No. 01-9532

IN THE
SUPREME COURT OF THE UNITED STATES

ABU ALI ABDUR'RAHMAN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether this Court possesses jurisdiction to review the decision of a state supreme court declining to exercise its discretion to recall its mandate, issued 12 years ago on the petitioner's direct appeal from his conviction and sentence, on the basis of purported "new evidence" of racial discrimination in the selection of petitioner's jury.

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The opinion of the Tennessee Supreme Court on direct appeal from petitioner's conviction and sentence was issued on April 12, 1990, and is reported at 789 S.W.2d 545. The order of the Tennessee Supreme Court declining to withdraw the mandate issued in connection with that decision was filed April 5, 2002, and appears as Appendix A to the petition for writ of certiorari.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

In 1987, the petitioner, then known as James Lee Jones, was convicted after trial of first degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. The jury sentenced petitioner to death, finding three aggravating circumstances: 1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; 2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and 3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft of kidnapping.[1] The Tennessee Supreme Court affirmed the judgment, and this Court denied a writ of certiorari. *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908, 111 S.Ct. 280 (1990).

In 1991, petitioner sought post-conviction relief in state court, which was denied by the trial

[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

court. That judgment was affirmed by the Tennessee Court of Criminal Appeals, *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995). The Tennessee Supreme Court denied review on August 28, 1995, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122, 116 S.Ct. 933 (1996).

Petitioner filed a petition for federal habeas corpus review in 1996, challenging both his convictions and the sentences. The district court granted the writ and vacated the death sentence based upon ineffective assistance of counsel at the sentencing phase; the district court denied relief on all other claims. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D.Tenn. 1998). On appeal, the Sixth Circuit Court of Appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects raised. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

On October 9, 2001, this Court denied certiorari review of the Sixth Circuit's judgment. *Abdur'Rahman v. Bell*, 122 S.Ct. 386 (2001). On October 10, 2001, petitioner filed in the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. On November 2, 2001, petitioner filed in the district court a Fed. R. Civ. P. 60(b) motion for relief from the court's 1998 judgment habeas corpus judgment. On November 5, 2001, petitioner filed in this Court a petition for a rehearing of the denial of certiorari.

On November 27, 2001, the district court, concluding that petitioner's Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. The district court also denied a certificate of appealability. On November 30, 2001, petitioner filed a notice of appeal from the district court's action on the Rule 60(b) motion. On December 3, 2001, this Court denied the petition for rehearing.

Abdur'Rahman v. Bell, 122 S.Ct. 661 (2001).

On December 6, 2001, petitioner filed in the Sixth Circuit a motion requesting 1) a certificate of appealability from the district court's action on his Rule 60(b) motion; 2) *en banc* consideration of his appeal therefrom; and 3) consolidation with the previously filed motion to withhold the mandate and to rehear or remand. In the meantime, on January 15, 2002, the Tennessee Supreme Court set a date of April 10, 2002, for execution of petitioner's sentence.

On January 18, 2002, a panel of the Sixth Circuit denied the application for a certificate of appealability. In that order, the court construed petitioner's Rule 60(b) motion as a second habeas corpus petition, subject to 28 U.S.C. § 2244(b). On February 11, 2002, the court denied all of petitioner's pending motions, including his application for leave to file a second habeas corpus petition and his motion for rehearing or remand of his original appeal. On March 18, 2002, petitioner filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (No. 01-9094), a Petition for an Original Writ of Habeas Corpus and Other Extraordinary Relief (No. 01-9095), and motions for a stay of execution in connection with those petitions in this Court.

On March 22, 2002, 12 years after issuance of the mandate from the direct appeal from his conviction and sentence and 19 days before his scheduled execution, Abdur'Rahman filed a motion requesting that the Tennessee Supreme Court recall its mandate in light of "new proof" of racial discrimination by the prosecution in the selection of his jury in his 1987 capital murder trial. In support of his motion, petitioner relied upon prosecution notes obtained after issuance of the mandate that he claimed demonstrated that the prosecutor's articulated non-racial reasons were a pretext for racial discrimination.

On April 5, 2002, the Tennessee Supreme Court issued an order denying petitioner's motion to recall the mandate, finding that the materials presented in support of petitioner's motion did not constitute post-judgment facts within the meaning of Tenn. R. App. P. 14(a) and, thus, were inappropriate for consideration by the Court. (Pet. App. A) The Court further concluded that, even if the materials were appropriate for consideration, they would not warrant the extraordinary remedy of a recall of the Court's mandate, since they do not conclusively establish that the racially neutral reasons offered by the prosecution were pretextual in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id*.

On April 8, 2002, this Court denied the petition for writ of habeas corpus in No. 01-9095, but stayed petitioner's April 10, 2002, execution date pending disposition of the petition for writ of certiorari in No. 01-9094.

ARGUMENT

THE DECISION BY THE TENNESSEE SUPREME COURT NOT TO RECALL ITS MANDATE IS NOT SUBJECT TO CERTIORARI REVIEW BECAUSE THE DECISION RESTS UPON INDEPENDENT STATE LAW GROUNDS.

Petitioner seeks this Court's review, as an exercise of its certiorari jurisdiction, of the Tennessee Supreme Court's April 5, 2002, order declining to recall the mandate from its April 12, 1990, decision on direct appeal from petitioner's conviction and sentence. Respondent submits, however, that this Court is without jurisdiction to review the state court's decision because the court's refusal to recall its mandate rested upon independent state procedural grounds.

It is essential to jurisdiction under 28 U.S.C. §1257 that a substantial federal question be both "drawn in question" and passed upon by the state court. If a state court judgment rests on a state ground, this Court has no jurisdiction to review the case. *Herb v. Pitcairn*, 324 U.S. 117, 125-26

(1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *see also* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, §3.21 at 140-42 (7th Ed. 1993).

As a general proposition, the "[i]ssuance of the mandate formally marks the end of appellate jurisdiction." *Johnson v. Bechtel Assocs. Prof'l Corp., et al.*, 801 F.2d 412, 415 (D.C. Cir. 1986). Nevertheless, an appellate court has the authority to vacate an otherwise final judgment and recall its mandate under appropriate circumstances. *See* Tenn. R. App. P. 42(d) ("The power to stay a mandate includes the power to recall a mandate."). *See also* 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3938 (2d Ed. 1996) (describing appellate court's inherent power of recall). But the power to recall a mandate is an extraordinary remedy and should be exercised sparingly, only upon a showing of good cause and to prevent injustice, and only when exceptional circumstances exist to justify such action.[2] In the federal context, this Court has recognized that courts of appeal "have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (*citing Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers)).

The Tennessee Supreme Court declined to exercise this extraordinary power, consistent with

[2]*See, e.g., Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (power to recall "is one of last resort, to be held in reserve against grave, unforeseen contingencies"); *United States v. Skandier*, 1997 WL 581662 (3rd Cir. 1997) (recall "is an extraordinary remedy to be used only" in unusual circumstances); *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997) (power to recall "is limited and should be exercised only in extraordinary circumstances"); *Ruiz v. Norris*, 104 F.3d 163, 164 (8th Cir. 1997) (power to recall is "rarely exercised" and is "reserved for extreme and necessitous cases"); *Bellsouth Corp. v. F.C.C.*, 96 F.3d 849, 851 (6th Cir. 1996) (party seeking relief must demonstrate good cause for that action through a showing of exceptional circumstances).

the sparing nature of its use.[3] The basis of the state court's decision was that the materials upon which petitioner relied in support of his motion were inappropriate for consideration by an appellate court under Tenn. R. App. P. 14(a), which requires that the facts occur after the judgment and involve matters that are unrelated to the merits, are readily ascertainable, and are not subject to dispute.[4] The Court further observed that, even if the materials are appropriate for consideration, the petitioner's contentions as to the significance of the alleged "new evidence" failed to furnish a basis for the extraordinary remedy of a recall of the mandate.

Because the state supreme court's order rests on state law grounds, this Court has no jurisdiction to review its decision. Quite simply, a state appellate court's refusal to exercise its discretion to recall a 12-year-old mandate furnishes no basis for review by this Court, particularly where that decision directly rests entirely upon state procedural grounds. *See* U.S. Sup.Ct. R. 10.

Even if this Court determines that the issue is properly subject to certiorari review, such review is unwarranted because the issue is without merit and is wholly unsupported by any evidence properly part of the record before the state court. On direct appeal from his conviction and sentence,

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[3]Indeed, Tennessee appellate courts have exercised the power to recall a mandate sparingly. *See, e.g., Brooks v. Carter,* 993 S.W.2d 603 (Tenn. 1999) (mandate recalled to permit filing of Rule 11 application where Court of Appeals directed issuance of mandate before 64-day period set forth in T.R.A.P. 42); *Jordan v. State*, No. 01C01-9711-CR-00528, 1999 WL 132894 (Tenn. Crim. App. Mar. 2, 1999) (mandate recalled less than two months after issuance to permit the filing of an application for permission to appeal under T.R.A.P. 11); *State v. Harding*, No. 01C01-9703-CC-00103, 1998 WL 218221 (Tenn. Crim. App. Nov. 2, 1998) (mandate recalled to permit the filing of a Rule 11 application where counsel's notice of intent to withdraw was sent to the wrong address); *Foster v. State*, No. 01C01-9508-CR-00249, 1996 WL 492160 (Tenn. Crim. App. Aug. 27, 1996) (mandate recalled in the interest of justice to permit filing of Rule 11 application).

[4]Tenn. R. App. P. 14(a) provides, in part, that "[t]he Supreme Court, Court of Appeals and Court of Criminal Appeals on its motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. . . ."

the Tennessee Supreme Court considered and rejected petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the prosecution exercised its peremptory challenges to exclude black persons from the jury. *State v. Jones*, 789 S.W.2d 545, 548-49 (Tenn. 1990). In its order refusing to recall the mandate from that decision, the Tennessee Supreme Court observed that the materials submitted in support of petitioner's motion actually supported the court's prior decision:

> Abdur'Rahman specifically contends that the notes indicate that the prosecutor struck two African-American jurors — Robert Thomas and Sharon Baker — for racially biased reasons. With regard to juror Thomas, he points to a "rating" system used by the prosecution that purportedly scored Thomas as "more acceptable than five white jurors and equally acceptable as five other white jurors" who were not removed. However, the handwritten notes on their face contain no indication of the criteria for the prosecution's "ratings" or the weight customarily given to the individual "ratings" in exercising peremptory challenges. Moreover, Abdur'Rahman's motion appears to ignore the primary reason for excusing Thomas, credited by both the trial court and this Court, which was that the juror was "a close friend of defense counsel from whom he had solicited money for the church he had once pastored." *Jones*, 789 S.W.2d at 549. That explanation is fully supported by the notes which plainly state: "Lionel [Barrett] & he have known each other for several years. When he had church going he came to Lionel for a donation. He worked downtown delivering office supplies — thinks of Lionel as a friend." (Emphasis in original) The notes also reflect numerous valid race-neutral reasons for the prosecutor's excusing Sharon Baker that were credited by both the trial court and this Court. These include Baker's demeanor and behavior during voir dire ("was sitting in the jury box reading a book during voir dire" and "she will not look at defendant") and her answers to questions (referred to a death sentence as a "killing"). *See Jones*, 789 S.W.2d at 549. In sum, Abdur'Rahman's contentions furnish no basis for the extraordinary remedy of recall of the mandate.

(Pet. App. A) (emphasis in original)

Respondent further notes that petitioner's repeated insistence in his statement of facts that "undisputed evidence" demonstrates the prosecutor's racial motivation in removing minority jurors is misleading at best. The "evidence" submitted in support of petitioner's motion to recall the mandate, which appears as Appendices C and D to the petition, is not part of the record before the state court in petitioner's direct appeal and, as the state supreme court determined, is inappropriate

for consideration at this point by a state appellate court under Tenn. R. App. P. 14. Therefore, it cannot form the basis for certiorari review by this Court.

Finally, the grant of certiorari in *Miller-El v. Cockrell*, 261 F.3d 445 (5th Cir. 2001), *cert. granted*, 534 U.S. __ (2002) (No. 01-7662), has no bearing on the case, since the Tennessee Supreme Court never reached the *Batson* question.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid, on this the _____ day of April, 2002, to:

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