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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2010-2011

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1091312

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Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama

v.

Albert Mack III)

(Tuscaloosa Circuit Court, CC-93-1204.60;  
Court of Criminal Appeals, CR-09-0973)

WOODALL, Justice.

The Court of Criminal Appeals issued a writ of mandamus in response to a petition filed by Albert Mack III, whose Rule 32, Ala. R. Crim. P., petition is pending in the Tuscaloosa Circuit Court, directing the trial court to ensure that Mack has access to certain demographic information he is seeking. The State of Alabama has sought review of the Court of Criminal Appeals' decision in this Court by filing a petition for a writ of mandamus directed to the Court of Criminal Appeals. See Rule 21(e)(1), Ala. R. App. P. We deny the State's petition.

Our consideration of this matter must begin with Ex parte Mack, 894 So. 2d 764 (Ala. Crim. App. 2003) ("Mack I"), in which the Court of Criminal Appeals granted, in relevant part, an earlier mandamus petition filed by Mack. Mack filed that petition after the trial court had denied his requests for "the demographic information on the race and gender of grand and petit jurors in Tuscaloosa County from 1978 through 1995." 894 So. 2d at 766. Mack had sought the demographic information in relation to his claim "that his trial counsel's performance was ineffective because he failed to effectively challenge the underrepresentation of African-Americans on the grand and petit juries in Tuscaloosa County." 894 So. 2d at

1091312

769. The Court of Criminal Appeals held that Mack had shown good cause for obtaining the demographic information, and, insofar as the information was concerned, it granted Mack's petition.

The judges of the Court of Criminal Appeals have responded to the State's petition for a writ of mandamus directed to that court. See Rule 21(b), Ala. R. App. P. In their response, the judges assert that "[t]he instructions in [Mack I] were clear," but they admit that the opinion "did not identify what agency could or would furnish [the demographic] information to Mack." Judges' response, at 7-8.

Until 2010, Mack took no further action to obtain any of the demographic information to which he had sought access, despite the favorable holding in Mack I. Then, on March 4, 2010, the trial court, on Mack's motion, ordered the circuit clerk to produce the grand and petit jury venire lists from 1978 through 1995. The clerk promptly produced the lists, but only two lists from 1995 contained information regarding the race and gender of the members of the venire.

On April 1, 2010, Mack filed a motion seeking the trial court's "compliance" with the decision in Mack I. More specifically, the motion requested that the court order "the

1091312

Alabama Department of Motor Vehicles, the Administrative Office of Courts, the Tuscaloosa District Attorney's Office, and the Tuscaloosa County Department of Voter Registration ... to produce any records in their custody or control that reflect the race and gender of jury venires between 1978 and 1995 in Tuscaloosa County." On April 5, the trial court denied that motion on the bases that the circuit clerk had provided Mack everything within her possession and that the additional requests amounted to "nothing more than a fishing expedition."

On April 6, 2010, Mack's counsel sent a letter to the trial court explaining why she had reason to believe that the Tuscaloosa County Board of Registrars had demographic information responsive to the earlier request and stating that, with a court order, counsel would be given access to the available records. On April 9, the trial court entered another order denying any further discovery, and Mack filed a second petition for a writ of mandamus in the Court of Criminal Appeals.

On June 9, 2010, the Court of Criminal Appeals granted Mack's petition. In a brief unpublished order, the court, relying upon the holding in Mack I, directed the trial court

"to comply with [the Court of Criminal Appeals' instructions in Mack I] and to ensure that Mack has access to the demographic information concerning the grand and petit jurors in Tuscaloosa County from 1978 through 1995." Ex parte Mack (No. CR-09-0973, June 9, 2010), \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2010) (table) ("Mack II"). However, as in Mack I, the Court of Criminal Appeals did not identify which agency could or would furnish the demographic information to Mack. Thus, as the State correctly argues, Mack II "fails to provide any guidance to the circuit court [as to] what specific discovery Mack is entitled." Petition, at 12. Thus, in deciding whether to issue a writ of mandamus to the Court of Criminal Appeals, we must look to the response to the State's petition by the judges of that court to determine the breadth of the Court of Criminal Appeals' order in Mack I.

In their response, the judges mention only that Mack "informed the circuit court that the information he sought was maintained by the Tuscaloosa Voter Registration Office and ... that he could have access to the information if the [trial court] would sign an order to that effect."<sup>1</sup> Judges'

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<sup>1</sup>The judges never mention in their response the Tuscaloosa District Attorney's Office, the Administrative Office of

1091312

response, at 5. Then, according to the respondent judges, when the trial court "refused to sign [such an] order for discovery," Mack filed his petition for a writ of mandamus in the Court of Criminal Appeals. Id. Therefore, we construe the order in Mack II to order discovery only with regard to demographic information available from the Tuscaloosa County Board of Registrars. Our review of the order is de novo. Rule 21(e), Ala. R. App. P. However, "[t]he materials reviewed by this Court in considering a petition for writ of mandamus consist [only] of exhibits provided by the parties ...." Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 232 n. 2 (Ala. 2004).

In Mack I, the Court of Criminal Appeals clearly held that Mack was entitled to the demographic information about the jury venires in question. However, although the circuit clerk has been able to produce the jury lists Mack requested, only two of the lists reveal information about race or gender. On the other hand, it is undisputed that the board of registrars has in its records voter-registration applications that request, and generally contain, information about the

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Courts, or the Department of Public Safety.

1091312

applicant's gender and race. We see no reason why the trial court should not be required to order that the voter-registration applications in the possession of the board of registrars be made available to Mack for his review. Hopefully, Mack will be able to gather from this review the demographic information he needs without again requesting further discovery from other sources, allowing his long pending Rule 32 petition to move toward a conclusion.

The State's arguments in support of its petition are not persuasive. First, the State argues that Mack is entitled to no further discovery, "because the circuit court has already attempted to provide 'demographic information' by ordering discovery of the jury venire lists of Tuscaloosa County from 1978-1995." Petition, at 14. Although it is true that the trial court ordered the production of the venire lists, it is equally true that "Mack still needs the demographic information." Mack's response, at 15.

Next, the State argues that Mack's request for further discovery is a "textbook example of a fishing expedition." Petition, at 20. This is so, according to the State, because there is no evidence indicating that the board of registrars possesses any jury list or other information concerning the

1091312

identity of veniremembers for the period in question. This argument completely misses the mark. Mack already has the jury lists. He needs the voter-registration applications available from the board of registrars because those applications are likely to reveal the type of demographic information that is missing from all but two of the jury lists. More specifically, if Mack is able to identify the veniremembers' voter-registration applications, he is likely to have available to him information concerning the race and gender of those veniremembers.

Third, the State argues that requiring the board of registrars to produce the available voter-registration applications "would create an overwhelming strain and burden on that agency's resources." Petition, at 29. This argument is based on the State's assumption that "an employee [of the board] would have to manually search each box of paper voter registration applications by hand and compare each application to a list of people who served on juries in Tuscaloosa County from 1978-1995." Id. However, as previously stated in this opinion, the trial court is required to order only that the voter-registration applications be made available to Mack for



1091312

his review.<sup>2</sup> The exhibits before this Court in this petition for the writ of mandamus indicate that the board of registrars has already located the boxes containing the voter-registration applications and identified those applications within the scope of Mack's request.

Finally, we note that the State does not argue that the Court of Criminal Appeals has ordered the production of any confidential information. Indeed, the materials before this Court belie any concern that the voter-registration applications contain confidential information. "Even if Mack [is] able to gain access to voter registration records, such records do not request an applicant's full Social Security number. (Ex. D., App. 8 at p. 2)." Petition, at 25. The exhibit referenced by the State states, based on information provided by an employee of the board of registrars, that the "applications request [only] the last four digits of the applicant's Social Security number."

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<sup>2</sup>"Mr. Mack only requests that the information be made available to him. He will make arrangements to gather, review, copy or scan the necessary information." Mack's response, at 25.

1091312

For these reasons, the State's petition for a writ of mandamus directed to the Court of Criminal Appeals is denied.

PETITION DENIED.

Cobb, C.J., and Lyons, Stuart, and Parker, JJ., concur.

Bolin, J., concurs specially.

Smith and Murdock, JJ., dissent.

Shaw, J., recuses himself.\*

\*Justice Shaw was a member of the Court of Criminal Appeals when that court considered this case.

1091312

BOLIN, Justice (concurring specially).

I concur specially with the main opinion, but I write separately to address the potential divulgence of voters' Social Security numbers as the result of any blanket discovery order directed to the Tuscaloosa County Board of Registrars allowing unfettered access to voter-registration applications.

The defendant, Albert Mack III, seeks information concerning the race and gender of members of jury venires in Tuscaloosa County from 1978 to 1995, specifically through the local board of registrars. As the main opinion correctly points out, the State does not argue that the order of the Court of Criminal Appeals makes available for inspection, either inadvertently or not, confidential information from the voter-registration applications. The only mention by the State of the possible disclosure of such information is in its reply brief, which states:

"However, simply because Mack asserts that he is willing to do the searching and copying does not mean that he will actually be granted access by the various agencies to their official files, with potentially confidential information, to sift through and copy."

(Reply brief, p. 14.)

The State's only specific mention of voters' Social Security numbers, as opposed to nonspecific "confidential information," relates to its argument that Mack's request for discovery of records of the Department of Motor Vehicles would require the individuals' Social Security numbers because that is what the Department uses to access information, arguing that such would be "completely impracticable and is nothing but a fishing expedition." (Petition, p. 25.) This in no way properly addresses a crucial issue -- whether unfettered access to voter-registration records would allow the disclosure of voters' Social Security numbers. Indeed, the State takes at face value a statement from Mack's counsel, based on a conversation with an employee of the board of registrars, that that board's voter-registration records list only the last four digits of a voter's Social Security number. This is true now by virtue of § 17-4-36, Ala. Code 1975, which became effective January 13, 2003. See Act No. 2003-313, Ala. Acts 2003. Act No. 2003-313 changed the duty of each board of registrars from obtaining a voter's "Social Security number, if such number is known," to obtaining only the last four

digits of that number.<sup>3</sup> A 1977 voter-registration form

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<sup>3</sup>Act No. 2003-313 amended § 17-4-36 as follows (the changes are shown by strike-throughs (deletions) and emphasis (additions)):

"(a) In order to establish the statewide voter file and to ensure its continued accuracy, it shall be the duty of the boards of registrars, on forms or in a manner rule prescribed by the ~~Director of Voter Registration~~ Secretary of State:

"(1) To provide ~~said director~~ the Secretary of State the name, driver's license number or non-driver's identification number, if such number is known, the last four digits of the Social Security number, if such number is known, date of birth, address, race, sex, and political subdivision or voting place of each registered voter in their respective counties within one month after a written request from ~~said director~~ the Secretary of State;

"(2) To provide ~~said director~~ the Secretary of State the name, driver's license number or non-driver's identification number, if such number is known, the last four digits of the Social Security number, if such number is known, date of birth, address, race, sex, political subdivision or voting place, place of previous registration, if applicable, and date of registration of each newly registered voter as such voter is registered;

"(3) To provide to ~~said director~~ the Secretary of State the name, driver's license number or non-driver's identification number, if such number is

1091312

approved by this Court in accordance with then § 17-4-122 (now § 17-3-52) requested Social Security numbers from registering voters. Because Mack is requesting records from 1978-1995, it is fair to assume that the board of registrars met its duty during this period and, as a consequence, that the majority of its stored application records contain full Social Security numbers.

The State does argue that compliance with the judgment of the Court of Criminal Appeals would create "an extreme burden

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known, the last four digits of the Social Security number, if such number is known, date of birth, address, race, sex, political subdivision or voting place, and date of reidentification of every voter who reidentifies, pursuant to Article 7 of this chapter.

"(b) Where an applicant for voter registration is unable to produce either a driver's license number, a non-driver's identification number, or the last four digits of the Social Security number, the state voter registration list shall assign a unique number which shall serve as the registrant's voter registration identification number

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~~"(b) Members of local boards of registrars and members of county commissions who fail to comply with the provisions of this article in their representative capacities as such registrars and commissioners shall be guilty of a Class A misdemeanor and punished as prescribed by law."~~

1091312

on the state." As pertains to the burden on the board of registrars, the State argues:

"Regarding the Tuscaloosa Board of Registrars, specifically, that agency's records are maintained in the attic of the Tuscaloosa County courthouse. The Board of Registrars' records are stored in boxes. The records within these boxes are not maintained in a particular order. In order for that agency to comply with a discovery order to provide demographic information, an employee would have to manually search each box of paper voter registration applications by hand and compare each application to a list of people who served on juries in Tuscaloosa County from 1978-1995. The Board of Registrars also does not have a large staff and this process would be both time consuming and labor intensive. Furthermore, as noted above, this exercise could all be a fruitless labor as there is no guarantee that searching through the Board of Registrars records will reveal any person who served on [a] jury from 1978-1995, not to mention demographic information. Certainly, such a task would create an overwhelming strain and burden on that agency's resources."

(Petition, pp. 28-29.) Mack counters that he needs only that the information be made available to him and that he will "make arrangements to gather, review, copy or scan the necessary information." (Emphasis added.) (Respondent's brief, p. 25.)

Significantly, the State does not argue that the presence of, and possible disclosure of, voters' Social Security numbers will mandate personal scrutiny by employees of the board of registrars as each individual voter-registration

1091312

application is examined to see if the applicant matches the name of a venireperson supplied by the lists prepared by the circuit clerk. It is my opinion that this would have been pertinent to the State's argument that the requested discovery would have been unduly burdensome.

Citizens applying to vote before the effective date of Act No. 2003-313 had a right to rely on their belief that their State government would not make available their Social Security numbers, which were requested by the board of registrars on their voter-registration application. Social Security numbers are private information, the unauthorized release of which can lead to identity theft. See Greidinger v. Davis, 988 F.2d 1344, 1353-54 (4th Cir. 1993) (holding that the state's requirement that a voter supply a Social Security number when registering to vote and then making voter-registration lists containing Social Security numbers available to the public infringed upon the right to vote and that the burden was not narrowly tailored to meet the state's interest in preventing voter fraud because "armed with one's [Social Security number], an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's



1091312

checking account, obtain credit cards, or even obtain the person's paycheck. ... Succinctly stated, the harm that can be inflicted from the disclosure of [Social Security number] to an unscrupulous individual is alarming and potentially financially ruinous."). The Kentucky appellate court in Zink v. Commonwealth, 902 S.W.2d 825, 829 (Ky. Ct. App. 1994), accurately stated:

"Those nine digits today represent no less than the keys to an information kingdom as it relates to any given individual. Access to a wealth of data compiled by both government agencies and private enterprises such as credit bureaus is obtainable simply upon presentation of the proper Social number."

The Alabama Legislature exempted voter-registration records from being classified as public records in § 17-3-52, Ala. Code 1975, which states, in pertinent part:

"Except as provided in Section 17-3-53, the applications of persons applying for registration shall not become public records as public records are defined under the laws of the State of Alabama, nor shall the board disclose information contained in such applications and written answers, except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding."

Because the State has not shown a clear legal right to mandamus relief in this proceeding, I would suggest that the trial court would still be "a court of competent jurisdiction

1091312

in a proper proceeding" to protect the confidentiality of the voter-registration applications as they pertain to the sensitive information contained therein, in complying with Mack's right to discover demographic information as ordered by the Court of Criminal Appeals.

1091312

MURDOCK, Justice (dissenting).

As a threshold matter, I note that the underlying issue for which the discovery is sought in this case is not the direct question whether there was an unconstitutional disparity in the makeup of the jury panels in Tuscaloosa County at the time Albert Mack III was indicted and convicted in 1995. Rather it is whether there was a constitutional disparity and whether this disparity was such that it was known or should have been known to Mack's trial counsel so that his failure to assert it and to conduct the discovery now being attempted in an effort to find proof of it justifies a conclusion that counsel was not acting as the counsel guaranteed by the Sixth Amendment to the United States Constitution. If the answer to any aspect of the latter query is "no," this would have been a ground for the Court of Criminal Appeals to have reached a different result in Mack I. I see no discussion of this issue in Mack I; I therefore assume that the State did not explore it at the time of that decision, and I will not do so now.

Nonetheless, under the de novo standard by which we are to review the current petition, I question whether the discovery being ordered by this Court today will provide Mack

1091312

the information he is seeking concerning the race and gender of veniremembers from 1978 to 1995. In this regard, I first note that, according to the affidavit of Kathie Viselli, the director of the Board of Registrars for Tuscaloosa County, the only voter-registration records from 1978-1995 that have been located are from the years 1980 to 1984. Even if these records were to show a significant disparity in the makeup of Tuscaloosa County jury panels during those years, I question how material this information would be to Mack's ultimate purpose of showing that his 1995 conviction came at the hands of an improperly constituted jury to which his trial counsel should have objected.

Second, I am not persuaded that the available registration forms, even for this four- or five-year period, contain the information needed. Alabama law during this period did not provide for registration forms requesting that the voter indicate his or her race or gender. See \_\_ So. 3d at \_\_ n. 3 (Bolin, J., concurring specially and indicating the differences between the current registration statute and the statute in place before the 2003 amendment). In her affidavit, Viselli states that she has worked with the

1091312

Tuscaloosa Board of Registrars only since 2004. She thereafter states:

"I do not know for sure whether demographic information, such as race and gender, will be contained on the voter registration applications from the years 1980-1984. The voter registration applications request data on race and gender. However, in my experience, in some cases applicants will fail to identify their race or gender or both on the voter registration applications."

Especially in light of the status of Alabama law during the period 1980 through 1984, I question whether Viselli's description in the middle sentence of what is requested on voter-registration applications should be read in relation to the reference in the preceding sentence to the "registration applications from the years 1980-1984" or in relation to the years with which Viselli has "experience," as referenced in her following sentence, i.e., from 2004 forward.

For similar reasons, and despite some suggestion to the contrary in one of the numerous exhibits attached to the State's petition,<sup>4</sup> I am not persuaded that the voter-

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<sup>4</sup>The materials before us include an exhibit consisting of a letter from Mack's counsel to the trial judge recounting an April 2010 conversation with Coral Lewis "in the Tuscaloosa County Voter Registration records department." Counsel (not purporting to quote Lewis) asserts that "Lewis indicated that the voter registration applications request name, address, date of birth, race, sex, drivers' license numbers, and the

1091312

registration applications Mack seeks do not contain the entire Social Security number of the applicants. The Alabama statute governing this matter during the period in question provided for registration forms requiring the voter to provide his or her entire Social Security number. Again, see \_\_\_ So. 3d at \_\_\_ n. 3 (Bolin, J., concurring specially and indicating the differences between the current registration statute and the statute in place before the 2003 amendment).

Overarching these doubts is the fact that the voters whose Social Security numbers appear in whole or in part on the voter-registration forms to be produced are not parties to this case. I therefore do not consider myself or other elements of the judiciary bound by the fact that the prosecutorial arm of the State, insofar as it is a party to this action, does not adequately make an issue of this fact. In his special writing, Justice Bolin correctly observes that "[c]itizens applying to vote before the effective date of Act No. 2003-313 had a right to rely on their belief that their State government would not make available their Social Security number, which were requested by the board of

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last four digits of the applicant's [S]ocial [S]ecurity number." (Petition Exhibit D, App. 8 at p. 2.)

1091312

registrars on their voter-registration application." \_\_\_ So. 3d at \_\_ (Bolin, J., concurring specially). The judiciary is a part of that State government.

On the basis of the law and materials presented, and the confidentiality concerns expressed above, I do not believe the relief left in place by this Court's decision today is justified. I therefore respectfully dissent.

Smith, J., concurs.