No. 01-9095

IN THE
SUPREME COURT OF THE UNITED STATES

In re ABU-ALI ABDUR'RAHMAN,
Petitioner.

ON PETITION FOR WRIT OF HABEAS CORPUS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether claims for habeas corpus relief that are subject to the restrictions against successive petitions in 28 U.S.C. § 2244(b)(1) because they were presented in a first habeas corpus petition and dismissed as procedurally defaulted should nevertheless be entertained by this Court in a petition for an original writ of habeas corpus.

II.

Whether the retrospective applicability of a state procedural rule, purporting to establish the requirements for state exhaustion of federal habeas corpus claims, presents exceptional circumstances sufficient to warrant an exercise of this Court's power to grant extraordinary habeas corpus relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

MISCELLANEOUS

OPINIONS BELOW

On September 13, 2000, the United States Court of Appeals for the Sixth Circuit reversed the district court's grant of petitioner's habeas corpus petition on one claim and otherwise affirmed the district court's judgment denying relief in all other respects raised. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 122 S.Ct. 386 (2001). On February 11, 2002, the Sixth Circuit denied, *inter alia*, petitioner's application for leave to file a second habeas corpus petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain a petition for an original writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254(a).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(b) provides:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2244(b) provides:

(b)(1) A claim presented in a second or successive habeas corpus application

under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

In 1987, petitioner, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. After the sentencing phase of petitioner's trial, 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, or kidnapping.[1] The Tennessee Supreme Court affirmed the judgment, *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, petitioner sought post-conviction relief in state court, which was denied by the trial 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 (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 petitioner's death sentence on petitioner's claim of 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). The court of appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects. *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

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

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 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.

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.

ARGUMENT

I. THE PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS FAILS TO STATE CLAIMS FOR RELIEF.

Petitioner has filed a petition with this Court seeking the issuance of an original writ of habeas corpus. Such a petition must comply with the requirements of 28 U.S.C. §§ 2241 and 2242. U.S. Sup. Ct. R. 20.4(a). *See Felker v. Turpin*, 518 U.S. 651, 664 (1996). Under 28 U.S.C. § 2241(c)(3), the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws of the United States. While the petition alludes generally to several constitutional claims on which petitioner seeks relief from this Court, his petition is devoid of any particular recitation of the nature of such claims. By failing to set forth his grounds for relief, petitioner has failed to show the exceptional circumstances necessary to justify the exercise of this Court's discretionary powers. *See* U.S. Sup. Ct. R. 20.4(a). Insofar as petitioner's general references in his petition are to the several procedurally defaulted claims that he filed as part of his first habeas corpus petition, such claims are unexceptional. They "do not materially differ from numerous other claims made by successive habeas petitioners." *Felker*, 518 U.S. at 665.

II. PETITIONER'S CLAIMS ARE BARRED BY THE PROVISIONS OF 28 U.S.C. § 2244(B).

While not identifying specific claims, petitioner concedes that "the claims in question" are the same claims he presented in the habeas corpus petition he filed in the

district court in 1996. He further concedes that the claims for which he seeks relief from this Court are the same claims that were the subject of the Sixth Circuit's denial of petitioner's application to file a second habeas petition.

Under 28 U.S.C. § 2244(b)(1), claims presented in a second or successive habeas corpus application that were presented in a prior application shall be dismissed. While this Court may not be bound by these statutory restrictions, they "certainly inform" this Court's consideration of original habeas petitions like this one. *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). The claims petitioner purports to present in this successive petition, because they are the same claims he presented in his first habeas application, are clearly barred by the statute's terms. Aside from the fact that petitioner is under a capital sentence and is approaching an execution date, he presents no exceptional circumstances why this Court should bypass the clear restrictions of the statute as it pertains to these claims.

III. PETITIONER'S CONTENTION THAT HE HAS PROPERLY EXHAUSTED HIS CLAIMS IN STATE COURT IS NOT AN EXCEPTIONAL CIRCUMSTANCE; IT IS ALSO WITHOUT MERIT.

Where, as here, the relief sought from this Court is from the judgment of a state court, "the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)." U.S. Sup. Ct. R. 20.4(a). *Compare* 28 U.S.C. § 2254(b)(1)(A). Petitioner asserts that the claims for which he seeks relief from this Court were

presented to the Tennessee intermediate appellate court but were not presented to the Tennessee Supreme Court in a petition for discretionary review. *See* Tenn. R. App. P. 11. As he did in the Sixth Circuit, petitioner now seeks to rely on the June 28, 2001, promulgation of Tenn. Sup. Ct. R. 39 as support for his contention that he has exhausted state court remedies. Indeed, this exhaustion argument is the predominant, if not sole, basis on which petitioner asks this Court to grant extraordinary habeas relief. But such relief is rarely granted, U.S. Sup. Ct. R. 20.4(a), and respondent submits that petitioner's invocation of a new state procedural rule, issued eleven years after his judgment of conviction became final, five years after he filed his habeas corpus petition in the district court and three years after the district court's judgment thereon, is not the exceptional circumstance for which this Court reserves its power to issue an original writ of habeas corpus.

In any event, petitioner's exhaustion argument is without merit. As the district court observed when it first passed on petitioner's claims,[2] state court exhaustion of constitutional claims includes fairly presenting those claims for consideration by the state's highest court, even where a grant of such court's review is discretionary. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir.1993). Despite the availability of such review in the Tennessee Supreme Court, petitioner failed to seek that court's review of the claims he

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[2] *See Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1080 (M.D.Tenn. 1998).

now presents to this Court.[3] On June 28, 2001, though, the Tennessee Supreme Court announced that prisoners need not seek discretionary review in that court in order to exhaust state court remedies for purposes of federal habeas corpus review. Tenn. Sup. Ct. R. 39. This rule, however, cannot be applied to petitioner's case for several reasons. *See generally Wenger v. Frank*, 266 F.3d 218 (3rd Cir. 2001), *cert. denied*, No. 01-7852 (Mar. 25, 2002).

The order adding Tennessee Supreme Rule 39 reads as follows:

> In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.
>
> > In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of

[3] Petitioner *did* seek such review as to other claims.

> Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tennessee Decisions (45-46 S.W.3d). XL-XLI (West 2001)

"Statutes, regulations, and rules of the court must be read in a 'straightforward' and 'commonsense' manner." *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997); *compare Duncan v. Walker*, 533 U.S. 167, 172, 174 (2001) (construction of statute begins with language of statute with duty to give effect, if possible, to every clause and word); *Seals v. State*, 23 S.W.3d 272, 276 (Tenn. 2000) (basic principle of statutory construction is to ascertain and give effect to legislative intent without unduly restricting or expanding intended scope).

A careful reading of Rule 39 shows that the operative word is "shall," a word clearly and unambiguously signaling *future* conduct, *e.g.*, "a litigant *shall* not be required to petition for a rehearing or to file an application for permission to appeal . . .," and "the litigant *shall* be deemed to have exhausted all available state remedies . . ." (emphasis added). The only significance of the July 1, 1967 date mentioned is that this is the date that the Court of Criminal Appeals was created.

Similarly, Rule 39 was not intended to have retrospective application so as to absolve a failure to raise claims in a previously-filed Rule 11 application to the

Tennessee Supreme Court. First, if the Tennessee Supreme Court intended for the rule to have retrospective application, it could have clearly and unambiguously said so. It did not. The purpose of Rule 39 is to discourage petitions for discretionary review under Tenn. R. App. P. 11. "Permission to appeal will be granted. . . only where special and important reasons justify the exercise of that discretionary review power." Tenn. S. Ct. R. 39. As such, Rule 39 is not designed to benefit state prisoners seeking to litigate claims that were previously procedurally defaulted in federal court. Rather, the obvious purpose is an attempt by the Tennessee Supreme Court to control its docket. Such a purpose is not served by retrospective application of Rule 39. Any docket relief for the Tennessee Supreme Court could be prospective only.

Second, under Tennessee law, a statute does not operate retrospectively unless it is so provided in the statute, and "statutes dealing with matters of procedure or remedy are generally held to be applicable to proceedings after enactment even though the facts occurred prior to enactment." *Mangrum v. Wal-Mart Stores, Inc.*, 950 S.W.2d 33, 37 (Tenn. App. 1997). Where there is a new law changing a rule of practice, the new rule is applicable to all cases then pending in the state system. *Frame v. Marlin Firearms Company, Inc.*, 514 S.W.2d 728, 730 (Tenn. 1974). Petitioner's case has been final so far as the state system is concerned since at least 1996.

Both *Randolph v. Kemna*, 276 F.3d 401 (8th Cir. 2002), and *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), the cases on which petitioner relies, are distinguishable.

In *Randolph*, the court rejected the state's assertion that an October 23, 2001, order of the Missouri Supreme Court governing discretionary transfers to that court could not be applied to the petitioner's case. The court focused on the fact that the order itself recited that it was issued "[i]n order to state the existing law in Missouri . . ." *Id.*, 276 F.3d at 404. In contrast, Tennessee's rule states only that the new rule was adopted "[i]n order to clarify that denial of relief by the Court of Criminal Appeals *shall* constitute exhaustion." (emphasis added). It does not purport to state that this had been the existing law in Tennessee. In *Swoopes*, while the Ninth Circuit concluded that the Arizona Supreme Court had announced that review need not be sought in that court in order to exhaust state remedies, the state court had done so some fifteen years prior thereto — in 1984 — and then again, in more precise fashion, in 1989. *Swoopes*, 196 F.3d at 1010.

But even if the Tennessee Supreme Court meant for Tenn. S. Ct. R. 39 to apply retrospectively, that intention is not binding on the federal courts. It is the federal courts, not the state courts, that must determine whether "available" remedies have been "exhausted" in the state courts before the federal courts can hear a claim. As such, the Supremacy Clause prevents Rule 39 from being directive to the federal courts. *See Mattis v. Vaughn*, 128 F. Supp.2d 249, 259 (E.D. Pa. 2001).[4]

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[4] Furthermore, Tenn. S. Ct. R. 39 raises a serious separation of powers question under the Tennessee Constitution. All legislative authority is vested in the General Assembly. Tenn. Const. art. II, § 3. The courts are expressly forbidden by the constitution from exercising any of the powers belonging to the legislative department. Tenn. Const. art. II, § 2; *Ballentine v. Mayor of Pulaski*, 83

To interpret Rule 39 to require retrospective application would effectively say that, even though Sixth Circuit and Supreme Court precedent make seeking discretionary review mandatory for exhaustion in the absence of such an order or rule, *see O'Sullivan v. Boerckel*, 526 U.S. at 842; *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990), this Court is now required to treat such review as not having been available in the past. This too, would be a Supremacy Clause violation. *See Mattis v. Vaughn*, 128 F. Supp.2d at 261. In other words, retrospective application of Rule 39 would amount to an attempt by the Tennessee Supreme Court to direct the federal courts to treat the Tennessee system as *never* having required Tenn. R. App. P. 11 applications to the Tennessee Supreme Court for discretionary review. *See Wenger*, 266 F.3d 218, 226 ("[w]hile a state may, of course, prospectively change the remedies that are available under state law, if a remedy was available or unavailable at some time in the past, it is difficult to see how that fact can be retroactively altered").

Respondent submits that the only constitutional interpretation of Tenn. S. Ct. R. 39 is one reading the Rule as a statement that, effective immediately, the ordinary appeals process in Tennessee no longer necessarily includes Tenn. R. App. P. 11 applications. Accordingly, petitioner's failure to raise his claims in the Rule 11 application he filed in state court results in his having failed to properly exhaust those claims. Such claims, therefore, may not be reviewed by a federal court, including this Court, as the provisions of this Court's own rules reflect. *See* U.S. Sup. Ct. R. 20.4(a).

Tenn. 633 (1885).

CONCLUSION

The petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded, by facsimile and first-class mail, postage prepaid, to Thomas C. Goldstein, Goldstein & Howe, P.C., 4607 Ashbury Pl., NW, Washington, D.C., 20016; Bradley A. MacLean, Stites & Harbison PLLC, SunTrust Center, Suite 1800, 424 Church Street, Nashville, Tennessee, 37219-2376; and to William P. Redick, Jr., 810 Broadway, Suite 201, Nashville, Tennessee, 37203, on this the 28th day of March, 2002.

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