

Nos. 05-10959, 05A1042

Supreme Court, U.S.
FILED
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CLERK

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

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QUESTION PRESENTED BY PETITIONER

1. Did the District Court abuse its discretion, i.e., act in a “clearly unreasonable” manner (*Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980)) in concluding that Dr. Lubarsky’s affidavit established a likelihood of success on the merits?
2. Is a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?
3. Under this Court’s decision in *Nelson*, does a challenge to a particular protocol the State plans to use during the execution process constitute a cognizable claim under 42 U.S.C. § 1983?

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OPINIONS BELOW

The May 12, 2006, order of the Sixth Circuit Court of Appeals is unreported. (Pet.App.3) The May 11, 2006, memorandum opinion of the district court is unreported. (Pet.App.2)

JURISDICTION

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

STATEMENT

On July 11, 1985, petitioner Sedley Alley abducted nineteen-year-old Suzanne Marie Collins, beat her, and raped and killed her by impaling her with a thirty-one-inch long tree branch. *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989). On April 11, 2006, thirty-six days prior to his then-scheduled execution date,¹ and nearly three months after this Court granted certiorari in *Hill v. McDonough*, cert. granted, 126 S.Ct. 1189 (2006), petitioner brought a claim under 42 U.S.C. §1983 challenging Tennessee's lethal injection protocol. On May 4, 2006, petitioner moved for a preliminary injunction pending a decision by this Court in *Hill*. On May 11, 2006, the district court issued an order granting that motion and staying petitioner's execution. (Pet.App.2) On May 12,

¹This was a *rescheduled* date. Petitioner's June 3, 2004, execution date had been stayed by order of a federal district court on the basis of petitioner's filing of a motion under Fed.R.Civ.P. 60(b) and the then-pending procedural question whether and to what extent habeas petitioners may file such motions. This Court ultimately resolved that question in *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), Alley's motion was rejected, and his execution was rescheduled for May 17, 2006. See *Alley v. Bell*, No. 05-10960 (U.S.).

2006, however, the Sixth Circuit vacated that order. (Pet.App.3) Petitioner subsequently moved this Court for a stay of execution and petitioned for a writ of certiorari, seeking review of the Sixth Circuit decision. But on May 16, 2006, just hours before the scheduled execution, the Governor of Tennessee granted a fifteen-day reprieve of the execution of petitioner's sentence on an unrelated basis. (copy attached hereto)

REASONS FOR DENYING A STAY AND DENYING REVIEW

In Tennessee, when a scheduled date for execution of a death sentence has passed by reason of a stay or reprieve, a new date must be set by the Tennessee Supreme Court. *See* Tenn.Sup.Ct.R. 12.4(E). The May 17, 2006, date for execution of petitioner's sentence has now passed by virtue of the executive reprieve granted on May 16. No new date has yet been set. Consequently, petitioner's motion for a stay of execution is now moot.

For similar reasons, the questions raised in the petition for a writ of certiorari, though perhaps not currently moot, strictly speaking, nonetheless fail to warrant this Court's review of the Sixth Circuit decision, which simply vacated the preliminary injunction and stay issued by the district court pending this Court's decision in *Hill v. McDonough*. *Hill*, of course, was argued this Term, and a decision in the case is imminent. Indeed, the district court contemplated just that when it issued the stay. *See* Pet.App.2, p. 5 ("the Supreme Court is expected to issue an opinion in *Hill* before June 30, 2006"). Two of the three questions presented in the petition (Questions 2 and 3)

are the very same questions as those presented in *Hill*. But they are not properly before the Court in this case — they are not directly implicated by the Sixth Circuit decision to vacate the injunction and stay issued by the district court. The Sixth Circuit did not decide whether petitioner’s challenge to Tennessee’s lethal injection protocol was cognizable under § 1983 or whether his § 1983 complaint should be recharacterized as a successive habeas petition. Indeed, in vacating the stay issued on the basis of *Hill*, the Sixth Circuit assumed that the questions in *Hill* would be resolved in petitioner’s favor. *See* Pet.App.3, p. 4 (“we assume . . . that Alley may challenge the lethal injection chemical protocol through a § 1983 action”).

The remaining question presented by petitioner would have this Court review only whether the Sixth Circuit properly determined that the district court had abused its discretion in granting injunctive relief on the basis of the pendency of *Hill*. But if this question is not moot now, it surely will become so once *Hill* is decided.

Furthermore, this latter question, which focuses on the district court’s determination regarding petitioner’s likelihood of success on the merits, is also not properly before the Court. It is based on a flawed premise regarding the Sixth Circuit’s standard of review. While the Sixth Circuit applies an abuse-of-discretion standard to a district court’s grant or denial of preliminary injunctive relief, the court reviews whether the district court abused its discretion as to its ultimate *weighing* of the four preliminary injunction factors — of which likelihood of success is but one; it does not

necessarily review whether the district court abused its discretion as to its separate conclusion regarding any one individual factor. *See Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*, 126 S.Ct. 361 (2005). It makes no sense, therefore, for petitioner to isolate one individual factor and offer it as the basis on which to review the Sixth Circuit's ultimate holding here "that the district court abused its discretion in issuing the preliminary injunction and stay." (Pet.App.3, p. 4)

CONCLUSION

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

Respectfully submitted,

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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 1st day of June, 2006.

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
Associate Solicitor General