IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**DAVIDSON COUNTY CRIMINAL**
v.	)	
	)	**No. M1988-00026-SC-DPE-PD**
ABU-ALI ABDUR'RAHMAN,	)	
	)	
Appellant.	)	

RESPONSE TO "MOTION TO RECALL THE MANDATE AND TO CONSIDER POST-JUDGMENT FACTS ESTABLISHING RACIAL DISCRIMINATION IN THE SELECTION OF THE PETIT JURY"

Abdur'Rahman has filed a motion requesting that this Court recall the mandate issued 12 years ago following the direct appeal from his conviction and sentence in light of "new proof" of racial discrimination by the prosecution in the selection of the jury in his 1987 capital murder trial. Specifically, he points to prosecution notes that he obtained after issuance of the mandate and that he contends demonstrate that the prosecutor's articulated non-racial reasons for exercising his peremptory challenges to remove certain black jurors were a pretext for racial discrimination. Because the "new evidence" upon which Abdur'Rahman relies is inappropriate for consideration by this Court, and extraordinary circumstances warranting a recall are not present in this case, the Court should deny Abdur'Rahman's motion.

STATEMENT OF THE CASE

In 1987, the appellant, 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 Jones 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] This Court affirmed the judgment, and the United States Supreme 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, appellant 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). This Court denied review on August 28, 1995, and the Supreme Court subsequently denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122, 116 S.Ct. 933 (1996).

Appellant 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 Abdur'Rahman's death sentence but

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

affirmed the judgment in all other respects raised. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000). On October 9, 2001, the United States Supreme Court denied certiorari review of the Sixth Circuit's judgment. *Abdur'Rahman v. Bell*, 122 S.Ct. 386 (2001).

ARGUMENT

A. Power to Recall the Mandate

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] Moreover, to warrant a recall, the circumstances should be "sufficient to override the strong public policy that there should be an end to a case in litigation, that when the judgment therein becomes final the rights or liabilities of the parties therein are finally determined, and that the parties thereafter are entitled to rely upon such adjudication as a final

[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)

settlement of their controversy." *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958).

> There is a strong policy of repose which requires that mandates and the opinions which they effectuate carry a heavy seal of finality. Litigation must end some place and this is the logical place to draw the line. . . . Consequently, the power to recall mandates should be exercised sparingly and only where special reasons or exceptional circumstances require that action. . . . It is not to be used freely for the purpose of revising the substance of opinions even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final.

Yocom v. Bratcher, 578 S.W.2d 44, 46 (Ky. 1979) (noting the most common reasons for recall are to correct clerical mistakes or to make the mandate consistent with the opinion).

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., March 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).

Moreover, this Court has never permitted, nor does Tenn. R. App. P. 42(d) contemplate, the use of the extraordinary remedy of a recall as a vehicle to re-litigate issues based on purported "new evidence," as Abdur'Rahman seeks to do in this case. Aside from swallowing post-conviction procedures, such a proposition would eviscerate the strong policy in favor of the finality of judgments and wholly defeat the legitimate expectations of litigants who have relied upon this

Court's final decision for over a decade — indeed, no judgment could ever be secure since there would always exist the potential for attack based on purported "new evidence."

B. Abdur'Rahman has failed to demonstrate extraordinary circumstances warranting a recall of the mandate.

Abdur'Rahman has not shown that his are "extraordinary circumstances" warranting a recall. To the contrary, the basis of his motion is quite ordinary — he is aggrieved by the prior adverse decision of this Court on his *Batson* claim and seeks to re-litigate the merits. In support of his request, Abdur'Rahman has attached papers, which he claims are handwritten notes made by the prosecutor at the time of his criminal trial (Motion, Ex. 1), as well as an affidavit of an individual named Robert Thomas, who was purportedly removed from the jury by the prosecutor through the exercise of a peremptory challenge. (Motion, Ex. 2) None of these documents is contained in the record before this Court, nor have they been identified and/or authenticated before any trier of fact in a judicial proceeding. *See* Tenn. R. Evid. 901 ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.").[3]

Moreover, the "new evidence" presented does not constitute post-judgment facts within the meaning of Tenn. R. App. P. 14 and is, therefore, not properly before the Court for consideration.

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[3]Indeed, standing alone, the documents attached to Abdur'Rahman's motion are entirely meaningless and cannot form the basis for relief. Exhibit 1 consists of 14 pages of unidentified handwritten notes, with no indication of when they were written or by whom. Likewise, the affidavit of Robert Thomas, Exhibit 2, makes no specific reference to the appellant or his criminal trial.

Tenn. R. App. P. 14(a) provides that this Court "may consider facts concerning the action that *occurred after judgment*." (emphasis added) The rule further provides:

> While neither controlling nor fully measuring the court's discretion, consideration will generally extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters.

Tenn. R. App. P. 14(b).

Additional guidance as to the scope of Rule 14 is found in the Advisory Commission Comment to the rule:

> Although the appellate court should generally consider only those facts established at trial, it occasionally is necessary for the appellate court to be advised of matters arising after judgment. These facts, *unrelated to the merits and not genuinely disputed*, are necessary to keep the record up to date. This rule gives the appellate court discretion to consider such facts. *This rule is not intended to permit a retrial in the appellate court.* (Emphasis added).

In *Duncan v. Duncan*, 672 S.W.2d 765 (Tenn. 1984), this Court discussed appropriate guidelines for the scope of Rule 14, clarifying that consideration of post-judgment facts is addressed not to the *propriety* of the action of the trial court, but to the *nature* of the judgment, such as mootness, death or other circumstances unrelated to the merits of the underlying claims. In limiting the scope of post-judgment facts, the Court stated that appellate courts may not consider facts that "would be mere cumulative evidence, nor evidence which it would be possible to controvert or dispute in the trial court, nor concerning the effect of which there might be differences of opinion, or from which different conclusions could possibly be drawn." *Duncan*, 672 S.W.2d at 767 (adopting language quoted from *Crawford v. Crawford*, 163 Kan. 126, 181 P.2d 526, 531-32 (1947)).

Abdur'Rahman seeks to do precisely what was prohibited in *Duncan,* that is, to "supplement" the record in this matter with additional evidence directly related to a contested issue that was previously addressed and rejected on direct appeal before this Court. *Compare State v. Branam*, 855 S.W.2d 563, 572 (Tenn. 1993) (case remanded to trial court on direct appeal to consider "post-judgment facts" suggesting a *Brady* violation since "the matter was not contested and could not have been contested at trial, because evidence was unconstitutionally withheld from the defense").[4] Indeed, the very nature of the inquiry Abdur'Rahman proposes, *i.e.*, re-assessment of the credibility of the prosecutor with regard to the reasons for exercising peremptory challenges, is inappropriate in an appellate context. To consider the facts under these circumstances would require this Court to exercise original jurisdiction, a wholly impermissible result. *Fine v. Lawless*, 140 Tenn. 43, 205 S.W.124 (1918).[5]

Finally, even assuming the evidence presented could be deemed "post-judgment facts" under T.R.A.P. 14(a), this Court has never held that the existence of such evidence would justify the extraordinary remedy of a recall of the mandate, particularly where such relief is requested over a decade after issuance of the mandate, and where collateral challenges have been rejected by both the state and federal courts. *State v. Williams*, 52 S.W.3d 109 (Tenn. Crim. App. 2001), the sole case

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[4]The State would note that the Court's decision in *Branam* rested, in part, on *Pruett v. State*, 501 S.W.2d 807 (Tenn. 1973), a case decided prior to the adoption of the Tennessee Rules of Appellate Procedure based upon a statute that this Court construed as permitting an appellate court to remand to the trial court for the purpose of developing evidence of new facts not presented in the case. By contrast, Rule 14 does not contemplate additional fact-finding and, in fact, emphasizes the requirement that that facts at issue must be "capable of ready determination" and "not genuinely disputed."

[5]Moreover, Abdur'Rahman has failed to allege circumstances that would permit supplementation of the record under Tenn. R. App. P. 24(e), because the items were not introduced at trial, nor properly includable in the record on appeal.

on which Abdur'Rahman relies for the recall proposition, did not involve a recall of the mandate. Rather, the Court of Criminal Appeals in that case reviewed the propriety of a trial court's imposition of a sentence of split confinement following a limited remand by that Court for the purpose of placing the defendant on full probation. Although *dicta* in that decision suggested that the defendant's involvement in a post-judgment automobile accident while under the influence of an intoxicant might have been appropriately considered for sentencing purposes had the matter been raised in a motion under Tenn. R. App. P. 14(a), *Williams*, 52 S.W.3d at 121-22, no such motion was ever filed, nor was an appeal to this Court taken from the intermediate appellate court's decision.

In sum, the "evidence" presented in this case is inappropriate for consideration by this Court and, in any event, fails to establish extraordinary circumstances warranting a recall of the mandate. Abdur'Rahman's motion should be denied.

C. Abdur'Rahman has not been deprived of a reasonable opportunity to present his Batson *claim.*

Citing this Court's decisions in *Burford v. State,* 845 S.W.2d 204 (Tenn. 1992), and *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001), Abdur'Rahman claims that he was denied a fair consideration of his *Batson* claim on direct appeal, and due process requires that this Court rehear that claim in light of "new evidence."

In *Burford v. State*, 845 S.W.2d 204, 208-09 (Tenn. 1992), this Court created a due process exception to the post-conviction statute of limitations, finding it inapplicable where a *ground for relief* does not arise or is not created until such time that application of the time bar would deprive a petitioner of a reasonable opportunity to have the claim adjudicated. The Court subsequently

established a framework for evaluating such "later-arising" claims in *Sands v. State*, 903 S.W.2d 297 (Tenn. 1995):

> In applying the *Burford* rule to specific factual situations, courts should utilize a three-step process: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. *In making this final determination, courts should carefully weigh the petitioner's liberty interest in "collaterally attacking constitutional violations occurring during the conviction process," . . . against the State's interest in preventing the litigation of "stale and fraudulent claims."*

Sands, 903 S.W.2d at 301 (citation omitted) (emphasis added). That analysis was extended to the context of *error coram nobis* proceedings in *Workman v. State*, 41 S.W.3d 1000 (Tenn. 2001), where a majority of the Court determined that the evidence presented in that case raised questions of "actual innocence" of a capital offense. *Workman*, 41 S.W.3d at 103-04.

Abdur'Rahman's reliance on *Burford* and its progeny is misplaced for several reasons. First, unlike *Burford* and *Workman*, Abdur'Rahman is not contesting the application of a time bar to a legitimate collateral action challenging a final judgment — he is asking this Court simply to set aside a 12-year-old judgment based on the mere suggestion of new evidence, wholly apart from any evidentiary proceeding at which that "evidence" is authenticated through the sworn testimony of witnesses and evaluated by a trier of fact. Aside from the complete absence of any authority supporting such an extreme remedy, this Court should reject the suggestion as wholly inconsistent with the strong public policy in favor of the finality of judgments. Moreover, *Burford* and *Sands* require only that a petitioner be afforded a reasonable opportunity to raise his claim. Abdur'Rahman does not and cannot claim that his *Batson* claim has never been adjudicated. Indeed, this Court

considered and rejected it on direct appeal from his conviction and sentence, *State v. Jones*, 789 S.W.2d at 548-49, and appellant does not contend that he was deprived of an opportunity to present his new "evidence" in federal proceedings.[6]

Curiously, Abdur'Rahman does not state when this "new evidence" became available to him except to say that it was after the mandate issued from this Court on direct appeal following denial of certiorari by the United State Supreme Court. But the direct appeal was concluded and certiorari denied 12 years ago. If this "new evidence" has been available to him for years, and Abdur'Rahman is only now presenting it 19 days before his scheduled execution, he hardly can argue that extraordinary relief is warranted.[7] *See In re Byrd*, 269 F.3d 561, 572 (6th Cir. 2001) (federal habeas petitioner not entitled to second or successive petition to raise claim of perjured testimony, when "[h]e sat on this evidence, like a chicken waiting for an egg to hatch, for twelve years, despite repeated contact with both state and federal courts.").

D. Even if Abdur'Rahman's "new evidence" was properly before the Court, it does not establish a Batson *violation.*

Finally, the "new evidence" presented, even if appropriate for consideration by this Court, in no way undermines this Court's decision on Abdur'Rahman's *Batson* claim on direct appeal. In

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[6]In fact, during federal habeas proceedings in the district court, Abdur'Rahman not only had access to the District Attorney's file (and presumably the very evidence upon which he relies in his present motion) under the Tennessee Public Records Act, but was permitted to depose Assistant District Attorney General John Zimmermann as well. And just as this Court had previously done on direct appeal, the federal district court rejected Abdur'Rahman's *Batson* claim on the merits. Abdur'Rahman later abandoned the claim by failing to pursue it on appeal to the Sixth Circuit.

[7]It is clear that the "evidence" was available to Abdur'Rahman as early as January of 1992, following the decision in *Capital Case Resource Center v. Woodall*, No. 01C01-9104-CH-00150 (Tenn. Ct. App. Jan. 12, 1992) (holding that files maintained by the District Attorney General could be obtained following direct appeal under the Tennessee Public Records Act).

Batson, the United States Supreme Court held that purposeful racial discrimination in the selection of a jury violates a defendant's constitutional right to equal protection and, further, outlined a three-step analysis to determine whether discrimination has occurred in the exercise of peremptory challenges. *Batson v. Kentucky*, *supra*; *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). First, the opponent of the peremptory challenge must make out a *prima facie* case of racial discrimination. Second, the proponent of the strike must articulate a race-neutral explanation for the action. Third, the trial court weighs the evidence presented by both sides to determine whether the opponent has established purposeful discrimination based on the totality of the circumstances. *Batson*, 476 U.S. at 96-98; *Purkett*, 514 U.S. at 767; *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 902-904 (Tenn. 1996); *State v. Ellison*, 841 S.W.2d 824, 826 (Tenn. 1992).

A trial judge is well-situated to make these fact-based determinations. *Woodson v. Porter Brown Limestone Company*, 916 S.W.2d at 904. Findings in this regard are entitled to "appropriate deference by a reviewing court," *State v. Smith*, 893 S.W.2d 908, 914 (Tenn. 1994), and with the presumption of correctness that attaches on appeal, are not to be set aside unless clearly erroneous. *Woodson v. Porter Brown Limestone Company,* 916 S.W.2d at 905 n.7, 906.

Abdur'Rahman contends that his new "evidence" reveals that the prosecutor struck two black jurors — Robert Thomas and Sharon Baker — for racially biased reasons.[8] With regard to juror Thomas, he points to a "rating" system used by the prosecution that purportedly scored Thomas as "more acceptable that five white jurors and equally acceptable as five other white jurors" who were

[8]Abdur'Rahman does not challenge the prosecution's striking a third black juror, William Green, a claim that was also considered and rejected by this Court on direct appeal. *Jones*, 789 S.W.2d at 548.

not struck. (Motion, pp. 4-6) But Abdur'Rahman's interpretation of the prosecution "rating" system is wholly unsupported by any proof in the record, and the handwritten notes on their face contain no indication of the criteria for such "ratings" or the weight customarily given to the individual "scores" in the final analysis. Moreover, Abdur'Rahman's argument ignores 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 borne out by the new "evidence" presented, which plainly states: "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." (Motion, Ex. 1, p. 7) (emphasis in original)

Abdur'Rahman's argument with regard to juror Sharon Baker is little more than re-argument of matters previously before the trial court, *i.e.*, the juror's demeanor and behavior during voir dire ("was sitting in the jury box reading a book during voir dire" (Motion, Ex. 1, p. 3)) as well as her responses to questions. And again, his emphasis on a single aspect of the prosecutor's reasons for the strike, that she gave "short cryptic answers," ignores numerous other valid race-neutral reasons for the strike that were credited by both the trial court and this Court and are supported by the "new evidence" presented, specifically that she avoided eye contact ("she will not look at defendant"), read a book during voir dire (see above), indicated that she would only vote for the death penalty if the defendant would not serve a complete life term ("knows that person will not serve holdover term if he gets life") (emphasis in original), and referred to a death sentence as a "killing" ("now realizes that has power in her hands to 'kill'") (emphasis in original). *Jones*, 789 S.W.2d at 549. *See also* Motion, Ex. 1, p. 3.

Abdur'Rahman's contentions furnish no basis for the extraordinary remedy of a recall at this stage of the proceedings, and his motion should be denied.

CONCLUSION

For these reasons, this Court should deny Abdur'Rahman's motion.

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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