No. 06-6925

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON
Petitioner-Appellant

v.

RICKY BELL
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

RESPONSE TO MOTION FOR STAY OF EXECUTION

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INTRODUCTION

Donnie E. Johnson ("petitioner" or "Johnson") has filed a motion requesting a stay of execution under 28 U.S.C. § 1651, § 2251, and "all other applicable law" pending final disposition of his appeal from the district court's dismissal of a Rule 60(b) motion in which he sought relief from his habeas corpus judgment. Johnson contends there are "serious questions" going to the merits of the district court's judgment and a stay of execution is necessary in order to "preserve the existing state of things until the rights of the parties can be fairly and fully litigated." Because a Rule 60(b) motion does not provide proper grounds for a stay of execution under 28 U.S.C. § 2251 and because Johnson has failed to establish that he is entitled to equitable relief under the traditional four-part test for preliminary injunctions, the motion for a stay of execution should be denied.

STATEMENT OF THE CASE AND FACTS

Johnson has already litigated one federal habeas corpus petition, which resulted in summary dismissal by the district court on February 28, 2001. (R. 84) This Court affirmed the district court's judgment and subsequently issued the mandate. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2074 (2004). On October 13, 2004, approximately one month before a previously scheduled execution date, Johnson filed a motion under Fed. R. Civ. P. 60(b) for equitable relief and/or for relief from the judgment of the district court's judgment. The district court stayed Johnson's execution pending disposition of the motion. (R. 103, 104, and 109) Following the Supreme Court's decision

in *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), the district court denied Johnson's Rule 60(b) motion on November 3, 2005, and, on May 10, 2006, denied his subsequent motion to alter or amend under Fed. R .Civ. P. 59. (R. 122 and 130)

Johnson filed a notice of appeal on June 7, 2006. (R. 135) On June 20, 2006, the Tennessee Supreme Court entered an order setting Johnson's execution for October 25, 2006. (Attachment 1) Johnson took no steps at that time to seek expedited review in this Court in light of the imminent execution date. In fact, even after this Court entered a briefing schedule setting a December 18, 2006, deadline for final briefs, Johnson took no steps to ensure a merits review of his appeal prior to his scheduled execution. It was not until September 15, 2006, that Johnson filed a proof brief in this Court and then nearly a month later, on September 15, 2006, that he first asked the district court to stay its judgment (presumably under the mistaken belief that such a stay would also operate to stay his state-court judgment and, thus, his execution). Johnson filed the instant motion for a stay of execution pending appeal on October 17, 2006. The district court denied the motion to stay its judgment that same day. (R.144)

ARGUMENT

None of the authority cited in Johnson's motion justifies issuance of a stay of execution. Under 28 U.S.C. § 2251(a), a federal judge "before whom a habeas corpus proceeding is pending" may, before or after judgment or pending appeal, "stay any proceeding against the person detained in any State court or by or under the authority of any

State for any matter involved in the habeas corpus proceeding." § 2251(a)(1). "For purposes of this section, a habeas corpus proceeding is not pending until the application is filed." § 2251(b). Because Johnson has already had one fully-litigated habeas corpus petition, any further application for relief would require the permission of this Court. 28 U.S.C. § 2244(b)(3). *See In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (where application for second or successive petition has been denied by court of appeals, there is no authority to grant stay under § 2251 because no "habeas corpus proceeding" is "pending."). *See also Williams v. Cain*, 143 F.3d 949, 950 (5th Cir. 1998) (where habeas petition has been ruled on by district court and the appellate mandate has issued, habeas petition is no longer pending and district court lacks jurisdiction to issue a stay of execution.). That plainly has not occurred in this case; § 2251 thus provides no basis for injunctive relief.

Rather, Johnson filed a motion in the district court pursuant to Fed. R. Civ. P. 60(b) for relief from the district court's judgment on three habeas corpus claims raised in his initial petition: his challenge to the heinous, atrocious or cruel aggravating circumstance; his challenge to the prosecution's alleged withholding of a deal in exchange for Ronnie McCoy's testimony at trial; and his challenge to sentencing-stage jury instructions regarding unanimity. (R. 104) Because the district court previously concluded that Johnson had procedurally defaulted each of those claims, the court construed his motion under the standards applicable to Rule 60 motions as articulated in *Gonzalez v. Crosby*, 125 S.Ct. 2641

(2005), ultimately concluding that Johnson failed to demonstrate any extraordinary circumstances justifying relief from the judgment. (R. 122) As *Gonzalez* makes clear, a Rule 60(b)(6) motion is not a habeas corpus application at all; thus, a stay of execution under § 2251 would be inappropriate pending either disposition of such a motion by the district court or an appeal from a disposition adverse to the petitioner. *See Gonzalez*, 125 S.Ct. at 2648 ("[W]hen a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings [ ]" and "no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application.").[1] In other words, unless and until relief from a habeas corpus judgment is granted under Rule 60(b), there is no

[1]Furthermore, as to Johnson's *Brady* claim, it is clear that the district court, in fact, ruled on the merits of the claim notwithstanding his default: "[P]etitioner's [*Brady*] claim is totally lacking in substantive merit. . . . The various ambiguous bits of evidence put forward by petitioner are not sufficient to undermine the credibility of the unambiguous sworn denials of every individual with contemporaneous personal knowledge concerning the matter. Accordingly, the Court holds that petitioner has failed to establish the first two components of a *Brady* violation: the existence of material evidence favorable to the accused and the suppression of that evidence by the prosecution. Because there was no 'deal,' the Court declines to speculate on the possible effect of such hypothetical evidence on the jury." (R. 84, pp. 115-17). In denying the Rule 60(b) motion, the district court further noted that Johnson had "failed to rebut the Court's prior holding that this claim is, aside from being defaulted, clearly devoid of merit." (R. 122, p. 20). Johnson's current Rule 60(b) motion is clearly an attempt to relitigate the substance of a claim that has already been resolved by the federal district court on its merits and, as such, is barred by 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed"). *See also* 28 U.S.C. § 2254(b)(2) (habeas corpus application may be denied on the merits notwithstanding an applicant's failure to exhaust available state court remedies).

habeas corpus proceeding pending within the meaning of § 2251 that would permit a federal court to stay state court proceedings. And without express authorization by a federal statute or an exception to the Anti-Injunction Act, this Court is without jurisdiction to grant a stay of execution of a state court judgment. *See* 28 U.S.C. § 2283; *Mitchum v. Foster*, 407 U.S. 225, 226 (1972).[2]

Rather, as with any request for injunctive relief in a civil case, it is incumbent upon Johnson to demonstrate at least a likelihood of success on the merits in order to secure a stay of execution. *See Tesmer v. Granholm*, 333 F.3d 683, 702 (6th Cir. 2003). Given the State's "all but paramount" interest in the execution of its final criminal judgment and the current posture of this case, Johnson's burden here is even more stringent. *See In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997) ("what is necessary to support a stay is a strong and significant likelihood of success on the merits"); *see also Delo v. Blair*, 509 U.S. 823 (1993) (per curiam) (stay of execution requires showing of substantial grounds upon which relief might be granted). A court presented with a request for a preliminary injunction or stay of execution must consider four factors: (1) the petitioner's likelihood of success on the merits;

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[2]Nor is jurisdiction to issue a stay conferred by 28 U.S.C. § 1651—the All Writs Act—which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." While the All Writs Act *is* a residual source of authority to issue writs, it only authorizes issuance of those that are not otherwise covered by statute. *Pa. Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Because § 2251 specifically addresses when a federal court may order a stay of state-court proceedings, "it is that authority, and not the All Writs Act, that is controlling." *Id. See McFarland v. Scott*, 512 U.S. 849, 863 n.* (1994) (O'Connor, J., concurring and dissenting) ("[T]he All Writs Act . . . does not provide a residual source of authority for a stay.")

(2) the possibility of irreparable harm to the petitioner in the absence of an injunction; (3) public interest considerations; and (4) potential harm to third parties. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532 (6th Cir. 2004) (setting forth factors for granting of preliminary injunctions). In addition, the United States Supreme Court recently instructed that, when considering a request for a stay of execution, courts must apply a "strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring the entry of a stay." *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (quoting *Gomez v. United States Dist. Court for Northern Dist. Calif.*, 503 U S. 653, 654 ("last-minute nature of an application or an applicant's attempt at manipulation of the judicial process may be grounds for denial of a stay"))). Applying these principles to this case leads to the conclusion that a stay of Johnson's execution is not warranted under any of the considerations noted.

Although Johnson is concededly threatened with irreparable harm, this interest must be weighed against the State's interest in carrying out punishment. The "State's interests in finality are compelling" and the "powerful and legitimate interest in punishing the guilty" attaches to both "the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citations and internal quotations omitted). In considering the countervailing interests of Johnson and the State, the small likelihood of Johnson's success

on the merits of his appeal (as demonstrated by the district court's order, R. 122, and the respondent's brief previously filed with this Court) tips the balance in the State's favor.

Moreover, while Johnson complains of fraud and state action — based upon little more than conflicting affidavits regarding a 17-year-old conversation — the district court correctly noted that he had been dilatory in asserting that claim. As early as 1999, Johnson was fully aware that Wayne Morrow had written an account of a statement by Ronnie McCoy concerning a grant of immunity in exchange for his testimony and, further, that McCoy disputed making such a statement. Indeed, Johnson was well aware even at trial that the State did not intend to prosecute Ronnie McCoy for his role in the events surrounding this case. Yet, it was not until 2004, after the district court denied federal habeas relief, the federal appellate review process completed, and a new execution date set, that Johnson sought to obtain an affidavit from Morrow to rebut McCoy's contention.

But the district court did not reject Johnson's fraud claim on that basis alone. The court further found that, far from showing fraud, the Morrow affidavit "in no way conclusively establishes the veracity of [Johnson's] allegation that a deal was concocted for McCoy's testimony" and thus failed to demonstrate "extraordinary circumstances" justifying relief from the judgment. (R. 122, pp. 21-22) Thus, even setting aside Johnson's failure to establish that the evidence was unavailable during state post-conviction and federal habeas corpus proceedings, the evidence on which he now relies does not establish fraud in any event. As set forth in the district court's order and in the respondent's brief in this Court,

Johnson's Rule 60(b)(6) motion falls well short of demonstrating an "extraordinary circumstance" justifying relief and, therefore, necessarily fails to show a likelihood of success on the merits.

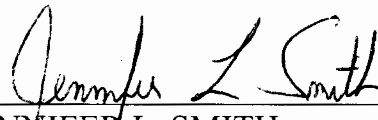
The analysis is not altered by Johnson's supplement to his motion for stay of execution in which he cites the district court's observation that "serious questions" inhere regarding the question of "what misconduct of a governmental official can be attributed to [the state's habeas] counsel" for purposes of fraud upon the federal habeas court. (R. 144, p. 4 n.1) The district court's previous analysis and rejection of the merits of Johnson's *Brady* and fraud claims plainly show that any such theoretical question, regardless of its seriousness in general, has no impact here. Indeed, in dismissing Johnson's Rule 60(b) motion, the district court specifically found that, even if the court were to assume the truthfulness of the Morrow affidavit, it "merely presents one party's contrasting recollection of an interview which occurred more than seventeen years ago." (R. 122, pp. 21-22) In short, the affidavit in question illustrates nothing more than the type of factual dispute resolved every day by judicial triers of fact. To assert in no uncertain terms, as Johnson now does, that such evidence constitutes positive proof of fraud by an officer of the court is not only factually and legally unsupportable, it arguably raises serious ethical considerations in and of itself. In any event, however, Johnson presents nothing in his motion or supplement to justify a stay of execution, and his motion should be denied.

CONCLUSION

Johnson's motion for stay of execution should be denied.

Respectfully submitted,

MICHAEL E. MOORE
Acting Attorney General & Reporter



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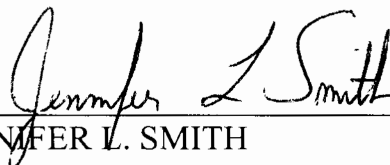
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served by first class mail, postage prepaid, and by email, to Paul Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 19th day of October, 2006.



JENNIFER L. SMITH
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ATTACHMENT 1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. DONNIE JOHNSON

No. M1987-00072-SC-DPE-DD - Filed: June 20, 2006

ORDER

On August 10, 2004, Donnie Johnson having completed the standard three-tier appeals process, this Court ordered that Johnson's sentence of death be executed on November 16, 2004. On November 9, 2004, after Johnson filed a motion for relief pursuant Fed. R. Civ. P. 60(b) in the United States District Court for the Western District of Tennessee, the federal district court issued an order staying Johnson's execution. On November 30, 2005, the federal district court denied relief and dismissed the motion. On May 10, 2006, the federal district court denied Johnson's motion to alter or amend its judgment under Fed. R. Civ. P. 59(e). On May 5, 2006, the State of Tennessee filed in this Court a Motion to Reset Date of Execution, in which it stated that the actions of the federal district court in denying relief to Johnson dissolved the previously issued stay. On May 30, 2006 Johnson filed his Response to Motion to Reset Execution Date. Johnson contended that an execution date should not be re-set because an appeal from the federal district court's denial of relief was pending in the United States Court of Appeals for the Sixth Circuit. Johnson also asserted that an execution date should not be set because he had filed a petition in the Criminal Court for Tennessee's 30th Judicial District requesting post-conviction forensic DNA analysis under Tenn. Code Ann. § 40-30-301 et seq.

Having considered the Motion to Reset Execution Date and the Response, this Court finds that Johnson has presented no legal basis for denying the State's Motion to Reset Execution Date. Therefore, the State's motion is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the twenty-fifth day of October, 2006, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Donnie Johnson shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM