IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN (formerly known as James Lee Jones, Jr.) v. STATE OF TENNESSEE

No. M1988-00026-SC-DPE-PD

DISSENTING ORDER

Though recall of a mandate is an extraordinary remedy, the totality of the circumstances presented here convince me that such a remedy is warranted. Thus, I cannot join the majority's decision to deny relief on Abdur'Rahman's motions.[1] Moreover, even were I to concede that this motion affords little ground for the relief sought, I would, nevertheless, dissent because I do not agree that this Court should have set an execution date for Abdur'Rahman in the first instance.

Because of the need for finality in the justice system, a mandate may be recalled only in extraordinary circumstances. See generally Ruiz v. Norris, 104 F.3d 163, 164 (8th Cir. 1997) (noting that the power to recall a mandate is "reserved for extreme and necessitous cases"). As the State admits, however, this Court has an inherent authority to vacate an otherwise final judgment where circumstances require. Cf. 16 C. Wright et al., Federal Practice and Procedure § 3938 (2d ed. 1996) (discussing inherent power of recall). This Court has consistently held in other contexts that where a defendant raises serious claims but would be unfairly deprived of an opportunity to be heard because of procedural technicalities, due process requires us to weigh the defendant's interest in attacking constitutional violations against the State's interest in enforcing procedural barriers. See, e.g., Burford v. State, 845 S.W.2d 204, 208-09 (Tenn. 1992) (due process exception to the post-conviction statute of limitations); Workman v. State, 41 S.W.3d 1000 (Tenn. 2001) (due process exception to statutory limitations on the writ of error coram nobis where claims of "actual innocence" had been asserted).

Abdur'Rahman contends that the prosecution's notes, not available for his review until after his direct appeal, reveal that the State used peremptory challenges to remove Afro-American prospective jurors solely for race-based reasons. Assuming, *arguendo*, that this is provable, it posits an issue of utmost seriousness, for such racial discrimination is prohibited by the Constitution and has been condemned by the United States Supreme Court. See Batson v. Kentucky, 476 U.S. 79 (1986). Moreover, as is articulately noted in the thoughtful and well-drafted *amicus curiae* brief of the NAACP Legal Defense Fund, Inc., claims of invidious racial discrimination in our courts destroy public faith in the justice system. Thus, if Abdur'Rahman's claims are sustained, I would hold that

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[1] Motion to Recall Mandate and Motion for Stay of Execution.

their undeniably profound seriousness warrants recall of the mandate, and due process concerns outweigh any interest the State might have in enforcing procedural barriers to a remedy.[2]

With regard to juror Thomas, the allegations contained in the motion are not entirely persuasive.[3] But with regard to juror Baker, the justifications given by the State for dismissal are quite problematic. For example, one justification offered by the State is that Baker gave "short, cryptic" answers to questions on voir dire. The nature of her answers was understandable, however, in light of the lengthy, complex leading questions, some stretching for a paragraph or more in the record, asked by the State. It is significant that the otherwise detailed notes from the prosecution contain no comment on Baker's responses. Likewise, the State's notes are critical of Baker for "not look[ing] at the defendant," yet at trial the State faulted Thomas for looking at defense counsel and smiling. There appears to be some inconsistency in the expectations of what these jurors "should have done." Overall, when the notes regarding Baker are compared to notes regarding jurors who were not struck, questions arise concerning whether the reasons given by the State for striking her were honest, or whether they were merely pretextual.

Were my concerns about the State's treatment of Baker considered in isolation, I might join my colleagues in holding that Abdur'Rahman's claims are not sufficiently clear and compelling to mandate the extraordinary remedy he has requested. In the context of what has propelled this case to its present posture, however, the allegations of Batson violations take on a new and more urgent significance. Specifically, I continue to hold deep concerns, as expressed in prior dissenting orders, regarding whether the majority is moving toward a just result. Most notably, none of the judges who have reviewed this case, even those on the Sixth Circuit Court of Appeals, has seriously disputed that Abdur'Rahman's trial counsel was woefully incompetent and demonstrably ineffective in representing Abdur'Rahman.[4] It seems strikingly unfair, in my view, that we should allow such an extreme and final punishment to be imposed upon a man whose only chance to defend himself before a jury was snatched away by ineffective counsel. Additionally, I yet adhere to my belief that Abdur'Rahman has been placed in an untenable position with regard to possible claims of incompetency that may arise as his execution date approaches. The majority's failure to guarantee him access to a mental health professional could result in the unconstitutional execution of a man whose mental condition prevents him from understanding the nature of, or reasons for, his

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[2]Despite the majority's discussion of recall of the mandate, I would respectfully submit that its order must actually be read solely as a judgment that it does not find Abdur'Rahman's Batson claim convincing. Surely, if the prosecution's notes had explicitly stated that the State intended to remove jurors solely because of their race, I cannot imagine that the majority would allow such an injustice to stand by holding that recall of the mandate is not an available remedy. Accordingly, I do not accord great weight to the majority's discussion of delay in this case or to the discussion whether the prosecution's notes qualify as "post-judgment facts" as contemplated by Tenn. R. App. P. 14.

[3]Thomas testified that he and defense counsel Lionel Barrett were close friends, and regardless of his race, it would be anticipated that the State would strike him from the jury because of that friendship.

[4]The Sixth Circuit Court of Appeals held, in a 2-1 decision, that the death penalty should be reinstated not because Abdur'Rahman's trial counsel was effective, but because he was not prejudiced by the incompetence of his attorneys. See generally Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000).

punishment. Finally, I continue to be troubled by allegations of prosecutorial misconduct that have surfaced to plague this case. Although these allegations have not been thus far overwhelming, their existence infuses additional gravity into the Batson claims that now have arisen. Taking all of these considerations together, I find the balance weighs in favor of granting relief.

Finally, even if I did not hold the above-expressed views, I would dissent because I disagree with the setting of an execution date, as the majority has done. In my prior dissenting order in this case, I asserted that extenuating circumstances present in this case should compel this Court to certify to the Governor, pursuant to Tenn. Code Ann. § 40-27-106 (1997), that Abdur'Rahman's death sentence should be commuted to life in prison. Cf. also State v. Workman, 22 S.W.3d 807, 816-17 (Tenn. 2000) (Birch, J., dissenting from the majority decision to set an execution date, on the ground that a certificate of commutation should have been issued by the Court). Based upon the concerns I have expressed, I cannot agree with the Court's decision to advance this cause toward an execution which I deem improper. In other words, because I did not agree that an execution date should have been set in the first place, I cannot agree to the carrying out of that execution.

In conclusion, I am compelled to comment, on the record, upon what I perceive to be the most egregious of the several problems in this case. As this Court has considered the issues before us, it has become increasingly clear to me that our appellate review failed at the post-conviction stage. The Tennessee Court of Criminal Appeals's review of Abdur'Rahman's ineffective assistance of counsel claim can only be described as cursory. The case was reviewed by only two judges rather than the usual three, and one of those two judges was a Special Judge whose experience was predominantly civil. The opinion rendered by that court was barely three pages long, with merely two paragraphs devoted to discussion of the ineffectiveness of trial counsel. See Jones v. State, No. 01 C01-9402-CR-00079, available at 1995 WL 75427 (Tenn. Crim. App. 1995) (holding that trial counsel was ineffective, but deciding that Abdur'Rahman was not prejudiced as a result). Unfortunately, this Court refused to grant permission to appeal that decision. And ironically, when the Sixth Circuit Court of Appeals overturned the United States District Court's lengthy, detailed holding that Abdur'Rahman was "seriously prejudiced" by his trial counsel's "utterly ineffective"performance,[5] its fundamental rationale was that the findings of the state post-conviction court, as upheld by the Court of Criminal Appeals, must be "presumed correct." See Abdur'Rahman v. Bell, 226 F.3d 696, 700-01 (6th Cir. 2000). Hence, the cursory review described above essentially barred Abdur'Rahman from receiving appropriate consideration at the federal level. Such a result is, in my view, unacceptable. Lamentably, there are some who would opine, notwithstanding the glaring insufficiencies present in this case, that the ineffective assistance of counsel issue has been litigated, is final as a matter of law regardless of the result, and that our justice system's shortcomings, however clear in hindsight, are now beyond correction. In my view, however, it is plainly unconscionable in a death penalty case to ponder our errors, declare that our hands are tied, and yet send Abdur'Rahman to be executed. Our duty clearly calls for us to relentlessly pursue a just result.

[5] Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1077 (M.D. Tenn. 1998).

For the foregoing reasons, I would recall the mandate in this case and grant the stay of execution as requested by Abdur'Rahman. Accordingly, I respectfully dissent.

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ADOLPHO A. BIRCH, JR., JUSTICE