

No. 06-5816

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SEDLEY ALLEY

Plaintiff-Appellant

v.

GEORGE LITTLE, et al.

Defendants-Appellees

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

BRIEF OF THE DEFENDANTS-APPELLEES

**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**

STATEMENT RE: SIXTH CIRCUIT RULE 26.1

Pursuant to Rule 26.1(a), no corporate affiliate/financial statement is required because defendants-appellees are officials of the State of Tennessee.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees submit that the issue before the Court is capable of resolution without oral argument.

STATEMENT OF JURISDICTION

The district court dismissed plaintiff's action under 42 U.S.C. § 1983 on June 14, 2006. Plaintiff filed a notice of appeal on June 19, 2006. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court properly dismissed plaintiff's complaint seeking equitable relief under 42 U.S.C. § 1983, applying this Court's prior holding that plaintiff had unnecessarily delayed in bringing his claims.

STATEMENT OF THE CASE AND OF THE RELEVANT FACTS

Plaintiff, 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 Plaintiff'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).

Plaintiff 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 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 plaintiff'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

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

²Lethal 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.

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 plaintiff'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 plaintiff's motion, and on March 22, 2006, the district court denied plaintiff's motion to alter or amend. *See Alley v. Bell*, No. 05-6876 (6th Cir. May 9, 2006), *petition for certiorari filed* (No. 05-10960) (U.S.). 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, plaintiff 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 plaintiff's execution pending a decision by the Supreme Court in *Hill v. McDonough*, No. 05-8794 (U.S.). (R. 27, 28, Memorandum and Order) On May 12, 2006, on motion of the defendants, this Court vacated the district court's order, holding, *inter alia*, that even assuming *Hill* were decided in plaintiff's favor, *i.e.*, that § 1983 was a proper vehicle for plaintiff's claims, plaintiff had unnecessarily delayed in bringing those claims. *Alley v. Little*, No. 06-5650 (6th Cir. May 12, 2006), *petition for certiorari filed* (No. 05-10959) (U.S.) (copy attached as Addendum 1). On May 16, 2006, however, the Governor of Tennessee granted plaintiff a fifteen-day reprieve on unrelated grounds. (copy attached as Addendum 2). On June 2, 2006, upon the expiration of that reprieve, the Tennessee Supreme Court re-set the execution of plaintiff's sentence for June 28, 2006. *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. June 2, 2006) (copy attached as Addendum 3).³

On June 12, 2006, the Supreme Court decided *Hill v. McDonough*, ___ S.Ct. ___, 2006 WL 1584710 (June 12, 2006), holding that § 1983 was a proper vehicle for

³Copies of both the executive reprieve and the June 2, 2006, order of the Tennessee Supreme Court are also available on the court's website. *See* www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm.

challenges by condemned prisoners to a state's lethal injection protocol. On June 14, 2006, the district court dismissed plaintiff's complaint on the basis of this Court's holding that he had unnecessarily delayed in bringing his claims. (R. 39, 40, Memorandum and Order) (copy attached as Addendum 4). Plaintiff now appeals to this Court.

SUMMARY OF THE ARGUMENT

Under this Court's precedent, a claim for equitable relief will not be entertained when the plaintiff delays unnecessarily in bringing that claim. This Court has already determined that plaintiff delayed unnecessarily in bringing his claims challenging Tennessee's lethal injection protocol. The district court, therefore, properly applied the law of the case to dismiss plaintiff's complaint.

ARGUMENT

This Court reviews *de novo* a district court's dismissal of an action under 42 U.S.C. § 1983. *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004).

THE DISTRICT COURT PROPERLY DETERMINED THAT THE LAW OF THE CASE COMPELS THE DISMISSAL OF PLAINTIFF'S COMPLAINT.

In *In re Sapp*, 118 F.3d 460 (6th Cir. 1997), this Court determined that equity does not permit consideration of a state prisoner's § 1983 claim challenging the state's method of execution where the prisoner has unnecessarily delayed in bringing that claim. 118 F.3d at 464. And as the district court observed, the Supreme Court has

recently emphasized that “federal courts can and should protect States from dilatory . . . suits.” (R. 39, Memorandum, p. 3) (quoting *Hill v. McDonough*, ___ S.Ct. ___, 2006 WL 1584710, at *8 (June 12, 2006)). “The Court also highlighted the equitable powers of the federal courts ‘to dismiss suits [that are] speculative or filed too late in the day.’” (*Id.*) (quoting *Hill*, 2006 WL 1584710, at *10). *See also Hill*, 2006 WL 1584710, at *10 (citing *Hicks v. Taft*, 431 F.3d 916 (6th Cir.2005); *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005)) (recognizing that dismissal of dilatory suits addresses a significant problem).

As the district court further recognized, this Court recently had occasion both to reiterate what it had said in *Sapp* and to apply it to plaintiff’s § 1983 complaint challenging Tennessee’s lethal injection protocol, holding that plaintiff delayed unnecessarily in bringing his claims. *See Alley v. Little*, No. 06-5650, slip op. (6th Cir. May 12, 2006), *petition for certiorari filed* (No. 05-10959) (U.S.). *See also* R. 39, Memorandum, p. 3 (“According to the Sixth Circuit, this case was filed too late in the day.”). “[Plaintiff] 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.” *Alley.*, slip op., p. 6.

The Court noted that lethal injection had been the only method of execution in Tennessee since 2000, except for those death row inmates who affirmatively

expressed a preference for electrocution; that another inmate had challenged the lethal injection protocol in 2002; that the Supreme Court had denied a writ of certiorari in plaintiff's habeas case in 2003; and that on January 16, 2004, execution of plaintiff's sentence had first been set for June 3, 2004. The Court concluded that plaintiff had ample time to bring his claim. "Instead, he waited until thirty-six days before his currently scheduled execution date." *Id.*, slip op., p. 7.

Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. *Thus, equity would not permit the consideration of this claim for that reason alone*

Id., slip op., p. 8 (quoting *In re Sapp*, 118 F.3d at 464) (emphasis added). It is therefore now the law of the case that plaintiff delayed unnecessarily in bringing his claims, see *United States v. Thomas*, 167 F.3d 299, 306 (6th Cir. 1999); consequently, those claims may not be considered. The district court thus was quite right to dismiss plaintiff's complaint.

Plaintiff may here reiterate his argument that he was justified in waiting to bring his claims because they had not previously been ripe for adjudication. But this Court has already addressed and rejected this argument.⁴

⁴"By waiting as long as he did, [plaintiff] leaves little doubt that the real purpose behind his claim [was] to seek a delay of his execution, not merely to affect an alteration of the manner in which it is carried out." *Harris v. Johnson*, 376 F.3d 414, 418 (5th Cir. 2004). Plaintiff's ripeness argument, therefore, is properly seen as

[Plaintiff] contends that he did not suffer an imminent (and therefore justiciable) threat of the harms associated with the lethal injection protocol until after the Tennessee Supreme Court took steps . . . to set the execution date of May 17, 2006. This can not be right. The threat of the grievous harms of lethal injection loomed at least since the establishment of the 2004 execution date.

Alley, slip op., p. 7. The Court went on to note the lack of any precedent “where a claim such as the one [plaintiff] now raises 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.* Indeed, once certiorari was denied and an initial execution date was set in plaintiff’s case, there was nothing at all hypothetical, conjectural, or speculative about the State’s intent to enforce its lawful judgment. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). It simply makes no sense for plaintiff to assert that, at that point in time at least, there was no justiciable controversy.

Plaintiff may also argue that circumstances have changed since this Court decided *Alley v. Little*, No. 06-5650, in that a fifteen-day executive reprieve of his execution was granted on May 16, 2006, and on June 2, 2006, the execution was re-set for June 28, 2006. But such an argument would have no merit; there has been no material change in circumstance. That plaintiff won a temporary reprieve on May 16, only to have the execution date re-set upon the expiration of that reprieve, does

nothing more than a *post hoc* rationalization for his failure to bring his claims sooner.

nothing to alter the fact that plaintiff delayed more than two and a half years after certiorari was denied in his habeas case, and more than two years after an initial execution date was set, to file his complaint challenging the state's lethal injection protocol. And it does nothing to alter the fact that plaintiff filed his complaint a mere thirty-six days prior to his then-scheduled execution date.

Furthermore, plaintiff won a fifteen-day executive reprieve solely in order to afford him an opportunity to file a petition in state court to seek DNA testing of certain items of physical evidence — not in order to afford him an opportunity to litigate his late-filed challenge to the lethal injection protocol.⁵ (Addendum 2) Plaintiff is not entitled to parlay the temporary reprieve granted by the Governor for a specific purpose into a windfall in this case. In any event, the forty-two-day delay occasioned by the reprieve ultimately put plaintiff in no better position than he was in when he filed his complaint thirty-six days before the May 17 execution date.

⁵Plaintiff filed a petition in state court to seek DNA testing on May 19, 2006; the trial court denied the petition on May 31, 2006. *See Alley v. State*, No. W2006-00179-CCA-R3-PD (Tenn.Crim.App. June 22, 2006) (affirming judgment of the trial court) (available at www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm). In denying the petition, the trial court remarked that it had “serious questions regarding the motivations of the [plaintiff] for raising this issue at this time.” *Id.*, slip op., p. 28. “It is clear to this court that [plaintiff] seeks to delay his execution with this last minute successive petition for Post Conviction DNA Analysis.” *Id.* The Court of Criminal Appeals agreed: “[T]his Court can only conclude that such efforts leading to the filing of the petition that is presently before this Court were made for the purpose of delaying the execution of the sentence.” *Id.*, slip op, p. 29.

CONCLUSION

For the reasons stated, the judgment of the district court dismissing plaintiff's complaint should be affirmed.

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

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document is being forwarded by electronic mail to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 23rd day of June, 2006.

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
Associate Solicitor General

ADDENDUM 1

Alley v. Little, No. 06-5650 (6th Cir. May 12, 2006)

ADDENDUM 2

Executive Reprieve (May 16, 2006)

ADDENDUM 3

State v. Alley, No. M1991-00019-SC-DPE-DD (Tenn. June 2, 2006)

ADDENDUM 4

Alley v. Little, No. 3:06-0340 (M.D.Tenn. June 14, 2006)