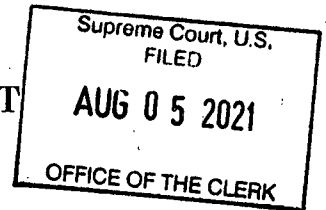


No. 21-201

ORIGINAL

IN THE UNITED STATES SUPREME COURT



NEHAD ABDEL NABI – PETITIONER

Vs.

FATMA ADEL SEKIK – RESPONDENT

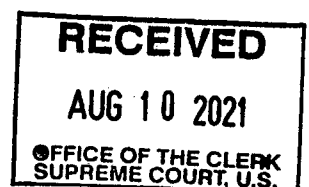
On Petition For Writ Of Certiorari To The Court Of
Appeals of Tennessee For The Eastern Division,
Case No. E2019-01302-COA-R3-CV

PETITION FOR WRIT OF CERTIORARI

PRO-SE PETITIONER:

Nehad Abdel Nabi
561320
T.C.I.X.
1499 R.W. Moore Memorial
Highway
P. O. Box 4050
Only, Tennessee 37140-4050

No Phone



QUESTIONS PRESENTED FOR REVIEW

I.

DID THE TENNESSEE COURT OF APPEALS DENY THE PETITIONER'S DUE PROCESS RIGHTS WHEN IT ALLOWED *EX PARTE* ORAL ARGUMENTS BY OPPOSING COUNSELS OVER THE PETITIONER'S OBJECTION?

II.

DID THE TRIAL COURT DENY DUE PROCESS WHEN IT REFUSED TO GRANT APPELLANT SUFFICIENT TIME IN WHICH TO LOCATE AND SECURE NEW COUNSEL AFTER HIS TRIAL ATTORNEY WITHDREW DUE TO A CONFLICT?

RULE 29.6 STATEMENT

Petitioner Nehad Abdel Nabi is an individual serving a sentence in a State of Tennessee Department of Corrections institution. Fatma Adel Sekik is Nehad Abdel Nabi's wife who sought a divorce that is the subject of this petition. No corporation is involved in this cause.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE PETITION	16
DID THE TENNESSEE COURT OF APPEALS DENY THE PETITIONER’S DUE PROCESS RIGHTS WHEN IT ALLOWED <i>EX PARTE</i> ORAL ARGUMENTS BY OPPOSING COUNSELS OVER THE PETITIONER’S OBJECTION?	16
THE TRIAL COURT DENIED DUE PROCESS WHEN IT REFUSED TO GRANT APPELLANT SUFFICIENT TIME IN WHICH TO LOCATE AND SECURE NEW COUNSEL AFTER HIS TRIAL ATTORNEY WITHDREW DUE TO A CONFLICT.	29
CONCLUSION.....	36

APPENDICES

Appendix “A”

Fatma Adel Sekik v. Nehad Abdelnabi, No. E2019-01302-COA-R3-CV, 2021 WL 120940 (Tenn.Ct.Appeal Jan. 13, 2021), permission to appeal denied by the Tennessee Supreme Court on May 12, 2021.

Appendix “B”

Technical Record Volume I

Appendix “C”

Technical Record Volume II

Appendix “D”

Technical Record Volume III

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)	20
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).....	20, 21
Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).....	21
Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977)	20
Fidelity-Phenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254 (Tenn.Ct.App. 1941).....	35
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 365 (1982).....	19
Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000).....	17, 23, 24, 25
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	20, 21
Moore v. Moore, No. 01-A-01-9210-CH00-389, 1993 WL 54593 *5 (Tenn.Ct.App. Mar. 3, 1993).....	27
Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 70 S.Ct. 652 (1950).....	22
Obergefell v. Hodges, ___ U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015)	19
Paiko v. Connecticut, 302 U.S. 319 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937)	19
Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed.2d 1356 (1948)	17, 22
Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).....	19
United States v. Cronin, 104 S.Ct. 2039 (1984)	36
Wolf v. McDonnell, 418 U.S. 529, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)	21

STATUTES

28 U.S.C. § 2244(d).....	34
28 U.S.C.A. § 2254.....	33
Tenn.Code Ann. § 41-21-304(a).....	25, 29
Tennessee Code Annotated § 20-7-101	34

Tennessee Code Annotated § 40-30-102(a)	33
-----------------------------------------------	----

Tennessee Code Annotated § 40-30-106(b)	33
-----------------------------------------------	----

RULES

Rule 10, RJC 2.9 Rules of the Supreme Court of the State of Tennessee	27, 28
-----------------------------------------------------------------------------	--------

Rule 2 of the Tennessee Rules of Appellate Procedure.....	28
-----------------------------------------------------------	----

Tennessee Rules of Appellate Procedure, Rule 35	26, 28
-------------------------------------------------------	--------

CONSTITUTIONAL PROVISIONS

Art. 1, Sec. 12, of the Constitution of Tennessee	17
---------------------------------------------------------	----

Art. 1, Sec. 17, of the Constitution of Tennessee	17
---------------------------------------------------------	----

Fifth Amendment of the Constitution of the United States	18
----------------------------------------------------------------	----

Fourteenth Amendment of the Constitution of the United States	18
---------------------------------------------------------------------	----

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix “A” to the petition and is unpublished at *Fatma Adel Sekik v. Nehad Abdelnabi*, No. E2019-01302-COA-R3-CV, 2021 WL 120940 (Tenn.Ct.Appeal Jan. 13, 2021), permission to appeal denied by the Tennessee Supreme Court on May 12, 2021.

JURISDICTION

The date on which the highest state court decided this case was December 30, 2009. A copy of that decision appears at Appendix "A".

A timely application for permission to appeal was thereafter denied on the 15th day of March, 2010, and a copy of the order denying rehearing appears at Appendix "A"

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

Fifth Amendment of the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 1, § 12 of the Constitution of Tennessee

That no conviction shall work corruption of blood or forfeiture of estate. ...

Art. 1, § 17, of the Constitution of Tennessee

That all courts shall be open; and every man, for an injury

done him in his lands, goods, person or reputation, shall have ~~remedy by due course of law, and right and justice~~ administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

Tennessee Code Annotated § 41-21-304(a)

(a) In no civil case can an inmate be removed from the penitentiary to give personal attendance at court, but testimony may be taken by deposition, as in other cases, the party seeking the testimony being required to make affidavit that the inmate is a material witness in the cause.

Rule 10, RJC 2.9(A), Rules of the Tennessee Supreme Court
(in pertinent part)

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside of the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

— — —

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

Rule 2 of the Tennessee Rules of Appellate Procedure

For good cause, including the interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion, except that this rule shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4, an application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate appellate court prescribed in Rule 9(c), an application for permission to appeal to the Supreme Court from an intermediate appellate court's denial of an extraordinary appeal prescribed in Rule 10(b), an application for permission to appeal prescribed in Rule 11, or a petition for review prescribed in Rule 12.

Tennessee Rules of Appellate Procedure, Rule 35

(a) Request; Waiver. Any party to an appeal who desires oral argument shall so request by stating at the bottom of the cover page of the party's brief that oral argument is requested. *If any party to an appeal requests oral argument it is unnecessary for any other party to do so* except as otherwise provided in this subdivision. No party may argue unless the party has filed a brief as required by these rules. A party who has requested oral argument and who thereafter determines to waive oral argument shall notify the clerk of the appellate court and all other parties. Any other party who has not previously requested oral argument may then request oral argument by notifying the clerk of the appellate court and all other parties.

STATEMENT OF THE CASE

A.

This appeal arises out of a divorce proceeding. Fatma Adel Sekik (“Wife” or “Mother”) and Nehad Abdelnabi (“Husband” or “Father”) are from the Middle East; Wife is from Cairo, Egypt, and Husband is from Palestine. The parties were married in 1996 in Egypt and moved to the United States shortly thereafter, where they resided in Knoxville, Tennessee. *Fatma Adel Sekik v. Nehad Abdelnabi*, No. E2019-01302-COA-R3-CV, 2021 WL 120940, *1 (Tenn.Ct.Appeal Jan. 13, 2021), *perm. Appeal denied* May 12, 2021. The parties have four children. Their third child, Hamza, was born in 2002 and has special needs. *Id.* Husband is an “electronics technician” and owned an electronics business in Knoxville. *Id.* He also oversaw the financial aspects of family life, including the buying and selling of real property during the marriage, such as the real property located in the Gaza Strip that is the subject of many issues raised in this appeal. *Id.* Wife primarily took care of the parties’ home and four children. *Id.* Wife also works part-time from home, translating Arabic conversations by phone, for which she is paid by the minute.

Born to the marriage were four (4) children: Sherin and Nesma, both daughters, who were fifteen (15) and twelve (12) at the time of filing and twenty-one (21) and eighteen (18) at the time of trial, and Hamza and Omar, both sons, who were nine (9) and three (3) respectively at the time of the filing of the divorce, and sixteen (16) and ten (10) at the time of trial. (Appendix "C", p. 248-49). Sherin is now on full scholarship to pharmacy school (having finished college in three (3) years) and Nesma attends the University of Tennessee on full scholarship. *Id.* Hamza suffers from autism that evidences itself in behavioral issues and intellectual limitations. *Id.* Hamza's reading comprehension is in the Kindergarten to First Grade range. *Id.* He has great difficulty with math and little success in other academic pursuits. *Id.* The consensus of his special education experts is that it is unlikely that Hamza will ever be able to be self-supporting. *Id.* Hamza's behavioral challenges require constant supervision, and any minor changes in routine exacerbate his behavioral problems significantly. *Id.* Omar is ten (10) now and thriving. *Id.*

On the 7th day of September, 2012, Fatma Adel Sekik filed a complaint for divorce against Nehad Abdel Nabi alleging

irreconcilable differences have arisen between the parties, and those differences are permanent. (Appendix "B", p. 2). In the alternative, the Plaintiff alleged that "the [Appellant] has engaged in inappropriate marital conduct, such that a divorce should be granted to the Plaintiff." (Appendix "B", p. 2).

Husband's was served with the Complaint for Divorce, along with the statutory injunctions, and a Petition for Order of Protection which had been filed September 7, 2012. (Appendix "C", p. 251). Appellant's attorney, Robert L. Jolley, Jr., filed a Notice of Appearance on the 17th day of October, 2012. (Appendix "B", p. 28). When the Order of Protection came up for hearing on September 26, 2012, Husband, with direct assistance and involvement of his brother, Mr. Nahed Abdulnabi (hereafter "Brother"), reached an agreement with Ms. Sekik as to financial support and child support pending the divorce. *Id.* Part of that agreement included Husband paying Two Thousand Dollars (\$2,000.00) per month, beginning with the month of September 2012, in child support. (Appendix "C", p. 251). Thereafter, Husband paid a total of Three Thousand Dollars (\$3,000.00) in support, and none has been paid since that time in 2012. *Id.*

In late November or early December 2012, Husband's family prevailed upon Ms. Sekik to give him another chance, as their faith might require. (Appendix "C", p. 252). Accordingly, on December 5, 2012, the parties entered an Amended Order of Protection, reaffirming the financial obligations of the original Order of Protection, but allowing social contact. *Id.* Husband moved back into the marital residence at that time. *Id.* They remained in the residence together from December 2012 until January 2016, when Husband was taken into custody after conviction for one count of aggravated kidnapping, one count of aggravated kidnapping, and two counts of aggravated assault. *Id.*; see also *State v. Nehad Sobhi Abdelnabi*, No. E2017-00237-CCA-R3-CD, 2018 WL 3148003, *1 (Tenn.Crim.App. filed Jun 26, 2018), *perm. app denied* Nov. 15, 2018.¹

Four (4) years after filing for divorce and eight months after he Husband's arrest, on the 29th of September, 2016, the Plaintiff filed a motion for default judgment. (Appendix "B", p. 29). On the 5th day of October, 2016, the Appellant filed his Answer to the Complaint.

¹ This case arose from from the kidnapping and assault of the victim, Naser Ferwanah, by the Defendant and co-defendant, Lowi Fathi Akila, on February 1, 2012. *State v. Abdelnabi*, 2018 WL 3148003 at *1. Mr. Abdelnabi thought Naser Ferwanah was having an affair with his wife. *Id.* at 1-2.

(Appendix “B”, p. 32). The Appellant admitted that the parties had not yet separated at the time the Complaint was filed. (Appendix “B”, p. 32). Appellant further averred that the parties continued cohabitating at the marital residence until his incarceration in January 2016. (Appendix “B”, p. 32).

On the 17th day of July, 2017, Plaintiff filed a motion to amend complaint, (Appendix “B”, p. 59), and an amended Complaint adding Nahed Abdulnabi and Rewa Gharbawe as co-defendants, (Appendix “B”, p. 63). A hearing was held on the 11th day of August, 2017 and the Honorable Judge Gregory S. McMillan granted the Plaintiff’s Motion to Amend the Complaint on the 31st day of August, 2017. (Appendix “B”, p. 101). On the 23rd day of September, 2017, the Appellant, through counsel, filed his answer to the Amended Complaint. (Appendix “B”, p. 120).

On the 27th day of April, 2018, Plaintiff filed a motion for default judgment as to the two co-defendants, Nahed Abdulnabi and Rewa Gharbawe. (Appendix “B”, p. 123). The Co-Defendants filed their response on the 8th day of June, 2018. (Appendix “C”, p. 150). On the 11th day of June, 2018, the Co-Defendants filed an Answer and Counter/Cross-Claim. (Appendix “C”, p. 152). On the 28th day of

June, 2018, the Plaintiff filed her answer to the counter/cross-claim filed by the co-defendants. (Appendix “C”, p. 171). On the 31st day of January, 2019, on the issue of grounds for and granting of divorce, with all other issues reserved, the Court granted the plaintiff a divorce. (Appendix “C”, p. 196).

On the 6th day of February, 2019, Robert L. Jolley, Jr., filed a motion to be relieved as counsel. (Appendix “C”, p. 198). Mr. Jolley submitted that he

... represented Mr. Abdelnabi in his criminal case, *State of Tennessee v. Nehad Abdelnabi*, Knox County Criminal Court, No. 100273A. On January 25, 2019, Mr. Abdelnabi filed a Petition For Post-Conviction Relief in his criminal case alleging ineffective assistance of counsel. ... Under such circumstances, Counsel asserts that he can no longer effectively represent Mr. Abdelnabi in these proceedings.

(Appendix “C”, p. 198).

On the 8th day of February, 2019, the Trial Court, “and for good cause shown,” relieved Mr. Jolley as counsel for Appellant Nehad Abdel Nabi. (Appendix “C”, p. 207). However, the trial court then ordered that:

This matter continues to be set for trial on February 25 — 27, 2019, and March 4, 2019. The relieving of Mr. Jolley as counsel will not continue this trial date. i Nehad Abdelnabi shall obtain new counsel or represent himself.

(Appendix “C”, p. 207).

On the 15th day of August, 2019, Plaintiff, Fatma Adel Sekik, through counsel, filed an “Amended Complaint to include an (*sic*) additional grounds and to join a party.” (Appendix “C”, p. 219). However, Appellant Nehad Abdel Nabi was never served with a copy of the Amended Complaint.²

On the 19th day of February, 2019, the Trial Court held a Hearing on the Defendant / Cross-Plaintiff Nahed Abdulnabi’s motion for continuance, (Appendix “C”, p. 225-26). Appellant Nehad Abdel Nabi was not present at the hearing. (Appendix “C”, p. 226). In that hearing, the trial court stated:

Mr. Abdelnabi -- Mr. Nehad Abdelnabi's loss of counsel struck this Court as fortuitous in that he had a year to file his motion asserting ineffective assistance of counsel as part of his criminal case, and yet he chose to do it a week -- well, within a month of the trial date, I believe in an effort to delay the trial, and so that Mr. Jolley could not continue, who has defended this case since its inception.

(Appendix “C”, p. 233)

² The Certificate of Service indicates that a copy of the Amended Complaint was served upon Robert L. Jolley whom had withdrawn as counsel 6 months prior to the Amended Complaint being filed. Upon information and belief, the Amended Complaint was not forwarded to Defendant Nehad Abdel Nabi and Mr. Abdel Nabi never received a copy until he received the certified record from this appellate court.

February, 2019, on the Motion to Continue, in pertinent part, found as follows:

As this Court has previously noted, it is fortuitous that Nehad Abdelnabi had nearly a year to file an effective assistance of counsel claim and waited until very shortly before trial to do so resulting in the withdrawal of his counsel and his request for continuance.

(Appendix "C", p. 239).

On the 11th day of March, 2019, the trial court issued an Order upon Appellant Nehad Abdel Nabi's oral Motion to retain Mr. Abdel Nabi in the custody of the Sheriff of Knox County, Tennessee. (Appendix "C", p. 245). The trial court found "that Original Defendant, Nehad Abdelnabi's presence in Knoxville is necessary until this matter is concluded." (Appendix "C", p. 245).

On the 18th day of March, 2019, the trial court issued its Findings of Fact and Conclusions of Law. (Appendix "C", p. 248-280). On the 25th day of June, 2019, the trial court issued an Order (Appendix "C", p. 281-289). On the 18th day of July, 2019, appellant Nehad Abdel Nabi filed a Motion for New Trial. (Appendix "C", p. 293-295). On the 12th day of August, 2019, appellant Nehad Abdel

Nabi filed an objection to the Plaintiff's Proposed Parenting Plan.

(Appendix "D", p. 305). Plaintiff Sekik filed a response to appellant Nehad Abdel Nabi's objection on the 16th day of August, 2019. (Appendix "D", p. 312). A "Corrected Plaintiff's Response to Nehad Abdelnabi's Objection to the Proposed Permanent Parenting Plan" was filed on August 21, 2019. (Appendix "D", p. 348). The trial court issued an Order "based upon the motion by Nehad Abdelnabi (Defendant) for a new trial, Defendant's Objection to the Parenting Plan, the responses filed by Plaintiff to each of those pleadings, and the record as a whole" on the 29th day of August, 2019. (Appendix "D", p. 354). Appellant Abdel Nabi filed his Notice of Appeal on the 19th day of September, 2019. (Appendix "D", p. 360).

The Permanent Parenting Plan Order was filed on the 10th day of October, 2019.³ (Appendix "D", p. 365). On November 10, 2019, Appellant Nehad Abdel Nabi filed his Objection to the Proposed Parenting Plan specifically challenging the Child Support Worksheet attached to the Parenting Plan.⁴ (Appendix "D", p. 389).

³ This was the first time Defendant Abdel Nabi had seen the Child Support Worksheet attached to the Parenting Plan. As it turns out, this was served Robert Jolley five months after he had withdrawn as counsel.

⁴ A timely Motion for Enlargement of Time was filed on October 28, 2019 asking for a thirty day extension of time. (Appendix "D", p. 382).

Moreover, Petitioner/Appellant Nehad Abdel Nabi is a pro se prisoner litigant in a divorce action entailing large amounts of real estate and capital as well as child support, custody and visitation rights of two minor children. While Mr. Abdel Nabi is proceeding pro-se, there are multiple attorneys involved in this action,⁵ none of whom have Mr. Abdel Nabi's best interest at heart, and all of whom have requested oral argument.

On Appeal, the Tennessee Court of Appeals scheduled Oral Arguments for the 21st day of June, 2020. Petitioner filed a Motion in Opposition to Oral Arguments which was denied on the 16th day of June, 2020. Petitioner filed a motion to rehear on the 29th day of June, 2020, which was denied on the 29th day of June, 2020. A Petition to grant a review of the Appellate Court's Interlocutory Order was submitted to Supreme Court of Tennessee on the 5th day of July, which was immediately denied. The Court of Appeals for the Eastern District of Tennessee entered final judgment on the 18th day of November of 2020. No Petition for Rehearing was filed. Application for permission to appeal to the Supreme Court of

⁵ Appellee Fatma Adel Sekik is represented by five (5) attorneys: Wanda Sobieski, Diane M. Messer, Caitlin F. Elledge, Zachary T. Powers & Laura E Wyrick of Knoxville; Third Party Appellant/Appellee is

Tennessee was denied on May 12, 2021.

REASONS FOR GRANTING THE PETITION

A.

DID THE TENNESSEE COURT OF APPEALS DENY THE PETITIONER'S DUE PROCESS RIGHTS WHEN IT ALLOWED *EX PARTE* ORAL ARGUMENTS BY OPPOSING COUNSELS OVER THE PETITIONER'S OBJECTION?

The first issue before this Court is whether the Court's Order of June 16, 2020⁶ erred in denying pro-se appellant Nehad Abdel Nabi's motion opposing oral argument on constitutional grounds as unconstitutionally infringing upon the due process rights of the appellant. Mr. Abdel Nabi argued that "[u]nder the facts of this case Appellant is being denied the opportunity to participate in Oral Arguments that have been requested by the Appellee thereby denying him procedural due process under both State and Federal Constitutions." (Appellant Nehad Abdel Nabi's Motion In Opposition To Oral Argument On Constitutional Grounds, p. 2, para. # 5). The Court's Order denied the Appellant's motion stating that: "[a]ppellant has no constitutional right to oral argument." *Order*, p.

represented by Matthew D. Barocas of Knoxville; and the State of Tennessee by the Hon. Herbert H. Slatery, III.

1; *Citing Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 163, 120 S.Ct. 684, 692, 145 L.Ed.2d 597 (2000) (“We already leave to the appellate courts’ discretion, keeping the best interests of both the prisoner and the government in mind,’ the decision whether to allow a *pro se* appellant to participate in, or even be present at, oral argument.” (quoting *Price v. Johnston*, 334 U.S. 266, 284, 68 S.Ct. 1049, 92 L.Ed.2d 1356 (1948))). The Appellate Court then incorrectly stated: “[w]e granted appellant’s motion to waive oral argument on his own behalf by Order entered February 25, 2020. *Id.*”

Art. 1, Sec. 12, of the Constitution of Tennessee provides, in part, “that no conviction shall work corruption of blood or forfeiture of estate”.

Art. 1, Sec. 17 provides, in part, “And every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law”.

Just as in the federal constitution, these constitutional provisions constitute clear and unequivocal declarations of the public policy of the State of Tennessee to the effect that no forfeiture of

⁶ Hereinafter referred to as “Order”.

property rights shall follow conviction for a crime, and that every man shall have a remedy by due course of law for an injury sustained by him.

The Fifth Amendment of the Constitution of the United States provides, in part, “that no person shall ... be deprived of life, liberty, or property, without due process of law’.

The Fourteenth Amendment provides, in part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”

The United States Supreme Court has consistently held that the Fourteenth Amendment forbids the government to infringe on fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 571 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997).

Due process under the state and federal constitutions encompasses both procedural and substantive protections. The most basic principle underpinning procedural due process is that individuals be given the opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30, 102 S.Ct. 1148, 71 L.Ed.2d 365 (1982). In contrast, substantive due process limits oppressive government action, such as deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Substantive Due Process

Substantive due process, unlike procedural due process, bars oppressive government action regardless of the fairness of the procedures used to implement the action. It protects unremunerated rights that are fundamental to our system of ordered liberty. *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (quoting *Paiko v. Connecticut*, 302 U.S. 319 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937); see also *Obergefell v. Hodges*, ___ U.S. ___,

135 S.Ct. 2584, 2618, 192 L.Ed.2d 609 (2015) (Roberts, C.J., dissenting) (quoting *Washington v. Glucksburg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)).

Procedural Due Process

“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotation marks omitted). An individual’s right of access to courts for the purpose of dissolving a marital relationship is protected by the Due Process Clause. See *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). The question of what form of hearing is required—including the “question ... of timing,” *Dixon v. Love*, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) — is addressed through consideration of the following three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893.

1. The private interest that will be affected by the official action

The United States Supreme Court has established that a prisoner has a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494, 52 L.Ed.2d 72 (1977). This right is founded in the due process clause of the fourteenth amendment. *Wolf v. McDonnell*, 418 U.S. 529, 579, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974). Of course, a prisoner's right of access is not absolute. However, at a minimum, due process requires that absent a countervailing state interest of overriding significance, prisoners must be afforded *meaningful* access to the courts and an opportunity to be heard. *See Bounds*, 430 U.S. at 822, 97 S.Ct. at 1495; *Boddie*, 401 U.S. at 377, 91 S.Ct. at 785. (Emphasis in original).

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections ...*” *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950) (emphasis added).

An appeal can always be submitted on written briefs and, in this case, all of the parties submitted briefs. But oral argument, while not indispensable, is frequently if not usually desired by the parties. *Price v. Johnson*, 334 U.S. 266, 280, 68 S.Ct. 1049, 1058, 92 L.Ed. 1356 (1948) *overturned on other grounds*. And there are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. *Id.* In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person. *Id.* The difficulty, of course, arises when one of the parties is a prisoner who has no

lawyer *Id.* Since ordinarily the court cannot designate counsel for the prisoner [in a civil case], an arrangement that is made for his presence and participation at the oral argument can be said to be ‘reasonably necessary in the interest of justice.’ *Id.* Otherwise the court loses the benefits of listening to his contentions, hearing only the arguments of [opposing] counsel. *Id.* Conceivably, the prisoner’s case might be unduly prejudiced by such a one-sided debate. *Id.*

Appellant posits that opposing counsel requested oral argument to gain a tactical advantage over the Appellant. Appellant submits that he suffered prejudice as a result in that he was denied the opportunities to impeach and contradict opposing counsel’s arguments, to make legal arguments and to reasonably explain his issues. The risk under the current procedure is that the appellant was deprived of any meaningful opportunity to present his side to the Court.

2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards

This Court denied the Appellant’s motion, relying on *Martinez v. Court of Appeal of California*, for the proposition that the

“Appellant has no constitutional right to oral argument.” *Martinez*

v. Court of Appeal of California, 528 U.S. 152, 163, 120 S.Ct. 684, 692, 145 L.Ed.2d 597 (2000). The *Martinez* Court found as follows:

“The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court. Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*. We already leave to the appellate courts’ discretion, keeping “the best interests of both the prisoner and the government in mind,” the decision whether to allow a *pro se* appellant to participate in, or even to be present at, oral argument. Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government’s interests outweigh an invasion of the appellant’s interest in self-representation.

For the foregoing reasons, we conclude that neither the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. Our holding is, of course, narrow. It does not preclude the States from recognizing such a right under their own constitutions. Its impact on the law will be minimal, because a lay appellant’s rights to participate in appellate proceedings have long been limited by the well-established conclusions that he has no right to be present during appellate proceedings, or to present oral argument. Meanwhile the rules governing appeals in California, and presumably those in other States as well, seem to protect the ability of indigent litigants to make *pro se* filings. In requiring *Martinez*, under these circumstances, to accept against his will a state-appointed

arguments, to make legal arguments and to reasonably explain his issues.

The Tennessee Appeals Court Order misstated the facts when it alleged that they “granted appellant’s motion to waive oral argument on his own behalf”. (*Order*, p. 1). While the Appellant filed a motion in opposition to oral argument in January of 2020, at no time did the Appellant waive oral argument. Rather, Appellant moved the Tennessee Appellate Court to suspend the application of Rule 35 allowing oral argument on grounds that allowing oral argument at a hearing that the Appellant was unable to attend is tantamount to allowing an *ex parte* hearing by opposing counsel. (*Defendant/Appellant Nehad Abdel Nabi’s Motion in Opposition to Oral Argument*) Moreover, any inference that Appellant waived oral argument because he did not request oral argument on his brief was in direct contravention to Rule 35’s provision that “If any party to an appeal requests oral argument it is unnecessary for any other party to do so...” See, Tennessee Rules of Appellate Procedure, Rule 35(a), which states:

- (a) Request; Waiver. Any party to an appeal who desires oral argument shall so request by stating at the bottom of the cover page of the party’s brief that oral argument is

requested. ~~If any party to an appeal requests oral argument it is unnecessary for any other party to do so except as~~ otherwise provided in this subdivision. No party may argue unless the party has filed a brief as required by these rules. A party who has requested oral argument and who thereafter determines to waive oral argument shall notify the clerk of the appellate court and all other parties. Any other party who has not previously requested oral argument may then request oral argument by notifying the clerk of the appellate court and all other parties.

Ordinarily, it is improper for a judge to initiate or consider *ex parte* communications concerning a pending or impending proceeding. Rule 10, RJC 2.9 Rules of the Supreme Court of the State of Tennessee (Code of Judicial Conduct). In the context of the cited rule, *ex parte* means without adequate notice to all parties and opportunity of all parties to respond. *Moore v. Moore*, No. 01-A-01-9210-CH00-389, 1993 WL 54593 *5 (Tenn.Ct.App. Mar. 3, 1993). In the context of the present situation, *ex parte* means out of the presence of the parties ..., without full disclosure and opportunity to impeach, contradict or explain. *Id.*

In Tennessee, the State Supreme Court had the foresight and wisdom to understand that sometimes circumstances arise that requires a deviation from the rules. Toward that end the Tennessee

Supreme Court enacted Rule 2 of the Tennessee Rules of Appellate

Procedure which reads as follows:

For good cause, including the interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion, except that this rule shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4, an application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate appellate court prescribed in Rule 9(c), an application for permission to appeal to the Supreme Court from an intermediate appellate court's denial of an extraordinary appeal prescribed in Rule 10(b), an application for permission to appeal prescribed in Rule 11, or a petition for review prescribed in Rule 12.

None of the exceptions in Rule 2 apply to Rule 35's provisions that would have prevented the Tennessee Court of Appeals from suspending oral argument.

3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

The State has a compelling interest in the security and cost of transporting inmates to participate in oral argument which would preclude oral argument by an inmate; however, the State would be without a compelling interest if oral argument is suspended when

one of the litigants is a prisoner pro se litigant, or, in the alternative, the inmate were allowed to participate through Video Communications Technology.

This matter appears to be an issue of first impression as the Petitioner has been unable to find any case law that addresses this particular question. It is quite apparent that the Respondent gained a significant tactical advantage when allowed to argue unopposed to the detriment of the Petitioner. Therefore, for good cause shown, Petitioner Nehad Abdel Nabi propounds that this Court should declare that Tennessee Rules of Appellate Procedure, Rule 35, as applied in the case sub judice in conjunction with Tennessee Code Annotated § 41-21-304(a), unconstitutionally denied the Petitioner due process and equal protection of the law.

II.

THE TRIAL COURT DENIED DUE PROCESS WHEN IT REFUSED TO GRANT APPELLANT SUFFICIENT TIME IN WHICH TO LOCATE AND SECURE NEW COUNSEL AFTER HIS TRIAL ATTORNEY WITHDREW DUE TO A CONFLICT.

The second issue, Appellant is asking the Supreme Court whether the Tennessee trial court's refusal to grant him sufficient

time in which to locate and secure new counsel after his trial attorney withdrew due to a conflict deprived him of “life, liberty, or property, without due process of law”.

On the 8th day of February, 2019, the trial court, “and for good cause shown,” relieved Mr. Jolley as counsel for Appellant Nehad Abdel Nabi. (Appendix “C”, p. 207). However, the trial court then ordered that:

This matter continues to be set for trial on February 25 — 27, 2019, and March 4, 2019. The relieving of Mr. Jolley as counsel will not continue this trial date. Defendant Nehad Abdelnabi shall obtain new counsel or represent himself.

(Appendix “C”, p. 207).

On the 19th day of February, 2019, the Trial Court held a Hearing on the Defendant / Cross-Plaintiff Nahed Abdulnabi’s motion for continuance, (Appendix “C”, p. 225-26). Appellant Nehad Abdel Nabi was not present at the hearing.⁷ In that hearing, the trial court stated:

Mr. Abdelnabi -- Mr. Nehad Abdelnabi's loss of counsel struck this Court as fortuitous in that he had a year to file his motion asserting ineffective assistance of counsel as part of his criminal case, and yet he chose to do it a week -- well, within a month of the trial date, I believe in an effort to

⁷ The Court “had requested that Mr. Abdel Nabi be brought over” [from the jail]. Consequently, Mr. Abdel Nabi’s failure to appear was through no fault of his own. (Appendix “B”I, p. 226).

delay the trial, and so that Mr. Jolley could not continue,
~~who has defended this case since its inception.~~

(Appendix "C", p. 233)

The trial court's Order, entered on the 22nd day of February, 2019, on the Motion to Continue, in pertinent part, found as follows:

As this Court has previously noted, it is fortuitous that Nehad Abdelnabi had nearly a year to file an effective assistance of counsel claim and waited until very shortly before trial to do so resulting in the withdrawal of his counsel and his request for continuance.

(Appendix "C", p. 239).

Appellant Nehad Abdel Nabi diligently attempted to hire counsel up to and during the trial.

Upon Appellant Nehad Abdel Nabi's Motion for New Trial, the trial court entered an Order finding and ordering, in pertinent part, as follows:

Defendant chose several years ago to utilize the same attorney to represent him in his criminal case as well as the divorce case. Mr. Abdelnabi (*sic*) was convicted and waited nearly an entire year before asserting a claim of ineffective counsel against his counsel. During the time that Defendant was considering to assert a claim of ineffective counsel and while that claim was being prepared, he had time to retain new divorce counsel. The Defendant is an educated and skilled businessman. The Court has absolutely no doubt that he understood that asserting an ineffective assistance claim

against his original counsel would require that attorney to ~~withdraw from both matters. Defendant delayed this case~~ while the criminal matters were pending. During that delay and subsequent periods once the case proceeded, Defendant disposed of assets and conspired with his family to defeat Plaintiffs claim to substantial marital property. Defendant failed to obtain new divorce counsel at the time he retained his new post-conviction counsel. He is not entitled to a new trial due to not having counsel under these circumstances.

(Appendix "D", p. 354).

It should be noted that while Nehad Abdel Nabi may be an "educated and skilled businessman", he is not a lawyer, or educated and trained in the law; consequently, he asserts that he did not contemplate that his post-conviction claims would conflict his counsel thereby requiring his counsel to withdraw from his divorce case.

The Divorce Court claimed that Mr. Abdel Nabi "was convicted and waited nearly an entire year before asserting a claim of ineffective counsel against his counsel." However, Mr. Abdel Nabi had only one year in which to file for post-conviction remedies. Both federal and state post-conviction remedies have a one-year limitation period. The Tennessee Post-Conviction Statute provides:

“[A] person in custody under a sentence of a court of this state must petition for post-conviction relief within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final .,”

T.C.A. § 40-30-102(a) (2006). The statute explicitly states “The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.” *Id.* It further stresses that “[t]ime is of the essence of the right to file a petition for post- conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise.” *Id.* In the event that a petitioner files a petition for post-conviction relief outside the one-year statute of limitations, the trial court is required to summarily dismiss the petition. *See id.*, T.C.A. § 40-30-106(b) (2006).

Additionally, a federal 28 U.S.C.A. § 2254 petition for habeas corpus relief requires that: “a person in custody pursuant to the judgment of a state court must file his application for a writ of habeas corpus within one year of the date on which the judgment

became final by either the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) as contained in 28 U.S.C. § 2244(d) provides in part that:

1. A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. ...
2. The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection..

Contrary to the trial court’s assessment that Mr. Abdel Nabi masterminded a scheme to delay the trial in his divorce, Mr. Abdel Nabi had no choice but to file his Petition for Post-Conviction Relief within the applicable one-year time limit.⁸

Continuances are governed by T.C.A. § 20-7-101 *et seq.* T.C.A. § 20-7-101 provides: “Continuances ... may always be granted by the court, upon good cause shown, in any stage of the action.” As stated

⁸ Mr. Nehad Abdel Nabi filed his Petition for Post-Conviction Relief in the Criminal Court on the 25th day of January, 2019. (Appendix “C”, p. 200).

above, “Good cause shown” includes, for instance, the unexpected withdrawal of counsel due to a conflict. *See, Fidelity-Phenix Fire Ins. Co. v. Oliver*, 152 S.W.2d 254, 258 (Tenn.Ct.App. 1941). (“[w]here it is shown that defendant’s attorney had withdrawn from the case, it is the duty of the court to continue the case a sufficient length of time to permit defendant to employ other counsel and to enable the new counsel to investigate the case and make defense.”). Robert L. Jolley, Jr., represented Mr. Abdel Nabi in both his Criminal Trial and his divorce proceedings. Mr. Jolley appeared in the divorce case on the 17th day of October, 2012, (Appendix “B”, p. 28), and continued to represent Mr. Abdel Nabi until his withdrawal for cause on the 8th day of February, 2019, (Appendix “C”, p. 207). Mr. Abdel Nabi did not contemplate that the filing for Post Conviction remedies in his Criminal trial would cause Mr. Jolley to become conflicted and have to withdraw as counsel. Mr. Abdel Nabi diligently attempted to retain new counsel prior to his February 25th trial date. The trial Court and opposing counsel would not agree to the continuance. All of this resulted in Mr. Nehad Abdel Nabi, (whom is untrained and unlearned in the law), being forced to proceed *pro-se* into complex civil litigation against a trained

professional lawyer, much like “a sacrifice of unarmed prisoners to gladiators”. *Cf., United States v. Cronin*, 104 S.Ct. 2039, 2046 (1984) (“While a ... trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”) As a result, Mr. Abdel Nabi’s was denied due process and equal protection of the law.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nebad Abdel Nabi', is written over a horizontal line.

Nebad Abdel Nabi

561320

T.C.I.X.

1499 R.W. Moore Memorial Hwy.

P. O. Box 4050

Only, Tennessee 37140-4050

Nehad Abdel Nabi

561320

T.C.I.X.

1499 R.W. Moore Memorial Hwy.
Only, TN 37140-4050

July 23, 2021

Scott S. Harris
Court Clerk
U.S. Supreme Court Bldg.
1 First Street N.E.
Washington, D.C. 20543

**RE: FATMA ADEL SEKIK v. NEHAD ABDEL NABI, ET AL.
PETITION FOR WRIT OF CERTIORARI**

Dear Clerk Harris,

Enclosed herewith for filing in the above referenced case is my Petition for Writ of Certiorari. Please file this with the Court.

Should you have any questions, or comments, regarding the above, please feel free to present them to me at my address above.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'Nehad Abdel Nabi', written over the typed name.

Nehad Abdel Nabi

NAN/jcw

Cc: Wanda G. Sobieski, Esq.
Hon, Herbert H. Slatery, III
File