IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
v.	)	**No. M1991-00019-SC-DPE-PD**
	)	**Filed December 30, 2004**
SEDLEY ALLEY.	)	

REPLY TO RESPONSE TO MOTION TO SET DATE OF EXECUTION

By virtue of the December 14, 2004, decision of the Sixth Circuit vacating the federal district court's entry of a stay of execution, the State moved on that same day that this Court set a new date of execution pursuant to Tenn.Sup.Ct.R. 12.4(E). On December 23, 2004, Alley responded to this motion, contending that this Court lacks authority to set a new execution date; he maintains that the stay issued by the district court remains "in full effect" until the Sixth Circuit issues its mandate. But Alley is incorrect; acceptance of his view would nullify the December 14, 2004, judgment of the Sixth Circuit. And one need only slightly alter the posture of this case to see the folly of Alley's position: if the stay of execution issued by the district court on May 19, 2004, had instead been issued by a panel of the Sixth Circuit, Alley would certainly not have accepted the argument that the panel's stay order was not final, and therefore of no effect, until the court's mandate was issued.

In the Sixth Circuit, the mandate is merely "the document by which [the court] relinquishes jurisdiction and authorizes the originating district court . . . to enforce the judgment of [the court of

appeals]." 6 Cir.I.O.P. 41(a).[1] It is quite true that, until the mandate issues, the judgment is not "final"; the court of appeals retains jurisdiction and may alter or modify the judgment by rehearing or rehearing en banc. But the fact that the court of appeals' judgment is not final until the mandate issues does not mean that the judgment has "no effect" until that time. Indeed, by rule in the Sixth Circuit, "[t]he effect of the granting of a rehearing en banc shall be to *vacate* the previous opinion and judgment of [the court] . . . ." 6 Cir.R. 35(a) (emphasis added). If the panel opinion and judgment had no effect, as Alley suggests, there would be no need to vacate it before rehearing. Conversely, when rehearing en banc is denied, or only partially granted, the panel opinion *remains* in effect. *See, e.g., Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 293 F.3d 242, 243 (5th Cir. 2002) (denial of rehearing en banc "leav[es] the panel opinion in effect"); *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1159 n.1 (10th Cir. 1999) (where rehearing not granted as to portions of the panel decision, "the remainder of the panel opinion remains in effect"); *Snyder v. Murray City Corp*., 159 F.3d 1227, 1228 (10th Cir. 1998) (same). *See also United States v. Carron*, 64 F.3d 713, 719 (1st Cir. 1995) (where rehearing denied as to certain issues, "the judgment will remain in effect but mandate will not issue").

Moreover, under the terms of the panel opinion in this case, there is nothing further for the district court to do in order to enforce the Sixth Circuit's judgment. The Sixth Circuit *itself* stated in its decision: "[T]he entry of the stay of execution is VACATED." *Alley v. Bell*, __ F.3d __, No. 04-5596, slip op., p. 9 (6th Cir. Dec. 14, 2004) (emphasis in original). And the judgment that accompanies that decision likewise provides: "[I]t is ordered that the entry of the stay of execution

[1]The mandate issues 21 days after the entry of judgment, but the timely filing of a petition for rehearing will stay the mandate, and a party may apply for a further stay of the mandate pending certiorari review by the United States Supreme Court. 6 Cir.I.O.P. 41(a)-(c). *See* Fed.R.App.P. 41.

is VACATED . . . ." (copy attached). The court did not, for example, direct or instruct the *district court* to vacate the stay. *Cf., e.g., Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (reversing judgment of district court and remanding "with instructions to vacate or modify the preliminary injunction").[2] If it had, Alley would likely have the better of the argument, because the stay could not be vacated until jurisdiction was returned to the district court. But, instead, because the Sixth Circuit itself vacated the stay, the mere fact that the mandate has not yet issued means nothing; once "the panel issued a decision vacating the district court's stay . . . , [Alley became] *immediately* eligible for execution." *Cooey v. Bradshaw*, 338 F.3d 615, 617 (6th Cir. 2003) (Gilman, J., concurring) (emphasis in original).[3]

Of course, to conclude that this Court is not *prohibited* from setting a new date of execution until the Sixth Circuit's mandate issues and the decision thus becomes "final" does not mean that this Court may not *elect* to wait for the issuance of the mandate before setting a new date. But the State would urge this Court not to do so. Without a new execution date, Alley has no incentive to act expeditiously in his pursuit of further review of the panel decision, either from the en banc court

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[2]The Sixth Circuit did remand Alley's case to the district court, but only for the "limited purpose" of allowing him to either withdraw his initial motion or allow it to be transferred to the Sixth Circuit as a successive habeas petition.

[3]The stay of execution at issue here differs materially from a stay of judgment or order issued "pending appeal," *see* Fed.R.App.P. 8(a), which *would* continue until the mandate issued because the appeal would remain pending until that time. Here, though, the appeal was from the stay order itself, and the State moved affirmatively in the appeals court to vacate that stay. Though Alley points to *Belyeu v. Johnson*, 82 F.3d 613 (5th Cir. 1996), in support of his position, that case did not involve "similar circumstances;" it involved a stay of execution issued "in aid of the appeal" from the denial of habeas relief, *id.*, 82 F.3d at 615, and not an appeal from, or a motion to vacate, the order granting the stay itself. *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002), despite Alley's assertion that it presented an "identical" situation, is likewise inapposite. *See Abdur'Rahman v. Bell*, 535 U.S. 981 (2002) (stay of execution granted "pending disposition of the petition for writ of certiorari;" if petition is granted, stay shall terminate "upon the sending down of the judgment").

of appeals, or the Supreme Court.[4] And experience shows that, left to proceed in the normal course, it may take upwards of a year, or more, for the Sixth Circuit's mandate to issue.[5] But it has already been a year since this Court set Alley's original execution date and nearly seven months since that date passed. Electing the course advocated by Alley, which in all likelihood would entail waiting yet another year for the string of post-judgment appellate proceedings in this case to play out, would serve only to perpetuate the vicious cycle that plagues capital cases — one in which execution dates are repeatedly set, stayed, and delayed, thus leading to endless litigation that frustrates enforcement of this Court's lawful orders. The State's motion to reset the date for execution of petitioner's sentence should be granted.

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[4]Alley has already sought and obtained an extension of time in which to file a petition for rehearing in the Sixth Circuit. Alley argues that the State is "judicially estopped" from seeking a new execution date because of its assertion, made seven months ago and well before the Sixth Circuit's en banc disposition of *In re Abdur'Rahman*, __ F.3d __, Nos. 02-6547/6548 (6th Cir. Dec. 13, 2004), that the en banc court of appeals would have "ample opportunity" to review the panel's decision in this case; but it has now been more than two weeks since the panel issued its decision here, and Alley himself appears to be in no great rush to present the en banc court with that opportunity.

[5]Alley's case illustrates the point: a panel of the Sixth Circuit issued its judgment affirming the denial of his habeas corpus petition on October 3, 2002, *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002); rehearing was denied on December 20, 2002; the Supreme Court denied certiorari on October 6, 2003, *Alley v. Bell*, 540 U.S. 839 (2003); and the Sixth Circuit mandate issued on October 27, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by first class mail, postage prepaid, and by facsimile, to Paul Bottei, at 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the _____ day of December, 2004.

JOSEPH F. WHALEN
Associate Solicitor General