

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

In Re:)
) Shelby County
) Original Appeal No. 2
SEDLEY ALLEY) M1991-00019-SC-DPE-DD
) **Filed December 19, 2003**

RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE
AND/OR REQUEST FOR CERTIFICATE OF COMMUTATION

Sedley Alley respectfully moves this Court to deny the state's motion to set an execution date and/or to issue a certificate of commutation. The State's motion to set execution date should be denied for the following reasons:

1. Sedley Alley still has federal habeas corpus proceedings pending before the United States District Court for the Western District of Tennessee. Alley v. Bell, W.D.Tenn.No. 97-3159-DV. Specifically, in those habeas corpus proceedings, the District Court is considering Sedley Alley's motion for relief from judgment under Fed.R.Civ.P. 60(b), a motion which establishes that Sedley Alley has been denied a full and fair consideration of his federal habeas corpus petition. Tennessee. Alley v. Bell, W.D.Tenn.No. 97-3159-DV, R. 118 (Motion For Relief From Judgment).

2. In its motion to set execution date, the State argues that Alley's 60(b) motion is a second petition for writ of habeas corpus outside the three-tiered federal habeas corpus process. That assertion is not established law. Rather, in *Abdur'Rahman v. Bell*, 6th Cir. Nos. 02-6547, 02-6548, the *en banc* United States Court of Appeals for the Sixth Circuit will shortly decide whether a motion for relief from judgment is outside the three-tiered process (as being a second habeas petition) or whether such a motion is part of the initial habeas proceedings. In light of the Sixth Circuit's *en banc* reconsideration of *Abdur'Rahman v. Bell*, Judge Bernice Donald has stayed proceedings in Sedley Alley's habeas case. See Alley v. Bell, No. 97-3159-DV (W.D.Tenn. Nov. 3,

2003)(Order), R. 122.

3. The Sixth Circuit's decision in *Abdur'Rahman* and Judge Donald's decision on Sedley Alley's case will answer the operative question whether Sedley Alley has, in fact, completed the "three-tier" federal habeas corpus process discussed in Tenn.S.Ct.R. 12.4(A).

4. With Sedley Alley's Rule 60(b) motion pending in federal court, and with decision on that motion being stayed until *Abdur'Rahman* is decided, the state simply cannot claim that Sedley Alley has completed the three-tier federal habeas corpus process, for he has not.¹

5. Rather, because Sedley Alley's Rule 60(b) motion is meritorious, Sedley Alley has not completed the three-tier process, because he still has proceedings on his initial habeas petition pending before the United States District Court and he is entitled to reopen his case.

6. Given pending habeas corpus litigation in the federal courts, therefore, an execution date should not be set because Sedley Alley has simply not "exhausted all judicial remedies." Workman v. State, 22 S.W.3d 807, 808 (Tenn. 2000). Sedley Alley has *not* "availed himself of all possible procedures and venues in an effort to seek judicial relief from his sentence of death." Workman, 22 S.W.3d at 814 (Barker, J., concurring). Sedley Alley's sentence has *not* "been reviewed to the fullest extent allowable under state and federal procedural guidelines." Workman, 22 S.W.3d at 816 (Birch, J., concurring and dissenting). The mere fact that Judge Donald has stayed

¹ See e.g., Pioneer Investment Services Co. v. Brunswick Associates, 507 U.S. 380, 393, 113 S.Ct. 1489, 1497 (1993)(60(b) relief reopens federal judgment); Boyko v. Parke, 259 F.3d 781, 787 (7th Cir. 2001)(Rule 60(b) relief reinstated initial habeas petition); Fobian v. Storage Technology Corp., 164 F.3d 887, 890 (4th Cir. 1999)("When a district court grants a Rule 60(b) motion, it must necessarily vacate the underlying judgment and reopen the record."); State Farm Mutual Automobile Insurance Co. v. Red Lion Medical Center, 57 Fed.Appx. 77, 78 (3d Cir. 2003)(granting of motion for relief from judgment vacates judgment and leaves case pending before United States District Court); Parks v. Collins, 761 F.2d 1101, 1103-1104 (5th Cir. 1985).

proceedings demonstrates that federal review of Sedley Alley's death sentence has not concluded. Thus, the State's motion must be denied.²

7. Likewise, as a matter of respect for the federal courts, it is appropriate to deny the state's motion: This Court should abstain from acting on any motion to set an execution date until Judge Donald and the federal courts can properly resolve the significant issues before them – which they fully intend to resolve, but cannot resolve until *Abdur'Rahman* is finally decided.

8. Indeed, abstention was the very course of action taken by this Court when the federal courts were faced with significant federal issues involving the constitutionality of Tennessee's prison system. Given the complexity of the issues, this Court wisely and appropriately "ordered abstention by the state courts pending federal resolution" of the issues. See Grubbs v. Bradley, 552 F.Supp. 1052, 1057 (M.D.Tenn. 1982). Likewise, just last month, this Court declined to answer questions certified by the Sixth Circuit in House v. Bell, No. M2003-01952-SC-S23-CQ (Tenn. Nov. 24, 2003), confirming once again the appropriateness of this Court's non-interference with pending federal capital habeas corpus proceedings.

9. With an *en banc* federal appeals court now considering issues vital to the resolution of Sedley Alley's case, and with a United States District Court doing the same, abstention is appropriate here – just as it was in Grubbs and House, where significant and complicated federal issues awaited (and await) resolution by the federal courts. See also United States v. County of Cook,

² With this Court having held in *Workman* that an execution date may be set only when all available judicial remedies have been exhausted, and with Rule 12.4 requiring proof of the completion of three-tier process in federal court, it would be a violation of the due process and equal protection clauses of the Fourteenth Amendment to set an execution date in light of *Workman* and Rule 12.4 where Sedley Alley's case does not fall within the scope of their holdings. See e.g., Hicks v. Oklahoma, 447 U.S. 343 (1980).

1997 U.S. Dist. Lexis 15993 (N.D. Ill. 1997) (in consideration of ongoing federal proceedings on same matter, state abstained from acting).³

10. For now, the deliberative process of the federal courts in Sedley Alley's case should not be short-circuited by a premature execution date.

11. In addition, there are significant questions about Sedley Alley's competence to be executed. Sedley Alley is not presently incompetent to be executed under the standard of Van Tran v. State, 11 S.W.3d 118 (Tenn 2000), which requires a threshold showing by a petitioner "that he or she is presently incompetent." Id. at 269. Nevertheless, Dr. George Woods, M.D., makes clear that at or around the time of any proposed execution, it is very likely that Sedley Alley's ability to grasp reality would be compromised, given the terrible trauma Sedley Alley has suffered in the past from surgical procedures, and the similar trauma to be inflicted upon him before and during the state's proposed execution. See Exhibit 1, pp. 3-7 (Affidavit of George Woods, M.D.). Sedley Alley also suffers extensive seizure activity. Id., pp. 2-3. Thus, despite the failure to show present incompetence, further proceedings should be ordered under Ford v. Wainwright, 477 U.S. 399 (1986).

12. Finally, in light of this Court's intervening decision in State v. Carter, 114 S.W.3d 895 (Tenn. 2003), the state's motion should be denied and/or this Court should grant Sedley Alley a certificate of commutation, because "there are extenuating circumstances attending the case." See Workman v. State, 22 S.W.3d at 808; Tenn. Code Ann. §40-27-106.

13. Specifically, Sedley Alley must not be executed because, at trial, he was denied his

³ Further, with the United States District Court considering Sedley Alley's case and having stayed those proceedings, it would be improper for a state court to set an execution date. Compare 28 U.S.C. §2251.

fundamental right (under the Eighth and Fourteenth Amendments and Article I § 16 of the Tennessee Constitution) to have the jury decide his fate based on full consideration of *all* mitigating evidence, including extensive mitigating evidence of his ongoing mental illness.

14. This Court's recent decision in State v. Carter, 114 S.W.3d 895 (Tenn. 2003) makes absolutely clear that Sedley Alley's death sentence cannot be carried out. Because *Carter* is "a legal basis that plainly call[s] into question the constitutionality of the [death] sentence[]" and this legal ground did not exist at the time of the direct appeals," relief and commutation are warranted. Workman, 22 S.W.3d at 816 n. 1 (Birch, J., concurring and dissenting), citing Collins v. State, 550 S.W.3d 643, 649 (Tenn. 1977).

15. Indeed, Sedley Alley has always asserted that he has been denied his fundamental right to have the sentencing jury consider mitigating evidence, because the trial court prevented the jury from considering videotaped interviews (including under hypnosis) which showed that he suffers severe mental illness and was severely mentally ill at the time of the offense. See Tr. 1776 (trial court's exclusion of videotapes at sentencing proceeding); Defendant's Trial Exhibits B (April 2, 1986 Session, Tr. 1032); C (April 3, 1986 session, Tr. 1033), D (May 5, 1986, Tr. 1034); E (January 23, 1987, Tr. 1035); F (January 21, 1987 session, Tr. 1037).⁴ Not only do those interviews show mitigating evidence of Sedley Alley in a dissociative state and not in control of his own faculties, but they also supported the defense that when the killing occurred, Sedley Alley could not appreciate the wrongfulness of his actions and lacked the capacity to conform his conduct to the

⁴ This mitigating evidence is contained in the record and is therefore available for review by this Court, which is obligated to review the entire record when evaluating a request for a certificate of commutation. See e.g., Workman, 22 S.W.3d at 813 (Barker, J., concurring).

requirements of law.⁵ Indeed, included in those interviews is compelling mitigating evidence about Sedley Alley's mental illness and the nature of the offense, which shows that Sedley Alley should not be executed:

(a) During the interviews, Sedley Alley actually dissociated for the first time in a clinical setting – and those signs of mental illness were fully recorded on videotape.⁶ Actual visual proof that Sedley Alley suffers dissociation and mental illness is highly relevant mitigating evidence which the jury was entitled to see and review when deciding whether Sedley Alley should live or die;⁷

(b) Also, during the interviews, Dr. Allen Battle, Ph.D., specifically probed the circumstances of the offense. As a result, the interviews contain the *only* direct evidence of Sedley Alley's mental state at the time of the killing. This critical mitigating evidence of

⁵ Based on his review of the videotapes, Dr. Willis Marshall, M.D. – a state-paid doctor at Middle Tennessee Mental Health Institute – concluded that Sedley Alley was insane at the time of the offense. Tr. 1110.

⁶ This is highly significant, because Dr. Willis Marshall, M.D., diagnosed Sedley Alley as suffering dissociative identity disorder, and such a diagnosis can only be made if a clinician has seen an individual in a dissociative state. Even the prosecution's expert agreed on this. Tr. 1057, 1061, 1063 (William R. Gentry). As Dr. Marshall explained, this disorder can be brought on by physical or sexual abuse suffered at an early age, and Sedley Alley suffered mental abuse from his father, as well as repeated urinary tract infections which were treated in a manner which was sexually abusive. Tr. 1096 (Dr. Marshall).

⁷ In fact, before the hypnosis sessions, Dr. Marshall believed that Sedley Alley was not insane, but that he suffered from atypical psychosis with dissociative features. Tr. 1119 (Dr. Marshall). Dr. Marshall later believed that the proper diagnosis might be malingering. Tr. 1124. But when those diagnoses had been made, Dr. Marshall had never seen another personality emerge in a clinical setting. Tr. 1124-1125. Because the hypnosis sessions showed alternate personalities, Dr. Marshall was then able to diagnose Sedley Alley as suffering dissociative identity disorder and being insane at the time of the offense. The videotape sessions were thus critical to the jury's decision in this case.

Sedley Alley's mental state establishes that Sedley Alley was not in control of his own faculties. Rather, as is evident from the videotapes, Sedley Alley was insane. This, too, provides compelling evidence in support of a life sentence which the jury was entitled to see: It shows "the mental state with which the defendant commits the crime." Tison v. Arizona, 481 U.S. 137, 156, 107 S.Ct. 1676, 1687 (1987).

16. Despite the fact that the videotapes contain mitigating evidence which was unconstitutionally withheld from the jury, this Court initially denied relief. This Court believed that the evidence on the videotapes could be excluded from the sentencing jury. State v. Alley, 776 S.W.2d 506, 516 (Tenn. 1989). State v. Carter, *supra*, makes clear that this Court's denial of relief is without legal basis under Tennessee law and the Eighth and Fourteenth Amendments under Lockett v. Ohio, 438 U.S. 586 (1978) and Skipper v. South Carolina, 476 U.S. 1 (1986).

17. In *Carter* (as here), the trial court excluded mitigating evidence at the sentencing phase of a capital trial. In *Carter*, based on a hearsay objection, the trial court ultimately excluded three cards, two letters, and six poems written by Carter to his pastor. Contending that the letters, poems, and cards contained mitigating evidence – evidence on which a jury could spare Carter's life – Carter asserted that he had been denied his fundamental Eighth Amendment right to have the jury weigh all relevant mitigating evidence. This Court unanimously agreed that the mitigating evidence was admissible under Tennessee law.

18. As this Court unanimously explained in *Carter*, Tennessee law "provides for liberal admission of mitigation evidence in the penalty phase" and allows admission of any "evidence tending to establish any mitigating factors":

Mitigating evidence includes 'any aspect of a defendant's character or record

and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Both the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the Tennessee Constitution require the sentencing body in capital cases to consider mitigating evidence. [citations omitted]. Consistent with these constitutional dictates, Tennessee Code Annotated section 39-13-204(c) *provides that evidence tending to establish any mitigating factors is admissible in a capital sentencing hearing*. Such mitigating factors need not be specifically listed in the statute. Tennessee Code Annotated section 39-13-204(j)(9) provides for the admissibility of ‘any other mitigating factor which is raised by the evidence’ Tennessee Code Annotated section 39-13-204 thus *provides for liberal admission of mitigation evidence in the penalty phase and ensures that a jury will have as much information as possible in making its sentencing determination*.

Carter argues that the proffered correspondence was relevant as a ‘potential basis upon which a juror could decline to impose the death penalty’ and should have been admitted into evidence. Cauthern, 967 S.W.2d at 738-39. We agree. It is well established that ‘the sentencer may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence.’ *Skipper v. South Carolina*, 476 U.S. 1 (1986)(quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)). The writings that Carter sought to introduce were probative of his character. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989)(holding that to ensure reliability that death is the appropriate punishment the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant’s background and character or the circumstances of the crime). Accordingly, we conclude that the writings that Carter sought to introduce into evidence were relevant mitigating evidence. Thus it was error for the trial court to exclude the proffered correspondence.

State v. Carter, 114 S.W.3d at 905 (emphasis supplied).

19. There is absolutely no distinction between *Carter* and *Alley*. The code section cited in *Carter* (Tenn. Code Ann. §39-13-204(c)(1989)) is identical to the Tennessee code section existing at the time of Sedley Alley’s trial. See Tenn. Code Ann. §39-2-204(c)(1982). Under Tennessee law, a defendant is entitled to admission of mitigating evidence “regardless of its admissibility under the rules of evidence.” Tenn.Code Ann. §39-13-204(c); Tenn.Code Ann. §39-2-204(c)(1982). Carter had mitigating evidence of character which was excluded. Sedley Alley had mitigating evidence of mental illness which was excluded – evidence which was clearly relevant to his background and the

circumstances of the crime under the Eighth Amendment and Fourteenth Amendments and Tennessee law. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Carter, 114 S.W.3d at 905. The fact that Dr. Willis Marshall relied on the videotapes to diagnose Sedley Alley as insane fully confirms that the evidence was relevant and probative to Sedley Alley's mental state and the appropriate punishment. Thus, the evidence was fully admissible under Tennessee law and the Eighth Amendment.⁸

20. Consequently, in light of *Carter*, Sedley Alley was denied his rights under the Eighth and Fourteenth Amendments and Tennessee law. He was denied a fair sentencing hearing. The videotapes were fully admissible under Tennessee law (Tenn.Code Ann. §39-2-204(c)(1982)), and there was no legitimate basis for preventing the jury from viewing the tapes when deciding Sedley Alley's fate. Yet the judge excluded the tapes, and the jury was prevented from hearing the most compelling evidence showing why Sedley Alley should live – he suffers serious mental illness.⁹

21. While it is true that this Court in *Carter* held the Eighth Amendment violation to be harmless, the error here (unlike *Carter*) simply was not harmless. Indeed, the crux of the entire

⁸ To allow Sedley Alley's execution in light of *Carter* would also violate due process and equal protection under the Fourteenth Amendment, because Sedley Alley has been denied the application of the law given to Carter.

⁹ Even the prosecution's experts relied the videotapes in forming their expert opinions about mental state, which thus establishes the relevance of the evidence on those tapes to any determination of Sedley Alley's mental state and his entitlement to live. See e.g., Tr. 1750 (William Gentry, Ph.D.: his opinion was that there was "no indication of a multiple personality" from the hypnosis sessions); Tr. 1427 (Sam Craddock, M.D.: "nothing" he had "seen regarding hypnotic sessions" changed his pre-hypnosis opinion that Sedley Alley did not suffer multiple personality); Tr. 1510, 1519 (Deborah Richardson: she reviewed sessions but they did not change her opinion that Sedley Alley did not suffer multiple personality); Tr. 1565 (William Bogan Brooks: videotapes did not change his opinion). The fact that the prosecution's experts relied on the evidence in the videotapes confirms that there was no valid basis for preventing the jury from considering that same evidence when making their life or death decision.

dispute before the jury at the guilt and sentencing phases concerned the videotapes: The entire case focused on Sedley Alley's mental illness and mental state. Closing arguments focused on whether Dr. Willis Marshall's diagnosis of insanity was correct,¹⁰ with the prosecution acknowledging that the videotapes were the focus of the entire dispute: "The only thing that changed was the hypnosis session, and now [Dr. Marshall] calls it multiple personality disorder."¹¹ While the prosecution took aim at the sessions and Dr. Marshall's opinion,¹² the defense argued that Sedley Alley suffered multiple personality disorder, as confirmed by Dr. Marshall's expert opinion,¹³ and maintained that the prosecution's claims to the contrary were wrong.¹⁴ With Sedley Alley being unable to present the critical mental state evidence in the videotapes to establish his defense, he was unable to defend Dr. Marshall's opinion by showing the videotapes to the jury. He was also unable to use the videotapes to effectively challenge the contrary opinions from the prosecution's experts. Not surprisingly, he was then convicted and sentenced to death.

22. Sedley Alley was never allowed to prove his case to the jury. He was never able to give the jury a full understanding why he deserves to live. This was fundamentally unfair under the Eighth and Fourteenth Amendments. See Lockett v. Ohio, 438 U.S. 586 (1978).

23. The question is whether "*at least one juror would have struck a different balance*"

¹⁰ The prosecution admitted that the existence of multiple personality was "the issue that we're here about." Sent. Tr. 60.

¹¹ Sent.Tr. 69.

¹² See e.g., Sent.Tr. 120, 122, 125.

¹³ Sent.Tr. 91-95.

¹⁴ Sent.Tr. 96-99.

between mitigating and aggravating circumstances had all twelve jurors considered the excluded mitigating evidence. Wiggins v. Smith, 539 U.S. ___, ___, 123 S.Ct. 2527, 2543 (2003)(emphasis supplied). Clearly, one juror could have voted for life – and thus spared Sedley Alley’s life – had the jurors been allowed to see the videotapes as demanded by Tennessee law. This is especially true where there were only two aggravating circumstances, and where one of those circumstances (“heinous, atrocious, or cruel”) was unconstitutionally vague. See Barber v. Tennessee, 513 U.S. 1184, 115 S.Ct. 1177 (1995)(Stevens, J., concurring in the denial of certiorari); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995). Thus, Sedley Alley’s death sentence cannot stand.

24. In light of the intervening decision in *Carter*, therefore, this Court should deny the state’s motion to set an execution date and/or issue a certificate of commutation.

CONCLUSION

The State’s motion should be denied and/or this Court should issue a certificate of commutation.

Respectfully Submitted,

* Paul R. Bottei (17036)
Attorney Of Record
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

* METHOD OF NOTIFICATION

The attorney of record should be notified of and orders or opinions via facsimile.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via first-class mail upon counsel for Respondent, Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243, this ____ day of December, 2003.

EXHIBIT 1