Nos. 05-11704, 05A1213

---

IN THE
SUPREME COURT OF THE UNITED STATES

---

SEDLEY ALLEY,
Petitioner,

v.

GEORGE LITTLE, et al.,
Respondents.

---

ON MOTION FOR STAY OF EXECUTION AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

# RESPONDENTS' BRIEF IN OPPOSITION

---

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN*
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3499

* *Counsel of Record*

## CAPITAL CASE

## QUESTIONS PRESENTED BY PETITIONER

1. When does a condemned inmate's 42 U.S.C. § 1983 challenge to a proposed execution method become ripe under Article III?

2. What constitutes undue delay in filing a 42 U.S.C. § 1983 challenge to a proposed execution method?

## TABLE OF CONTENTS

## OPINIONS BELOW

The June 24, 2006, decision of the Sixth Circuit Court of Appeals affirming the district court's dismissal of petitioner's complaint is unreported. (Pet.App.5) The memorandum opinion of the district court dismissing petitioner's complaint is unreported. (Pet.App.4) The May 12, 2006, order of the Sixth Circuit Court of Appeals vacating the district court's preliminary injunction and stay of execution is unreported. (Pet.App.2) The May 11, 2006, memorandum opinion of the district court issuing a preliminary injunction and stay of execution is unreported. (Pet.App.1)

## JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT

Petitioner, Sedley Alley, was convicted in 1987 of the premeditated murder, kidnapping, and aggravated rape of nineteen-year-old Suzanne Marie Collins; he was sentenced to death for the murder.[1] Petitioner's convictions and sentences were affirmed by the Tennessee Supreme Court on direct appeal. *State v. Alley*, 776 S.W.2d 506 (1989). Post-conviction relief was also denied in the state court. *See Alley v. State*, 882 S.W.2d 810 (Tenn.Crim.App. 1994).

Petitioner filed a petition for federal habeas corpus relief, which was denied on November 4, 1999. *Alley v. Bell*, 101 F.Supp.2d 588 (W.D.Tenn. 2000). This Court

[1]Petitioner was also sentenced to consecutive terms of forty years for each of his other offenses.

affirmed the judgment of the district court on October 3, 2002. *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002). The United States Supreme Court denied certiorari on October 6, 2003. *Alley v. Bell*, 540 U.S. 839 (2003). On January 16, 2004, the Tennessee Supreme Court ordered that petitioner's sentence be executed on June 3, 2004.

Lethal injection became the established method of executing death sentences in Tennessee in 2000. *See* Tenn.Code Ann. § 40-23-114; 2000 Tenn.Pub.Acts, ch. 614, § 1.[2] The state's lethal injection protocol was utilized in executing the sentence of another Tennessee inmate, Robert Glenn Coe, in April 2000. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 301 (Tenn. 2005), *cert. denied*, __ S.Ct. __, 2006 WL 384681 (May 22, 2006); *see also* R. 1, Complaint, ¶¶ 46, 72. In July 2002, yet another Tennessee inmate, Abu-Ali Abdur'Rahman, challenged the state's lethal injection protocol, and in June 2003, a state trial court issued a ruling in that case that set forth the details of the state's lethal injection protocol. *See Abdur'Rahman*, 181 S.W.3d at 300-304; *see also* R. 1, Complaint, ¶ 3 n.1, ¶¶ 65, 80.

On May 19, 2004, fifteen days prior to the scheduled execution of petitioner's sentence, the District Court for the Western District of Tennessee stayed the execution on the basis of plaintiff's filing of a motion under Fed.R.Civ.P. 60(b) on May 12, 2004. On November 28, 2005, the district court denied petitioner's motion, and on March 22, 2006, the district court denied petitioner's motion to alter or amend. *See generally Alley*

---

[2]Lethal injection had been an available method of execution in Tennessee, and the established method for certain prisoners, since 1998. *See* 1998 Tenn.Pub.Acts, ch. 982, §§ 1-3.

*v. Bell*, No. 05-10960 (U.S.), *petition for cert. filed* (May 16, 2006). On March 29, 2006, the Tennessee Supreme Court re-set the execution of plaintiff's sentence for May 17, 2006.

On April 11, 2006, more than two and a half years after certiorari had been denied in his habeas case, more than two years after an execution date had first been set by the Tennessee Supreme Court, and only thirty-six days before the scheduled execution, petitioner filed a complaint under 42 U.S.C. § 1983 challenging the state's lethal injection protocol and seeking declaratory and injunctive relief. (R. 1, Complaint). On May 4, 2006, he moved for a preliminary injunction. (R. 23, Motion). On May 11, 2006, the district court granted the motion for preliminary injunction and stayed petitioner's execution pending a decision by this Court in *Hill v. McDonough*, No. 05-8794 (U.S.). On May 12, 2006, on motion of the respondents, the Sixth Circuit vacated the district court's order, holding, *inter alia*, that even assuming *Hill* were decided in petitioner's favor, *i.e.*, that § 1983 was a proper vehicle for petitioner's claims, he had unnecessarily delayed in bringing those claims. "[Petitioner] was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last-minute complaint." (Pet.App.2, p. 4). On May 16, 2006, however, the Governor of Tennessee granted petitioner a fifteen-day reprieve on unrelated grounds.[3] On June 2, 2006, upon the expiration of that reprieve,

[3]The reprieve was granted solely to allow petitioner an opportunity to file a petition in state court to seek DNA testing of certain items of physical evidence. *See*

the Tennessee Supreme Court re-set the execution of petitioner's sentence for June 28, 2006. *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. June 2, 2006).

On June 12, 2006, this Court decided *Hill v. McDonough*, __ S.Ct. __, 2006 WL 1584710 (June 12, 2006), holding that § 1983 was a proper vehicle for challenges by condemned prisoners to a state's lethal injection protocol. On June 14, 2006, the district court dismissed petitioner's complaint on the basis of the Sixth Circuit's prior holding that he had unnecessarily delayed in bringing his claims. (Pet.App.4). On June 24, 2006, the Sixth Circuit affirmed, reiterating that "[petitioner's] filing was very late in coming." (Pet.App.5, p. 5) The court also reaffirmed its view "of the very small likelihood of [petitioner's] success on the merits" of his claims. (*Id.*) Petitioner now seeks this Court's review of that decision.

## REASONS FOR DENYING A STAY AND FOR DENYING REVIEW

### I. BALANCING THE EQUITIES WEIGHS STRONGLY IN FAVOR OF DENYING A STAY OF EXECUTION.

In *Hill v. McDonough*, __ S.Ct. __ , 2006 WL 1584710 (June 12, 2006), this Court reiterated that "a stay of execution is an equitable remedy." *Id.*, at *8. Accordingly, "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Inmates like petitioner, who

---

www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm. Petitioner filed such a petition on May 19, 2006, and it was denied by the trial court on May 31, 2006. Both the trial court and the Tennessee Court of Criminal Appeals have concluded, *inter alia*, that petitioner's efforts in filing this petition "were made for the purpose of delaying the execution of the sentence." *Alley v. State*, No. W2006-00179-CCA-R3-PD, slip op., p. 29 (Tenn.Crim.App. June 22, 2006).

seek time to challenge the manner in which the State plans to execute their sentences, must make a showing "of a significant possibility of success on the merits." *Id.* And a court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650)). *See id.* (quoting *Gomez v. United States Dist. Court for Northern Dist. Calif.*, 503 U.S. 653, 654 ("'last-minute nature of an application" or an applicant's attempt at manipulation' of the judicial process may be grounds for denial of a stay"). "The federal courts can and should protect States from dilatory or speculative suits . . . ." *Id.*

Here, the Sixth Circuit has done precisely that, and rightfully so. Petitioner brutally murdered and raped Suzanne Marie Collins twenty-one years ago, and at this stage, with federal habeas review having long since concluded, the State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 553 (1998). While petitioner sought to challenge Tennessee's lethal injection protocol, the Sixth Circuit concluded that petitioner had a "very small likelihood of . . . success on the merits" of his claims. (Pet.App.5, p.5)[4] Furthermore, the court concluded that, by

[4]Indeed, a similar challenge to Tennessee's lethal injection protocol has recently been fully litigated and rejected. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005), *cert. denied*, 126 S.Ct. 2288 (2006). Petitioner challenges the determination of the Sixth Circuit in this regard, touting the affidavit of his expert. (Pet.15 n.2) But not even the district court found a "significant possibility of success on the merits" on the basis of this affidavit. *See* Pet.App.1, pp. 5-6 (concluding that petitioner need only present a "sufficiently serious question to justify further investigation" and that his expert's affidavit was sufficient "to survive [this] relatively light burden"). In this affidavit, petitioner's expert ultimately

waiting two and a half years after this Court denied certiorari in his habeas case, and more than two years after an initial date of execution was thereafter set by the Tennessee Supreme Court, and filing his complaint a mere thirty-six days prior to his May 17, 2006, re-scheduled execution date, petitioner had delayed unnecessarily in bringing his claims. (Pet.App.2)

As the Sixth Circuit observed, since *Hill* was decided this Court has denied a stay of execution under very similar, if not even less egregious, circumstances. *See Reese v. Livingston*, __ S.Ct. __, 2006 WL 1681792 (June 20, 2006). This Court had denied certiorari in Reese's case in October 2004, but Reese waited a year and a half before filing his § 1983 action challenging Texas' lethal injection protocol on May 25, 2006 — twenty-six days prior to his scheduled execution date of June 20, 2006. And like the Sixth Circuit here, the Fifth Circuit found Reese's suit for equitable relief to be untimely. *Reese v. Livingston*, 2006 WL 1681090, *2 (5th Cir. June 20, 2006). "A plaintiff cannot wait until a stay must be granted to enable it to develop facts and take the case to trial — not when there is no satisfactory explanation for the delay." *Id.*[5]

---

opines only that an inmate subjected to the protocol "would very possibly not be adequately anesthetized." R. 11, Exhibit 1, ¶ 24.

[5]This post-*Hill* action by this Court comports with its pre-*Hill* treatment of stay applications presented under similar circumstances. *See, e.g., Wilson v. Livingston*, 126 S.Ct. 1942 (2006); *Neville v. Livingston*, 126 S.Ct. 1192 (2006); *see also Donahue v. Bieghler*, 126 S.Ct. 1190 (2006) (vacating stay of execution).

## II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT COURT.

In support of his claim that "the circuits are split on the question this case presents," petitioner points to what he says are "markedly different views about what dates drive the ripeness determination." (Pet. 7-8) But differing views do not necessarily create a split, and here, the decision of the Sixth Circuit simply does not conflict with the decisions of any other circuit court. Indeed, there is every indication that this case would have been decided exactly the same way had it originated in any other circuit.

Petitioner points first to the Fifth Circuit, where, to be sure, the court has consistently displayed intolerance toward even shorter delay than that in this case. *See Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006) (prisoner's § 1983 complaint was dilatory where he had been on death row for nine years, and he filed five days before scheduled execution); *Neville v. Johnson*, 440 F.3d 221, 223 (5th Cir. 2006) (complaint was dilatory where prisoner's conviction affirmed seven years before and claim brought two days before scheduled execution); *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005) (complaint dilatory where prisoner filed ten days after certiorari denied in his habeas case and before an execution date had been set) (*Harris v. Johnson*, 376 F.3d 414, 416 (5th Cir. 2004) (complaint dilatory where prisoner filed six weeks after certiorari denied in his habeas case and ten weeks before his scheduled execution). Here, lethal injection had been the established method of execution in Tennessee since 2000, certiorari was denied in his habeas case in 2003, and yet he waited until April 2006 to file his complaint. "By

waiting as long as he did, [petitioner] leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out." *Harris*, 376 F.3d at 418.

In *Rutherford v. Crosby*, 438 F.3d 1087 (11th Cir. 2006), the Eleventh Circuit likewise affirmed, albeit alternatively, a district court's dismissal of a prisoner's § 1983 complaint as dilatory under circumstances involving less delay than that in which petitioner has engaged. In *Rutherford*, lethal injection had been the established method of execution in Florida, as in Tennessee, since 2000; certiorari had been denied in the prisoner's habeas case in April 2005, *see Rutherford v. Crosby*, 544 U.S. 982 (2005); an initial execution date of January 30, 2006, was set on November 29, 2005; and the prisoner waited until January 27, 2006 — less than a year after the denial of certiorari — to file his claims. *See Rutherford,* 438 F.3d at 1092.

And in *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005), the Ninth Circuit said only that the district court had erred "in applying a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent." 395 F.3d at 1070. Instead, the court concluded, the district court should have inquired "whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* And while the court ultimately concluded in that case that, "[o]nce an execution was imminent, Beardslee acted promptly," 395 F.3d at 1069, unlike petitioner here Beardslee had filed his § 1983 complaint challenging the state's lethal

injection protocol a mere two and a half months — unlike the petitioner's two and a half years — after this Court had denied certiorari in his habeas case. *See id.*, 395 F.3d at 1067.[6]

Nor is there any conflict between the decision of the Sixth Circuit in this case and that of any other circuit on the ripeness issue. Since the Fifth Circuit has held that "[a] challenge to a method of execution may be filed any time after the plaintiff's conviction has become final on direct review," *Smith*, 440 F.3d at 263, petitioner's ripeness argument would surely be rejected in that circuit. While the Ninth Circuit in *Beardslee* pointedly declined to resolve the ripeness question, *see* 395 F.3d 1069 n. 6, the implicit holding of that case — that a prisoner's challenge to the method of execution ripens after certiorari has been denied in his habeas case and an initial execution date has been set — wholly comports with the decision of the Sixth Circuit here.

The Ninth Circuit cases of *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998), and *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997), not only fail to support petitioner's assertion of a circuit split, but they are in full accord with the Sixth Circuit decision here. Both *Fierro* and *Poland* involved a prisoner's attempt to challenge a method of execution to which he had not been subjected, because it was not the state's default method and

---

[6]Indeed, in finding that Beardslee had not delayed unduly in filing his complaint, the Ninth Circuit pointed out that Beardslee's case was "unlike the situation in *Cooper [v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004)]." Cooper had filed his § 1983 challenge to the lethal injection protocol more than a year after this Court's denial of certiorari in his habeas case. *See Cooper v. Calderon*, 537 U.S. 861 (2002).

because he had not yet affirmatively chosen the available alternative to the default method. *See Fierro*, 147 F.3d at 1159; *Poland*, 117 F.3d at 1104. Under these circumstances, the Ninth Circuit held, the claims challenging the alternative method of execution were not ripe. Petitioner's claim, however, challenged lethal injection — Tennessee's default method of execution.[7] Under these cases, this claim has always been ripe. Indeed, in *Poland* the Ninth Circuit proceeded to adjudicate the prisoner's challenge to lethal injection — Arizona's default method of execution. *See Poland*, 117 F.3d at 1105.

## III. PETITIONER'S RIPENESS ARGUMENT IS DEVOID OF MERIT; HE OFFERS IT AS NOTHING MORE THAN A *POST HOC* RATIONALIZATION FOR HIS FAILURE TO BRING HIS CLAIMS SOONER.

Having failed to demonstrate that the decision of the Sixth Circuit in this case conflicts with any decision of another circuit court, petitioner is left only with a merits argument for why he was justified in not bringing his claims sooner. But the best that he himself can say about his argument that his claims were not previously ripe is that the argument is "potentially meritorious" (Motion for Stay, p. 3) and not frivolous. (Pet. 11-12) Petitioner's argument is devoid of merit.

---

[7]Petitioner asserts that his claim did not become ripe until he chose one of the two available methods of execution — lethal injection or electrocution. But as these cases illustrate, petitioner is simply wrong to suggest that the method is not established until he is offered the alternative method. Tennessee law is quite clear: Tenn.Code Ann. § 40-23-114 makes "lethal injection applicable to all inmates on death row except for those who took affirmative steps of choosing electrocution." *Abdur'Rahman*, 181 S.W.3d at 300 n.4. *See Poland*, 117 F.3d at 1104.

Petitioner maintains that he was not "immediately in danger" of any harm until the Tennessee Supreme Court re-scheduled his execution date for May 17, 2006. (Pet. 12) But, as the Sixth Circuit said, "this can not be right." (Pet.App.2, p.4) "The threat of the grievous harms of lethal injection loomed at least since the establishment of the [June 3,] 2004 execution date." (*Id.*) And as the Sixth Circuit further observed, petitioner has still failed to point to any case "where a claim such as the one [petitioner] now raises [here] has been rejected for lack of ripeness at any time following the setting of an initial execution date and following the denial of certiorari on initial habeas." (*Id.*)[8] Once this Court denied certiorari in petitioner's habeas case and an initial execution date was set, there was nothing at all hypothetical, conjectural, abstract, or speculative about the State's intent to enforce its lawful judgment. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). It simply makes no sense for petitioner to insist that, at this point in time at least, there was no justiciable controversy. If any event absolutely triggers the finality of the state court judgment, and thus the need for a condemned inmate to challenge the method of its impending execution if he wishes to do so, it is the denial of certiorari by this Court that marks the end of his habeas corpus case. Indeed, this Court itself has said as much:

> A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review,"

[8]This particular excerpt from the Sixth Circuit opinion belies petitioner's assertion that the Sixth Circuit decided this case in an "unguided" fashion. (Pet.9)

> the State is entitled to the assurance of finality. *When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case.* Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.

*Calderon*, 523 U.S. at 556 (citations omitted) (emphasis added).[9]

No more persuasive is petitioner's assertion that his previously ripe claim suddenly became "unripe" by virtue of a federal court's issuance of a stay of execution. As this Court well knows, executions of death sentences are set and stayed all the time. But the issuance of such stays does nothing to alter the fact that the State expressly intends to execute its judgment. Indeed, it is precisely *because* the State's threat to execute the death sentence is real and imminent that a federal court would deem it necessary to order the State to refrain from doing so. Furthermore, petitioner's assertion here that he could not have brought his claims once a stay was issued is disingenuous, since he stood by while another Tennessee inmate, Abu-Ali Abdur'Rahman, did precisely that.[10]

---

[9]The Sixth Circuit's mandate denying federal habeas relief issued on October 27, 2003. *Sedley Alley v. Ricky Bell*, No. 99-6659 (6th Cir.)

[10]*See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (2005). While Abdur'Rahman initiated his administrative challenge to the lethal injection protocol in April 2002 while an execution date was pending, he filed his lawsuit in July 2002, three months after his execution was stayed by order of this Court. *Abdur'Rahman v. Bell*, 535 U.S. 981 (2002). No new execution date was set until March 2003, and that date was stayed by order of the Sixth Circuit in June 2003, and that stay remains in effect. Meanwhile, Abdur'Rahman's lawsuit proceeded through the trial court, the Tennessee Court of Appeals, the Tennessee Supreme Court, and, ultimately, this Court, which denied certiorari on May 22, 2006..

This Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), is inapposite, as the Sixth Circuit concluded, and petitioner thus misplaces his reliance on it. Unlike mental competency, the manner in which the State executes its death sentences is not fluid. "[C]laims involving mental competency are inherently different from the § 1983 petition before us in at least one respect: mental competency is subject to variance over time." (Pet.App.5, p.5) Indeed, petitioner's complaint implicitly relies on the stable nature of Tennessee's lethal injection protocol, based as it is on allegations pertaining to the use of the protocol in 2000 and findings made regarding the protocol in 2003. (R. 1, Complaint, ¶¶ 46, 65) And any assertion by petitioner that he was justified in waiting to file his claims because the protocol might be altered at some point amounts to mere conjecture. *Cf. Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726, 735 (1998) (finding controversy unripe where "the possibility that further [agency] consideration will actually occur before the Plan is implemented is not theoretical, but real"). Moreover, it would have been completely unreasonable for petitioner to so surmise at least after June 2003, when Tennessee's protocol was upheld against constitutional challenge by a state court.

## CONCLUSION

The motion for stay of execution and petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

*/s/ Joseph F. Whalen*

JOSEPH F. WHALEN
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3499

* *Counsel of Record*

## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered electronically and by first-class mail, postage prepaid, to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 27th day of June, 2006.

*/s/ Joseph F. Whalen*

JOSEPH F. WHALEN
Associate Solicitor General