing consent orders. *See, e.g.*, *Bacardi v. Tennessee Bd. of Registration in Podiatry*, 124 S.W.3d 553, 562 (Tenn. Ct. App. 2003).

Tenn. R. App. Proc. 3(c) authorizes the State to appeal from a final judgment in a post-conviction appeal, but the State is not properly before this Court. The State's sole representative in the trial court is the District Attorney and, in this case, he bound his client to a judgment by agreement. It is the Attorney General who seeks this appeal, not the State. But standing is conferred on parties, not lawyers.

The District Attorney is empowered to represent the State in this class of proceeding, and his discretion is explicitly provided for by statute. TENN. CODE ANN. § 40–30–108(a, d). The Attorney General is not required to approve of an action where the District Attorney is in charge, nor is the Attorney General allowed to supervise or veto the District Attorney's decisions. *Cf.* TENN. CODE ANN. § 8–6–303. For whatever reason, the Attorney General dislikes the outcome the District Attorney agreed to in this case. However, the job given by the legislature to the District Attorney to represent the State in the trial court at post-conviction, coupled with the prosecutor's traditionally unbridled discretion to resolve cases in the trial court, means that the District Attorney has the power to finish a case his office began. *Cf. State v. Superior Oil*, 875 S.W.2d 658, 661 (Tenn.1994).

Due process also requires the State to treat those it negotiates with fairly. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause."). At the core of representing a client, even one as powerful as the sovereign, is the basic function attendant to all attorneys of negotiating in good faith. *See, e.g.*, Tenn. Sup. Ct. R. 8, RPC Preamble & Scope, § 3. For the State to renege on its promise is both a violation of the most elementary laws of contract in addition to a violation of Mr. Abdur'Rahman's rights to meaningful due process, to be free of cruel and unusual punishment, and to equal protection under the law.

CONCLUSION

Though Mr. Abdur'Rahman disputes the Attorney General's characterization of the proceeding below and the questions presented for review, he does not oppose this Court removing the case from the Court of Criminal Appeals.

Dated: October 7, 2019

Respectfully submitted,

/s/ Bradley A. MacLean

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CERTIFICATE OF SERVICE

I, David R. Esquivel, hereby certify that a true and correct copy of the foregoing document was sent to the following via U.S. Mail, postage paid on this the 7th day of October, 2019:

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