IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DONNIE E. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 97-3052-BBD**
	)	
RICKY BELL, Warden,	)	**CAPITAL CASE**
	)	**EXECUTION SET: November 16, 2004**
Respondent.	)	

RESPONSE IN OPPOSITION TO
MOTION FOR STAY OF EXECUTION

Respondent respectfully requests this Court deny the motion for stay of execution for the reasons set forth below.

I. PROCEDURAL HISTORY

In 1985 petitioner was convicted and sentenced to death for the first degree murder of his wife Connie Johnson. The conviction and sentence were affirmed on appeal. *State v. Johnson,* 743 S.W.2d 154 (Tenn. 1987), *cert. denied,* 485 U.S. 994. Petitioner then sought post-conviction relief which was denied by the trial court and on appeal. *Donnie E. Johnson v. State,* No. 61, 1991 WL 111130 (Tenn.Crim.App. 1991), *permission to appeal denied.* His claim of ineffective assistance of counsel was submitted directly to the Tennessee Supreme Court which also denied relief. *Donnie Edward Johnson v. State,* No. 02-S-01-9207-CR-00041, 1993 WL 61728 (Tenn. 1993). A second petition for post-conviction relief was also denied. *Donnie Edward Johnson v. State,* No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn.Crim.App. 1997).

Petitioner filed a petition for writ of habeas corpus in this Court on November 14, 1997. Summary judgment was granted in favor of respondent on all claims on February 28, 2001. *Johnson v. Bell*, No. 97-3052-DO (W.D.Tenn. Feb. 28, 2001). On appeal, the Sixth Circuit Court of Appeals denied relief. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2074 (2004). On August 10, 2004, the Tennessee Supreme Court entered an order setting petitioner's execution for November 16, 2004. On October 13, 2004, petitioner filed a motion seeking equitable relief under this Court's Article III powers and relief under Fed.R.Civ.P. 60(b).

II. LEGAL STANDARD

Petitioner is seeking a stay of a 19-year old state court judgment that has been affirmed through the standard three-tier review process. It is incumbent upon petitioner, as with any request for injunctive relief in a civil case, 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), although petitioner's burden is arguably even more stringent than that, given the history of this case and the timing of this pleading. *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, 113 S.Ct. 2922, 125 L.Ed.2d 751 (1993) (per curiam) (stay of execution requires showing of substantial grounds upon which relief might be granted). For the reasons set forth below, respondent submits that petitioner has failed to meet this burden.

III. NOTHING IN THIS CASE WARRANTS THE ISSUANCE OF A STAY OF EXECUTION.

Petitioner seeks a stay of his November 16, 2004, execution date. He bases his request, at least in part, upon the case of *Abdur'Rahman v. Bell*, Nos. 02-6547/6548, which is pending *en banc*

review before the Sixth Circuit Court of Appeals. Oral argument was held in that matter on December 3, 2003. By invoking the *Rahman* case, petitioner hopes to prove yet again,[1] that, in order to frustrate the State of Tennessee's lawful execution of its own judgment, one repeatedly affirmed by both state and federal courts, a capital prisoner need only label a document a "Rule 60(b)" motion, submit it to a federal court and obtain an indefinite stay.

Comity, not to mention rudimentary justice and the law governing the issuance of injunctions, demands more, particularly in a case like this. The Sixth Circuit's disposition in *Abdur'Rahman* will make no difference here. If the ruling in *Abdur'Rahman* confirms that Johnson's pleading is a successive habeas petition, then it cannot be initiated in the district court, and this Court is, therefore, without jurisdiction to enter a stay. But even if *Abdur'Rahman* is resolved otherwise, and Johnson's pleading is determined to be a "true" Rule 60(b) motion, he would not be entitled to a stay of execution because his motion is devoid of merit.[2]

Once a petition for writ of habeas corpus has been finally adjudicated, the state's interest in executing its judgment is all but paramount. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). *See Gomez v. United States Dist. Court for the Northern Dist. Of Cal.*, 503 U.S. 653, 654 (1992) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment

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[1]In support of his motion petitioner has attached orders granting stays in the cases of *Sedley Alley v. Bell*, No. 97-3159-D/V (W.D.Tenn.); *Philip Ray Workman v. Bell*, Nos. 94-2577-D and 03-2660-D (W.D.Tenn); and *Olen E. Hutchison v. Bell*, No. 04-5081 (6th Cir. 2004) (order denying motion to vacate).

[2]This assumes that the pendency of a Rule 60(b) motion alone is sufficient to confer jurisdiction upon this Court to issue a stay. *But see Cooey v. Bradshaw*, 216 F.R.D. 408, 620 (N.D.Ohio 2003) (attachment to dissenting opinion of Boggs, J.) (where petitioner files only a purported Rule 60(b) motion, "there is no proper proceeding before the district court that would have allowed it to enter the stay of execution").

and [a habeas petitioner's] obvious attempt a manipulation"). Accordingly, and as with any effort to secure injunctive relief – particularly one seeking to have a federal court intervene in a state's process for executing its own judgment – a litigant must demonstrate *some* likelihood of success, if not a substantial likelihood of success, in order to secure a stay of execution. *See In re Sapp, supra; Delo v. Blair, supra; Herrera v. Collins*, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring) ("[a]t some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation").

IV. THE CASES RELIED UPON BY PETITIONER DO NOT CONSTITUTE INTERVENING AUTHORITY THAT WOULD ENTITLE HIM TO RELIEF.

As discussed in more detail in the "Response in opposition to the motion for relief from judgment" filed contemporaneously with this document, petitioner's reliance on *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004) *petition for cert. pending* (Case No. 04-394); *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); and *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), *cert. denied sub nom Mitchell v. Davis*, 124 S.Ct. 2902 (2004) in support of his Rule 60(b) motion is misplaced.

The Sixth Circuit opinion in *Cone* is directly at odds with the Supreme Court's holdings in *Duncan v. Henry*, 513 U.S. 365 (1995) and *Baldwin v. Reese*, 124 S.Ct. 1347 (2004) concerning the requirements of "fair presentation." Further even if *Cone* were deemed to be correctly decided, this case is materially distinguishable and petitioner is not entitled to relief. In contrast to the bare bones statutory language that comprised the jury instruction in *Cone*, in this case petitioner's jurors were given added definitions that served to narrow the construction of the terms of the HAC aggravator. These definitions were taken directly from the Tennessee Supreme Court's opinion in *State v.*

Williams, 690 S.W.2d 517 (Tenn. 1985), which was fashioned in light of the United States Supreme Court's holdings in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Therefore, not only did Johnson's jury receive instructions which satisfied the constitutional requirements, any "implied" review" by the Tennessee Supreme Court of the constitutionality of the HAC aggravator in Johnson's case must be presumed to have included application of that narrowing construction.

Petitioner's reliance on *Banks v. Dretke* is equally misplaced. First, *Banks*, as noted in the opinion, was a pre-AEDPA case. Further, the Court noted that the defendant in that case had, in fact, alleged a *Brady* violation in the state courts, but that he was denied relief based upon his failure to present evidence in support of that claim during the state proceedings. *Banks*, 124 S.Ct. at 1271-72. In this case, petitioner did not even assert a *Brady* claim relating to an alleged "deal" with Ronnie McCoy, much less present evidence in support of such a claim. This failure is even more significant since it is clear from the record that petitioner was well aware that McCoy had not been charged with murder – either as a principal or accessory – or with any violation of his work release plan either at the time of trial or during the post-conviction proceedings. In addition, even in the federal proceedings petitioner failed to demonstrate due diligence as shown by his reliance on a 2004 declaration of William Morrow, McCoy's probation officer. Although the declaration is provided to rebut affidavits of Ronnie McCoy and the Assistant District Attorney, those affidavits were submitted in 1999, during the summary judgment proceedings in this Court. It was not until September 2004, over five years later, and after all of the normal appellate processes were complete that petitioner chose to seek out Mr. Morrow and obtain a statement. These actions serve to materially distinguish petitioner's case from *Banks*.

Finally, petitioner relies upon the Sixth Circuit's holding in *Davis v. Mitchell*. *Davis*, however, can provide no basis for a grant of relief in this case as its holding relies on a finding that the sentencing instruction violated the requirements of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Petitioner fails to note, however, that in June of this year the Supreme Court held that *Mills* stated a new rule of criminal procedure which was *not* to be applied retroactively to cases on collateral review. *Beard v. Banks*, 124 S.Ct. 2504, 2515, 159 L.Ed.2d 494 (2004). Because petitioner's case became final in 1997 when the Supreme Court denied certiorari, *Mills* does not apply and *Davis* is irrelevant.

V. PETITIONER HAS FAILED TO ESTABLISH FRAUD UPON THE COURT

Buried within his argument regarding the effect of *Banks v. Dretke*, petitioner inserts a brief allegation that the affidavits filed by respondent during the summary judgment proceedings in this case were false and therefore constituted a fraud upon the Court warranting Rule 60(b) relief. Although the Sixth Circuit has held that a fraud upon the Court may constitute grounds for such relief, petitioner has failed to establish such. At best, petitioner has established the existence of dueling affidavits that reflect differences in recollection of conversations and events that occurred 11 to 16 years ago or more. Respondent submits that such differences, without more, are insufficient to establish fraud. Moreover, Rule 60(b) specifically requires, that where reliance is based on fraud, the motion must be brought within one year. As previously noted, the affidavits of which petitioner complains were filed in 1999, and this Court's ruling was issued in February 2001. Petitioner has offered no explanation for the four-year delay in bringing his Rule 60(b) motion on the basis of the alleged fraud.

CONCLUSION

Because it does not matter whether Johnson's "Rule 60(b) motion" is in fact a second or successive petition, the Sixth Circuit's disposition in *Abdur'Rahman v. Bell* is irrelevant to these proceedings and a stay of execution is clearly unwarranted. Comity cannot countenance so cavalier a derailing of the execution of a state court judgment. Petitioner's request for a stay of execution should be denied.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the foregoing was served by first class mail, U.S. postage prepaid, upon C. Mark Pickrell, 3200 West End Avenue, Suite 500, P.O. Box 50478, Nashville, Tennessee 37205-0478; and Christopher Minton, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203-3830, on this the 4th day of November 2004.

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