IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE:	)	ROBERTSON COUNTY
EDMUND ZAGORSKI	)	No. M1996-00110-SC-DPE-DD
	)	

REPLY TO "RESPONSE TO MOTION TO SET EXECUTION DATE" AND "REQUEST FOR ORAL ARGUMENT ON MOTION TO SET EXECUTION DATE"

Responding to the State's motion to set an execution date, Zagorski requests that the Court decline to effectuate the 1984 judgment of the Robertson County Circuit Court and instead reopen review of that judgment and consider three constitutional claims related to his conviction and sentence. Aside from invoking this Court's "inherent supervisory authority over Tennessee's judicial system," he provides no authority for disturbing the long-since-final judgment. However, his motion could be construed as a request to recall this Court's mandate on direct appeal and, because Zagorski presents no extraordinary circumstances warranting such relief, should be denied. Zagorski's request for oral argument should likewise be denied, since argument would not significantly assist the Court in its decision on the State's motion to set. The relevant facts are plainly set forth in the papers before the Court, and Zagorski presents no justification for disturbing this Court's 25-year-old mandate.

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. 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 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).

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 present new claims that could have, but were not, presented in the original trial and/or appellate

proceedings, as Zagorski seeks to do in this case. Aside from swallowing Tennessee's long-established post-conviction waiver rules, 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 in this case for over two decades.

B. Zagorski has failed to demonstrate extraordinary circumstances warranting a recall of the mandate.

Zagorski has not demonstrated "extraordinary circumstances" warranting a recall. To the contrary, the basis of his motion is quite ordinary – first, he is aggrieved by the prior adverse decision of this Court on the admission of his statements at trial and seeks to re-litigate the merits of that claim on an expanded evidentiary record and, second, in the 25 years since this Court's opinion on direct appeal, he has devised two additional legal arguments never before presented to this Court. As to the latter claims, Zagorski's arguments rest on constitutional principles that were well established at the time of his direct appeal. He was not deprived of a reasonable opportunity to present the claims through "happenstance" or otherwise. Moreover, Zagorski has waived consideration of his claims in any event under well-established procedural rules. *See, e.g.*, Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); Tenn. Code Ann. § 40-30-106(g) ("A

ground for relief [in post-conviction proceedings] is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.").

Regarding admission of his statements at trial, Zagorski constructs his coercive-conditions argument based largely on materials outside the record on appeal; thus, a recall of the mandate would serve no purpose. The trial court examined the circumstances surrounding all of Zagorski's statements in a pre-trial suppression hearing at which he had a full and fair opportunity to call witnesses and present evidence. Yet he presented no competent proof at that time of his medical or mental condition, and aside from the bare fact that he was held in solitary confinement, there was little, if any, proof suggesting that his confinement conditions were "torturous" or otherwise unduly oppressive. Moreover, Zagorski has never seriously disputed the fact that he initiated the latter two meetings with police Detective Perry, a fact evidenced by Zagorski's own writings, which were introduced into evidence at the suppression hearing.

On direct appeal, this Court concluded, based on the record evidence, that Zagorski had initiated the interrogations in question, that his statements were not the result of any coercive action on the part of the State, and that he knowingly and intelligently waived his right to have counsel present. The Court further found that, even if that were not the case, admitting the statements in question was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt.

> The statements of Zagorski in question were those of June 1, July 27, and August 1, 1983. Zagorski consistently denied that he had killed the victims, but in each of the statements, though differing in details, Zagorski implicated himself in the killings. For example, in the June 1 statement, Zagorski placed the killing site in Robertson County and himself at the Kentucky–Tennessee border keeping a lookout for police authorities. The later statements had the victims meeting their death in Hickman County, with Zagorski present but not taking part in the killings.
>
> Zagorski also talked with police officers on May 27, 1983. The statement was not used in the trial, but is important as Zagorski then stated he was not going "to make no statements or answer any question," and finally saying "[l]ike I said, I guess I really should talk to a lawyer."
>
> Zagorski having asked for a lawyer, it becomes important to determine whether later statements were initiated by Zagorski and whether there was a knowing and intelligent waiver by him of his request for an attorney to be present at any interrogation. *See Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 492-93, 83 L.Ed.2d 488 (1984); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).
>
> With this in mind as we viewed the evidence, we concluded that the evidence supports the trial court's finding that the defendant initiated the interrogations, that he was not subject to any coercive action on the part of the state, and that he knowingly and intelligently waived his right to have counsel present during the interrogations. Further, we are of the opinion that even if there had been an *Edwards* violation, error in admitting the statements in evidence was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt in this case. *See United States v. Webb*, 755 F.2d 382, 392 (5th Cir. 1985) (applying harmless error analysis to *Edwards* violation).

State v. Zagorski, 701 S.W.2d 808, 812 (Tenn. 1985).

Although Zagorski argued during his pre-trial suppression hearing that the conditions of his confinement rendered his statements involuntary, the trial court rightly rejected those contentions in light of the absence of any supporting evidence. Indeed,

despite its availability during his pre-trial motion hearings, Zagorski presented no medical records or other competent medical testimony to the trial court to substantiate his claim that his statements were the product of oppressive confinement conditions; no proof concerning air conditioning in the jail, the jail ventilation system, lighting conditions, or the psychiatric effects of solitary confinement; no proof of weather conditions in Robertson County in July 1983 and its effect on local crops; and no proof of physical complaints such as sleeplessness, numbness, headaches, weight loss, elevated blood pressure or any of the other maladies to which he now points as evidence of coercive jail conditions.

Under these circumstances, there exists no legal justification, let alone a valid procedural vehicle, to set aside the judgment in this case. Moreover, given that the law and facts on which he now relies have been available since the time of trial, Zagorski can hardly argue that such extraordinary relief is warranted. *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."). Zagorski has received the full benefit of direct review by this Court, state post-conviction relief proceedings, and review in the federal courts by way of habeas corpus proceedings under 28 U.S.C. § 2254. An execution date is warranted and should be ordered.

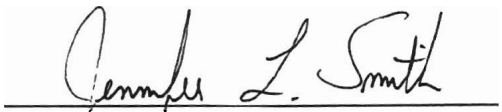
CONCLUSION

Zagorski's response furnishes no basis to disturb this Court's 1985 decision. Because there is no legal impediment to the setting of an execution date, the State's motion to set should be granted.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

GORDON W. SMITH
Associate Solicitor General



JENNIFER L. SMITH
Associate Deputy Attorney General
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Reply has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid, on this the 25th day of August, 2010, to:

Paul R. Bottei
Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203

JENNIFER L. SMITH
Associate Deputy Attorney General