

No. _____

DEATH PENALTY CASE
Execution Scheduled: June 28, 2006, at 1:00 a.m.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY
Petitioner-Appellee

v.

RICKY BELL
Respondent-Appellant

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

MOTION TO VACATE STAY
OF EXECUTION OF DEATH SENTENCE

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INTRODUCTION

Counsel for the State of Tennessee was advised that, at 10:00 p.m. on June 27, 2006, Sedley Alley will present an original petition for writ of habeas corpus under 28 U.S.C. §2241(a), § 2241(b), and § 2241(c)(3), with an accompanying motion for a stay of his June 28, 2006, execution and motion for discovery, to Senior Circuit Judge Gilbert S. Merritt, at his home in Nashville, Tennessee. Accompanying service of the petition and motions, counsel for the State received a handwritten note, signed by Alley's counsel, Paul Bottei, advising that "Judge Merritt will be available to hear from the parties at his home at 10:00 p.m. We [counsel for Sedley Alley] will be there by 10:00 p.m." (Attachment 1) At approximately 11:00 p.m., counsel for the State was informed that Judge Merritt had entered a stay of execution. Because the "procedure" invoked in this case is highly irregular and in brazen violation of every rule that applies to this situation, and because Judge Merritt's stay order is unlawful, this Court should immediately vacate the stay of execution.

Under Fed. R. App. P. 22(a), "[a]n application for a writ of habeas corpus must be made to the appropriate district court. **If made to a circuit judge, the application must be transferred to the appropriate district court.**" (Emphasis added) *See also* 6th Cir. R. 22(c)(5) (emergency motions to be filed with clerk of Court rather than with an individual judge). Moreover, because Senior Judge Merritt was not a member of the panel assigned to this case (members of which are presumably available to entertain any

emergency application Alley wishes to file), he is not authorized to issue a stay of execution under 6 Cir. I.O.P. 22. In addition, under 6 Cir. I.O.P. 22(a)(1), the panel originally assigned a death penalty case shall also be assigned "all incidental and collateral matters, including any separate proceeding questioning the conviction or sentence." This matter should have been directed to the panel.

Under Fed. R. App. P. 27(c), "[a] court of appeals may provide by rule or by order in a particular case may act on any motion or class of motions." By rule, this Court has removed the class of motions and petitions submitted by Sedley Alley from presentation to a single judge.

Furthermore, an original petition for writ of habeas corpus would be prohibited in any event under 28 U.S.C. § 2244 as a second or successive habeas corpus application subject to the pre-clearance requirements of this Court under § 2244(b)(2). Alley has neither sought nor received authorization from this Court to proceed on his petition in the absence of such. The fact that Alley has styled his petition as an application under § 2241 is of no moment. Federal habeas relief to state prisoners challenging the legality of their confinement pursuant to the judgment of a State court is necessarily limited by the requirements of AEDPA, regardless of the label a litigant chooses to attach to pleadings filed in the federal district court. *Felker v. Turpin*, 518 U.S. 651, 662 (1996); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Greene v. Tenn. Dept. Of Corr.*, 265 F.3d 369, 371-72 (6th Cir. 2001); *see also Greenwalt v. Stewart*, 105 F.3d 1287 (9th Cir. 1997)

("The Supreme Court has instructed us that the authority of the federal courts to grant habeas relief to state prisoners under § 2241 is limited by 28 U.S.C. § 2254.")¹

And, 28 U.S.C. § 2244(b)(3)(B) plainly provides:

A motion in the court of appeals for an order authorizing the district court to consider a second or successive application **shall be determined by a three-judge panel of the court of appeals.** (Emphasis added)

There is simply no authority for Senior Circuit Judge Merritt to entertain any original habeas petition in this matter, let alone enter a stay of execution.

¹And, even assuming an original application were appropriate, it would not be properly filed with a Senior Circuit Judge in any event. *See also* 6 Cir. R. 22 (all applications for habeas corpus relief are to be filed in the clerk's office and will be referred to a panel of this Court in accordance with approved operating procedures of this Court)

CONCLUSION

This Court should enter an order vacating the stay of execution issued by Senior Circuit Judge Merritt.

Respectfully submitted,
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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 Henry Martin, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this, the 27th day of June, 2006.



JENNIFER L. SMITH
Associate Deputy Attorney General