

05A1208

No. 05A1041

Supreme Court, U.S.
FILED
JUN 26 2006
CLERK

In the
SUPREME COURT of the UNITED STATES

SEDLEY ALLEY,

Applicant,

v.

**WILLIAM R. KEY, Clerk, Criminal Court of the
Thirtieth Judicial District of Tennessee,**

and

**WILLIAM L. GIBBONS, District Attorney General of the
Thirtieth Judicial District of Tennessee,**

Respondents.

**RESPONSE IN OPPOSITION TO
MOTION FOR STAY OF EXECUTION**

On March 29, 2006, the Tennessee Supreme Court entered an order setting Sedley Alley's execution for the 1985 kidnapping, aggravated rape and murder of Suzanne Collins for May 17, 2006. On May 16, 2006, Alley applied to this Court for a stay of execution pending disposition of a petition for writ of certiorari to the Sixth Circuit Court of Appeals from its decision affirming the district court's judgment dismissing a suit filed under 42 U.S.C. § 1983, in which Alley had sought injunctive

relief in the form of access to certain evidence introduced in his criminal trial for purposes of DNA testing.

That same day, the Governor of Tennessee issued an executive reprieve from execution of the death sentence effective until May 31, 2006.¹ Respondent thereafter filed responses to the petition for writ of certiorari and motion for stay of execution on May 26, 2006. *See also Alley v. Key*, No. 05-10958. As to the motion for stay, respondent argued that, because the May 17, 2006, execution date had passed and no new execution date set, the application for a stay should be denied as moot.

On June 2, 2006, following expiration of the governor's reprieve, the Tennessee Supreme Court re-set Alley's execution for June 28, 2006. On June 26, 2006, petitioner filed a second motion for stay of execution, identical to the first application in all respects except as to the updated execution date.

As set forth in respondent's brief in opposition to the petition for writ of certiorari, the Sixth Circuit correctly determined that there is no constitutional right to the post-conviction DNA analysis petitioner seeks.² Given the absence of any

¹A copy of the governor's reprieve was previously provided to this Court as an attachment to respondent's initial response to petitioner's motion for stay of execution.

²Respondent also questioned the authority of a federal district court to dispossess a state court of evidence in its custody and over which it has continuing jurisdiction, *see Penn Genn. Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U.S.

persuasive authority in the decisions of this Court or any circuit court of appeals for the existence of a constitutional entitlement to post-conviction DNA analysis of state evidence, there is no reasonable probability that this Court would consider the underlying issue in this matter sufficiently meritorious for a grant of certiorari, let alone a significant possibility of reversal of the lower court's decision. Thus, a stay of execution is not warranted.

Respondent further notes that petitioner's continuing allegation of "withheld evidence of innocence" has no basis in this proceeding. There has been no determination either by the courts below or in any other judicial proceeding that any material evidence related to petitioner's state judgment of conviction was suppressed by the State of Tennessee.³ Petitioner's prosecutorial misconduct claim is not

189, 195 (1935), and that petitioner's claim for relief is time-barred even if cognizable under § 1983.

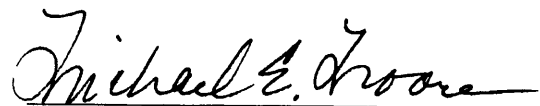
³Indeed, despite repeating his allegations of prosecutorial misconduct in virtually every filing related to his efforts to obtain DNA analysis, petitioner has yet to initiate proper judicial proceedings to remedy the alleged wrongdoing by officials of the State of Tennessee, choosing instead to raise the claim for the first time in a motion for relief from the judgment in his original habeas corpus proceeding under Fed. R. Civ. P. 60(b) — dismissed by the district court as an improper attempt to circumvent AEDPA's pre-clearance requirements for successive habeas applications under 28 U.S.C. § 2244(b)(2) — and then bootstrapping the same unadjudicated allegation — asserted as if it were "fact" — to an eleventh-hour request for DNA analysis under 42 U.S.C. § 1983.

properly considered in connection with his application for stay of execution or the petition for writ of certiorari in *Alley v. Key*, No. 05-10958.

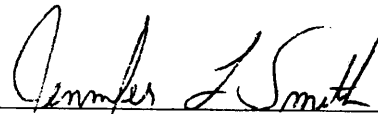
For these reasons and for the reasons set forth in respondent's brief in opposition to the petition for writ of certiorari, petitioner's motion for stay of execution should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Tennessee Attorney General



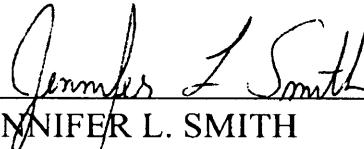
MICHAEL E. MOORE
Solicitor General



JENNIFER L. SMITH
Associate Deputy Attorney General
Counsel of Record
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid, to Paul R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 26th day of June, 2006.



JENNIFER L. SMITH
Associate Deputy Attorney General