No. 99-560

In the Supreme Court of the United States

MARCIA M. WITTER AND ABRAHAM NEE NTREH,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
ANH-THU P. MAI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by refusing to recall its mandate in petitioners' case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 99-560

MARCIA M. WITTER AND ABRAHAM NEE NTREH,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioners' motion to recall the court's mandate (Pet. App. 80a-81a) is unreported. That court's earlier opinion on the merits (Pet. App. 1a-16a) is reported at 113 F.3d 549. The opinion of the Board of Immigration Appeals is unreported, as is the opinion of the Immigration Judge (Pet. App. 17a-35a).[1]

[1] The opinion of the Board of Immigration Appeals, which the court of appeals affirmed, is not reprinted in the appendix to the petition. For the Court's convenience, we have lodged a copy of the Board's opinion with the Clerk.

JURISDICTION

The order of the court of appeals denying the motion to recall its mandate was entered on July 16, 1999. The court's judgment on the merits was entered on May 30, 1997. The petition for a writ of certiorari was filed on September 30, 1999, and is therefore jurisdictionally out of time with respect to the second question presented by the petition (see Pet. i). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Witter is a native of Jamaica and a citizen of the United Kingdom. Pet. App. 2a. Petitioner Abraham Nee Ntreh is a native and citizen of Ghana. Both initially entered the United States legally, and the two were married in Dallas, Texas, in August 1988. In May 1989, Nee Ntreh filed a petition for annulment, alleging that Witter had fraudulently induced Nee Ntreh to marry her, that the couple had never lived together, and that they had never consummated the marriage. Witter signed a waiver of notice in which she swore that she had read and understood the annulment petition, and agreed that the petition could be considered by the court without further notice to her. A transcript of the annulment hearing indicates that Nee Ntreh appeared and testified at the proceeding. The court granted the annulment and sent a copy of the order to Witter at the address provided in the waiver. *Ibid.*

Petitioners both left the United States. Five months after the annulment was granted, petitioners applied for new immigrant visas at the United States embassy in London, representing that they were married and presenting their 1988 marriage certificate as evidence to that effect. They did not disclose that the marriage

had been annulled. Witter was accorded preference for entry based on her employment as a nurse in Dallas, and Nee Ntreh's application was granted because he was Witter's spouse. Pet. App. 2a-3a.

2. In June 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioners under what were then Sections 241(a)(1)(A) and 212(a)(6)(C)(i) of the Immigration and Nationality Act, see 8 U.S.C. 1251(a)(1)(A) and 1182(a)(6)(C)(i) (1994), on the ground that they had willfully misrepresented a material fact in order to obtain petitioner Nee Ntreh's visa. Pet. App. 3a. The INS also alleged that petitioner Witter was deportable because she had aided and abetted Nee Ntreh's illegal entry, and that Nee Ntreh was deportable for engaging in marriage fraud. *Id.* at 3a-4a.

Petitioners then asked a Texas court to set aside the 1989 annulment, alleging that they had never intended to complete the annulment, and that they had only recently discovered that an annulment order had been entered. Pet. App. 4a. Petitioner Nee Ntreh testified that he did not attend the original annulment hearing, and that he and Witter had never lived apart. Based on those misrepresentations, the state court set aside the annulment. Texas authorities later charged Nee Ntreh with perjury based on his testimony concerning the annulment. *Ibid.*[2]

---

[2] Nee Ntreh was convicted of aggravated perjury for having testified falsely, in the proceeding to set aside the annulment, that he had not appeared at the hearing in the original annulment proceeding. See Pet. App. 36a, 43a. A state appellate court reversed that conviction (*id.* at 47a) on the ground that, although the reporter's record and docket sheet for the original proceeding "reflected that a person who identified himself as Abraham Nee Ntreh" appeared and testified at the annulment hearing (*id.* at

After conducting an evidentiary hearing, an Immigration Judge (IJ) ordered petitioners deported. Pet. App. 17a-35a. The IJ found that petitioners were not married at the time of their visa interview in London in November 1989, because the 1988 marriage, if it was ever valid, had been annulled before the interview took place. *Id.* at 27a-28a; see also *id.* at 29a-30a. Having noted that both petitioners repeatedly claimed to be single after the 1988 marriage, after the 1989 annulment, and after the annulment was set aside in 1993 (*id.* at 28a), and that they "referred to each other at various times as being merely friends, cousins, siblings, other relatives, an accountant, anything but husband and wife for the most part during that whole period" (*ibid.*), the IJ rejected (*id.* at 30a-32a) petitioners' claim that, notwithstanding the annulment, they were parties at the time of their visa interview to a "common-law marriage" under Texas law. The IJ found that there was "no doubt * * * whatsoever" (*id.* at 29a) that Nee Ntreh obtained his visa fraudulently by knowingly misrepresenting his marital status." See *id.* at 29a-30a, 32a. Although he considered the evidence against petitioner Witter "slightly less clear," the IJ found that her testimony was "not credible * * * about anything related to her relationship to [petitioner] Ntreh," and that "she did assist [Nee Ntreh] to perpetrate a fraud * * * to get him admitted to the United States." *Id.* at 32a-34a.

The Board of Immigration Appeals (BIA) affirmed the IJ's decision ordering both petitioners deported. See note 1, *supra.* Agreeing with the IJ that

---

38a), "there was no evidence adduced at [the perjury] trial to establish that the Abraham Nee Ntreh, identified in the reporter's record," was the same person as petitioner (*id.* at 45a).

petitioners' denials were not credible, the Board also agreed with his conclusion that "both respondents were aware at the time of their November 1989 consular interview that their marriage had been annulled several months earlier." BIA slip op. 12; see *id.* at 17. The Board also rejected (*id.* at 13-17) petitioners' argument that Texas would have recognized a "common-law marriage" between them at the time of the interview, pointing out both that petitioners based their representation that they were married on the 1988 ceremonial marriage, and that in any event they had not shown any of the three elements (agreement to marry, living together as husband and wife, and representing themselves as such to others) that would have been necessary to establish a "common-law" marriage under Texas law. The Board accordingly affirmed the IJ's judgment that both petitioners were deportable as aliens who procured their entry by fraud. *Id.* at 17.[3]

3. The court of appeals affirmed in May 1997. Pet. App. 1a-16a. Agreeing with decisions of two other courts of appeals, the court endorsed "the basic principle that changes in marital status undertaken after entry into the United States should not be used to manipulate immigration law," and it accordingly sustained the BIA's refusal "to relate back the order vacating [petitioners'] annulment to cure [the] misrepresentations" they knowingly made in connection with

---

[3] The Board sustained petitioner Witter's challenge to the IJ's finding that she was deportable for aiding and abetting the illegal entry of an alien, noting that there was no evidence that she had done so "for gain," as required by the law applicable to her case. BIA slip op. 17-18. The Board declined to consider the marriage fraud charge against petitioner Nee Ntreh, which the IJ had not addressed and the INS had not pressed before the Board. *Id.* at 18.

their visa applications. *Id.* at 7a-8a. The court also rejected petitioners' "common-law marriage" argument, agreeing with the Board both that petitioners did not rely on any such marriage when they applied for entry, and that in any event no such marriage existed at that time under Texas law. *Id.* at 9a-10a. Holding further that the Board properly found petitioners' misrepresentations to have been willful (*id.* at 10a-11a); that petitioner Witter had waived any argument that she could not be deported for making misrepresentations that were material only to Ntreh's eligibility for entry (not her own) (*id.* at 11a-13a); that the IJ did not abuse his discretion by denying a continuance pending resolution of the perjury charges against Nee Ntreh (*id.* at 13a-15a); and that petitioners were not entitled to a remand for consideration of their eligibility for voluntary departure rather than deportation (*id.* at 15a-16a), the court affirmed the Board's decision "in all respects" (*id.* at 16a).

4. In October 1997, petitioners were deported to the United Kingdom. See Pet. App. 75a. After the Texas court of appeals reversed petitioner Nee Ntreh's perjury conviction (see note 2, *supra*), petitioners moved in the court of appeals "for recall of [the court's] mandate * * * and[/]or relief under" Rule 60(b) of the Federal Rules of Civil Procedure (*id.* at 48a). They argued that "but for the perjury charge, neither the [IJ] nor the [BIA] would have found [petitioners] deportable, and [the court of appeals] would not have affirmed the BIA's deportation order." *Id.* at 48a-79a (reprinting motion). The court of appeals denied petitioners' motion without further comment. *Id.* at 80a-81a.

ARGUMENT

1. Petitioners were deported from the United States in October 1997. Former Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c) (1994), which applies to this case, provides that "[a]n order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."[4] "Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity." *Stone* v. *INS*, 514 U.S. 386, 399 (1995). That point alone is sufficient to support the court of appeals' refusal to recall its previous mandate in this case, and to require that the present petition be denied or dismissed.[5]

---

[4] Section 106(c) has been repealed, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(b), 110 Stat. 3009-612, but that change applies only to proceedings commenced on or after April 1, 1997, IIRIRA §§ 306(c)(1) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657) and 309(a), and the applicable transitional rule specifically provides that earlier deportation "proceedings (including judicial review thereof) shall continue to be conducted without regard to" the repeal. IIRIRA § 309(c)(1), 110 Stat. 3009-625 (as amended, 110 Stat. 3657); see also IIRIRA § 309(c)(4), 110 Stat. 3009-626 (as amended, 110 Stat. 3657) (transitional rules for cases in which final order is entered after Oct. 30, 1996); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 940 & n.5 (1999). The deportation proceedings against petitioners were commenced in 1993, see Pet. App. 3a, and the deportation orders became final when the BIA issued its decision in April 1996 (see note 1, *supra*).

[5] Some courts of appeals have asserted jurisdiction to review claims that an alien was deported without due process, at least if the claim is "colorable." See, *e.g.*, *Baez* v. *INS*, 41 F.3d 19, 22-25 (1st Cir. 1994) (discussing cases but rejecting any exception to statutory language), cert. denied, 515 U.S. 1158 (1995). In this

2. Even if the court of appeals would have had the authority to recall its mandate, its refusal to do so does not merit further review. As this Court has recently emphasized, a court of appeals' power to recall its mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998). It may be exercised "only in extraordinary circumstances." *Ibid.* There are no such circumstances here.[6]

Both the BIA (slip op. 12) and the court of appeals (Pet. App. 6a-8a, 10a-11a) rejected petitioners' claims on the basis of their own evaluation of the record before them, not in reliance on the State's independent decision to prosecute petitioner Nee Ntreh for perjury. The Immigration Judge, moreover, explicitly eschewed any reliance on the criminal case, noting that just as "an indictment is not evidence [of guilt]," so also "even a

---

case, petitioners were deported only after their case had been reviewed by an Immigration Judge, the BIA, and the court of appeals, and after the time for seeking review in this Court had expired. They now contend that the court of appeals should have recalled its mandate and ordered their case reopened (Pet. 6-8), and that the IJ, the BIA, and the court of appeals violated the Tenth Amendment when they concluded that petitioners' relationship at the time of their 1989 visa application did not amount to a "common-law marriage" under Texas law (Pet. 8-11). Those contentions do not raise colorable constitutional claims.

[6] Petitioners misplace their reliance on Rule 60(b) of the Federal Rules of Civil Procedure (Pet. 6-8) in addition to (or in lieu of) the court of appeals' inherent power to recall its mandate. The Rules of Civil Procedure apply to proceedings in the district courts, not the courts of appeals. See Fed. R. Civ. P. 1. The cases cited by petitioners (Pet. 7-8) all deal with the application of Rule 60(b) in the district courts; none of them suggests that a court of appeals should proceed under that Rule to reopen one of its own final judgments in light of "newly discovered evidence" (Pet. 7).

verdict of not guilty in a criminal [perjury] case might not resolve disputes [over credibility for purposes of the deportation proceeding,] because of the difference between criminal and civil courts and the burden of proof." Pet. App. 29a; cf. *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (acquittal of criminal charges does not preclude judge from taking underlying conduct into account at sentencing under preponderance-of-the-evidence standard). There is accordingly no substance to petitioners' argument (Pet. 6) that their "new evidence"—reversal of Nee Ntreh's criminal conviction —"would have made a material difference in the original order appealed" to the court of appeals, and the court of appeals plainly did not abuse its discretion by denying petitioners' motion to recall its mandate. Compare *Calderon*, *supra*.

3. Petitioners' argument that the court of appeals violated the Constitution by refusing to recognize petitioners' asserted "common-law marriage" (Pet. 8-11) goes to the merits of a judgment that the court of appeals entered in 1997. Because petitioners did not seek review by this Court at that time, and because the court below has not recalled its mandate or reentered its judgment, the petition is jurisdictionally out of time with respect to the second question it seeks to present (see Pet. i). See 28 U.S.C. 2101(c); Sup. Ct. R. 13; *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90, 98-99 (1994).

In any event, the argument is meritless. The Immigration Judge, the BIA, and the court of appeals all analyzed the facts of this case under Texas law and concluded that, under state law, petitioners were not parties to a "common-law marriage" at the time of their

visa applications in 1989.[7] Pet. App. 9a-10a, 31a-32a; BIA slip op. 13-17. In the absence of a prior, dispositive state judgment to the contrary, that application of state law by federal administrators and the federal courts, in the course of resolving deportation issues indisputably within their respective jurisdictions, raises no question of conflict between federal and state authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
ANH-THU P. MAI
Attorneys

DECEMBER 1999

---

[7] All three also correctly held that petitioners could not rely on the existence of such a marriage to avoid deportation when they had explicitly relied on their asserted (and then-annulled) *ceremonial* marriage, rather than on any "common-law" marriage, in applying for petitioner Nee Ntreh's visa. Pet. App. 9a, 31a; BIA slip op. 13. That holding provides an independent, federal-law basis for petitioners' deportation.