0510959

CAPITAL CASE
EXECUTION DATE 5/17/06 1:00 a.m.

No. 05-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2005

SEDLEY ALLEY,

Petitioner,

v.

GEORGE LITTLE, *et al.,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Paul R. Bottei
Office of the Federal Public Defender
for the Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265
Counsel for Petitioner Sedley Alley

Motion For Leave To Proceed *In Forma Pauperis*

Petitioner Sedley Alley respectfully moves this Court to grant him leave to proceed *in forma pauperis*. In support thereof, Mr. Alley shows:

1. A Tennessee jury convicted Mr. Alley of first-degree murder and sentenced him to death. State v. Alley, 776 S.W.2d 506 (Tenn. 1989).

2. Mr. Alley filed in the United States District Court for the Western District of Tennessee a habeas corpus petition. Pursuant to 21 U.S.C. § 848(q), the District Court appointed undersigned counsel to represent Mr. Alley in all appropriate proceedings respecting Mr. Alley's death sentence.

3. The District Court and the United States Court of Appeals for the Sixth Circuit have allowed Alley to proceed *in forma pauperis* in this action.

WHEREFORE, Sedley Alley respectfully requests that this Court:

1. Grant him leave to proceed *in forma pauperis*; and

2. Grant such other relief as this Court deems just.

Respectfully submitted,

Paul R. Bottei
Assistant Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by hand on Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 16 day of May 2006.

Paul R Bottei

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QUESTIONS PRESENTED

After weighing the equities, the District Court preliminarily enjoined Respondents from using a lethal injection protocol after concluding that Sedley Alley showed a likelihood of success on the merits: Dr. David Lubarsky, M.D. has declared that, under that specific protocol, Sedley Alley will not be adequately anesthetized and will suffer a cruel and inhumane death. *Compare* Koniaris, Lubarsky, et al, *Inadequate Anaesthesia In Lethal Injection For Execution*, 365 Lancet 1412-1414 (2005). A panel of the Sixth Circuit overturned the injunction by concluding that there was a small likelihood of success on the merits. The panel did not consider Dr. Lubarsky's affidavit. On rehearing, five Sixth Circuit judges have agreed that the District Court did not abuse its discretion by relying on Dr. Lubarsky. *Alley v. Little*, 6th Cir. No. 06-5650 (Martin, J., dissenting). The questions presented by this petition are:

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 constitutes a cognizable claim under 42 U.S.C. § 1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other:

CAPITAL CASE

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SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

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GEORGE LITTLE, *et al.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting a preliminary injunction (Appendix 2) is unreported. The Sixth Circuit opinion vacating the District Court's preliminary injunction (Appendix 3) is also unreported.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion vacating the District Court's grant of a preliminary injunction on May 12, 2006. (Appendix 3). On May 15, 2006, Alley filed a suggestion for rehearing en banc,

which was denied on May 16, 2006, over five dissents. Appendix 4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "Cruel and unusual punishments (shall not) be inflicted."

The Fourteenth Amendment to the United States Constitution provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

42 U.S.C. § 1983 provides that "Every person who, under color of [State law] subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...."

STATEMENT OF THE CASE

This cases involves the viability of Sedley Alley's 42 U.S.C. § 1983 action challenging the lethal injection protocol Defendants intend to use for Alley's May 17, 2006, 1:00 a.m. execution. David Lubarsky, M.D., M.B.A., co-author of Leonidas Koniaris et al, *Inadequate Anaesthesia In Lethal Injection For Execution*, 365 Lancet 1412-1414 (2005), testified by Affidavit that if subjected to the Protocol, Sedley Alley will lie on the gurney paralyzed, suffocating in silence, experiencing the searing

pain of a potassium chloride injection (Appendix 1). The District Court concluded that Dr. Lubarsky's Affidavit established a likelihood that Alley would succeed on the merits, and it entered a preliminary injunction. A panel of the Sixth Circuit vacated the District Court's order based on its belief that Alley had not made a showing that he would likely succeed on the merits. This petition presents the following facts.

Previously, on December 8, 2003, this Court denied Mr. Alley's petition requesting rehearing of its certiorari denial in Alley's habeas proceedings. On January 16, 2004, the Tennessee Supreme Court set a June 3, 2004, execution date. On May 19, 2004, the United States District Court for the Western District of Tennessee stayed Alley's execution pending its resolution of Fed.R.Civ.P. 60(b) proceedings relative to Alley's habeas proceedings.

On December 14, 2004, the State requested that the Tennessee Supreme Court set again an execution date. The Tennessee Supreme Court declined, recognizing that the Rule 60(b) proceedings in the District Court "could render ineffectual any date set."

On November 28, 2005, once the District Court finally denied Sedley Alley's Rule 60(b) motion, the State moved to set an execution date. The Tennessee Supreme Court then did so on March 29, 2006, establishing May 17, 2006, as that date.

On March 30, 2006, the day after his execution date was set, Sedley Alley informed Defendants of his constitutional objections the protocol which Defendants had previously used to execute Robert Glen Coe. Specifically, Alley noted that the protocol consisted of (1) an initial injection of sodium thiopental, a short acting barbiturate, seeking to cause anesthesia; (2) a subsequent injection of pancuronium bromide, a neuromuscular blocking agent that causes paralysis of an individual's skeletal muscles, including the diaphragm; and (3) a subsequent injection of potassium chloride, seeking to cause cardiac arrest. Alley expressed his objection, among others, that the initial injection of sodium thiopental would be insufficient and, as a result, he would remain conscious during the injections of pancuronium bromide and potassium chloride. Such a course of events would leave Alley paralyzed on the gurney, simultaneously suffocating and experiencing excruciating pain.

On April 6, 2006, Defendant Corrections Commissioner Little acknowledged receiving Alley's concerns but informed Alley that he needed time to respond or to consult with legal counsel. On April 13, 2006, Commissioner Little informed Sedley Alley that the State rejected Alley's protocol objections.

On April 19, 2006, pursuant to Tenn. Code Ann. § 40-23-114, Defendant Warden Ricky Bell requested that Alley fill out an Affidavit choosing either lethal injection or electrocution as his execution method. Alley declined to make a choice.

Under Tennessee law, Alley's silence established lethal injection as the method for his execution.

After Commissioner Little informed Alley he wanted additional time to consult with legal counsel about Alley's Protocol concerns, but before Little's eventual refusal to alter the Protocol to address them, Alley filed his 42 U.S.C. § 1983 Complaint. In support of his Complaint, Alley filed the Affidavit of David Lubarsky, M.D., M.B.A. In his Affidavit, Dr. Lubarsky testified that he reviewed the autopsy of Robert Glen Coe. According to Dr. Lubarsky: "the post mortem drug levels of thiopental measured in Mr. Coe would not be sufficient to produce unconsciousness or anesthesia." As a result, "Mr. Coe was probably awake, suffocating in silence, and felt the searing pain of injection of intravenous potassium chloride." Dr. Lubarsky concluded that "a person subjected to the (P)rotocol would very possibly not be adequately anesthetized and would have a reasonably high chance of suffering a cruel and inhumane death." See also Leonidas Koniaris et al, *Inadequate Anaesthesia In Lethal Injection For Execution*, 365 Lancet 1412-1414 (2005).

The District Court entered a preliminary injunction pending this Court's disposition of *Hill v. McDonough*, U.S.No. 05-8794. In doing so the District Court reasoned (1) *Hill* will establish whether the court has subject-matter jurisdiction to consider Alley's § 1983 action; (2) weighing the traditional four-factors considered

in injunction proceedings leads to the conclusion that a preliminary injunction should issue; and (3) given the procedural history described above, Alley brought his § 1983 action in a timely manner.

A panel of the Sixth Circuit vacated the District Court's order. It assumed *arguendo* that Alley's § 1983 action was proper, and it turned to the traditional four-factor test for injunctive relief. Without so much as mentioning Dr. Lubarsky's Affidavit, the panel opined that "it is not the law of the republic" that lethal injection constitutes an unconstitutional punishment, and, as a result, "the small likelihood of Alley's success on the merits ultimately decides the matter." The panel vacated the District Court's preliminary injunction.

On rehearing, five judges dissented. Unlike the panel, the dissenters concluded that the panel has failed to apply the "abuse of discretion" standard governing review of injunction, having wholly disregarded the District Court's "explicit factual finding" concerning Alley's likelihood of success that "by providing expert testimony on the merits that the current lethal injection protocol causes excruciating deaths, [Sedley Alley] has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims." Alley v. Little, 6th Cir. No. 06-5650, p. 3 (Martin, J., dissenting). One thing is clear from Judge Martin's dissent, though. If five judges agree with the District Court, the District Court has, by definition, not abused its

discretion by acting in a "clearly unreasonable" manner. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10 (1980). Compare Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (when there are two permissible views of the evidence, decisionmaker's choice between them cannot be deemed clearly erroneous); Slack v. McDaniel, 529 U.S. 473, 484 (2000)(where reasonable jurists differ about outcome of habeas claim, litigation of habeas claim must continue).

REASONS FOR GRANTING THE WRIT

This Court has pending its decision in *Hill v. McDonough*, U.S. No. 05-8794 which will decide whether the District Court has jurisdiction to consider Alley's § 1983 action. The Sixth Circuit panel seeks to make the decision in *Hill* irrelevant by opining that even if Alley's 1983 action can proceed, his failure to make a likelihood of success showing scuttles his ability to secure a preliminary injunction. The Sixth Circuit's decision, however, is patently incorrect. Its order vacating the District Court's preliminary injunction will have immediate, irrevokable, consequences for Alley. This Court should therefore grant certiorari pending its decision in *Hill*.

I. THE SIXTH CIRCUIT'S DECISION IS PATENTLY INCORRECT

Appellate review of the District Court's order requires application of the abuse of discretion standard. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. ___, ___ (2006). A "discretionary judgment of the district court should be

given *substantial deference*," and a "reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was *clearly unreasonable*." Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10 (1980)(emphasis supplied)(reviewing district court discretion to allow interlocutory appeal). The Sixth Circuit itself recognizes that under this standard, it is proper to overrule a District Court's weighing of the injunction equities "only in the rarest of cases." United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004).

As to the likelihood that Alley would succeed on the merits, the District Court, after reviewing Dr. Lubarsky's affidavit, determined that Alley has, in fact, established such a likelihood:

> [Sedley Alley], by providing expert testimony that the current lethal injection protocol causes excruciating deaths, has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims.

District Court Memorandum, p. 6. It cannot be disputed that the District Court's view of Dr. Lubarsky's Affidavit is reasonable. In fact, five other appellate judges agree. It cannot be disputed that the District Court properly determined that the Eighth Amendment prohibits an execution method that causes an excruciating death. See Trop v. Dulles, 356 U.S. 86 (1958). It cannot be disputed that the District Court properly applied that standard to Dr. Lubarsky's affidavit. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)(a district court abuses its discretion if it

bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence); McCoy v. Meridian Automotive Systems, 390 F.3d 417, 421 (6th Cir. 2004).

In vacating the District Court's order, the Sixth Circuit fails to conduct the required abuse of discretion review. Instead, it substitutes its view that, as a general proposition, lethal injection has never been held unconstitutional, and thus Sedley Alley cannot succeed. The panel nowhere mentions Dr. Lubarsky's Affidavit establishing that under the specific protocol at issue *in this case,* Sedley Alley faces the very real possibility of torture. The panel's decision to investigate the results in *other cases* instead of the evidence *in this case* focuses on the wrong inquiry.

When one conducts the appropriate inquiry under the appropriate standard of review, the conclusion is inescapable: the District Court did not abuse its discretion in ruling that Sedley Alley had made a sufficient likelihood of success showing. The Sixth Circuit's opinion overruling the District Court is patently erroneous.

Ultimately, the patent error in the panel's opinion is evident when one considers the fact that five Sixth Circuit judges have found merit to Sedley Alley's allegations; the Eighth Circuit has granted an *en banc* stay under similar circumstances (Taylor v. Crawford, No. 06-1379 (8th Cir. Feb. 1, 2006)(en banc)); and *even the Attorney General of the United States has agreed to an order similar to that*

entered by the District Court here (Roane v. Gonzales, No. 05-2337 (D.D.C. Feb. 24, 2006)(agreed order). Judge Trauger's actions can only be considered unreasonable if this Court concludes that Judge Martin and his colleagues have reached an unreasonable conclusion, as have the judges on the *en banc* Eighth Circuit, as well as the Attorney General of the United States.

Ipso facto, where Judge Trauger's injunction order is the very type of order found to be reasonable by at least 14 circuit judges and the Attorney General, as a matter of law, her decision was not abusive. The panel's decision to the contrary is manifestly and patently incorrect.[1]

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[1] While the Sixth Circuit panel founds its decision on its view of Alley's chances of success on the merits, it goes on to note its view that Alley unnecessarily delayed bring his 1983 action. The panel, however, fails to recognize this Court's well-established law that a claim for injunctive relief ripens only when a party is "immediately in danger" of sustaining some direct injury. City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983). In this case, Sedley Alley was placed in immediate danger of execution via the Protocol on May 17, 2006, *only after* (1) on March 29, 2006, after Alley's Rule 60(b) proceedings concluded in the District Court, the Tennessee Supreme Court set May 17, 2006, as the proposed execution date: (2) on April 19, 2006, Tennessee law established lethal injection as the method for Alley's proposed execution; and (3) Defendants, after consultation, informed Alley they would not alter the Protocol to address concerns he raised with them. See Statement of the Case, *supra*. The District Court agrees. That is not a "clearly unreasonable" conclusion, and it cannot be overturned. See Anderson v. Green, 513 U.S. 557, 559 (1995)(propriety of a lawsuit "is peculiarly a matter of timing" - it is the present situation, not a situation that existed in the past, that controls). For the reasons stated at pages 10-15 of Alley's Suggestion For Rehearing En Banc, incorporated herein by reference, any conclusion that the District Court abused its

(continued...)

II. THE ORDER VACATING THE DISTRICT COURT'S PRELIMINARY INJUNCTION WILL HAVE IMMEDIATE, IRREVOKABLE, CONSEQUENCES FOR SEDLEY ALLEY

The Sixth Circuit's order vacating the District Court's preliminary injunction subjects Alley to the prospect of torture on May 17, 2006, at 1:00 a.m.

III. BECAUSE THE SIXTH CIRCUIT'S REASON FOR ITS BELIEF THAT THERE IS NO NEED TO AWAIT THIS COURT'S DECISION IN *HILL* IS PATENTLY ERRONEOUS, THIS COURT SHOULD GRANT CERTIORARI PENDING *HILL*

Upon removing the Sixth Circuit's patently erroneous reasoning, there remains the question on which this Court granted certiorari in *Hill*: "Whether ... a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983." The arguments addressing this question have been presented in numerous briefs before this Court in *Hill* and during the April 26, 2006, oral argument in that case. Sedley Alley will not repeat what this Court has already heard. He simply notes that under Nelson v. Campbell, 541 U.S. 637 (2004), an inmate may bring a § 1983 action to challenge a specific proposed lethal injection protocol so long as judicial relief prohibiting the procedure would not "*necessarily* prevent (the State) from carrying out its execution." Nelson, 541 U.S. at 647. In his

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[1](...continued)
discretion in so concluding is also patently erroneous.

1983 action, Alley does not seek to prevent the State from carrying out his execution. That action only challenges the ability of the State to use the specific Protocol to do so. Thus, like the 1983 challenge brought by the petitioner in *Hill*, and for the reasons expressed by the *Hill* petitioner and the amici in support of the petitioner, Sedley Alley's challenge to the Protocol is cognizable in a 1983 proceeding.

Because this certiorari petition presents an issue identical to one on which this Court granted certiorari in *Hill*, this Court should grant certiorari in this case pending disposition of *Hill*.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

Paul R. Bottei
Assistant Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by hand on Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 16 day of May 2006.

Paul R Bottei

APPENDIX 1

AFFIDAVIT OF DAVID A. LUBARSKY, M.D., M.B.A.

Comes now the affiant, David A. Lubarsky, M.D., M.B.A., and declares under the penalty of perjury all as follows:

1. My name is David A. Lubarsky. I live in Miami, Florida.

2. I graduated from Washington University with a B.S. in 1980 and an M.D. in 1984. I also hold an M.B.A. from Duke University (1999).

3. I am licensed to practice medicine in New York (1985), North Carolina (1988) and Florida (2002). I moved from North Carolina to Florida, and while applying for a full license, in 2001, and early 2002, held a Florida Board of Medicine Medical Faculty Certificate.

4. I am board certified by the National Board of Medical Examiners, the American Board of Anesthesiology (placing in the 99th percentile on Part I of its examination), and have completed the American Board of Anesthesiology Maintenance of Certification Exam (2004) and am certified by the American Academy of Pain Management.

5. I serve as the Emanuel M. Papper Professor and Chairman, Department of Anesthesiology, University of Miami School of Medicine, with a secondary academic appointment as Professor, Department of Management, University of Miami School of Business.

6. I have published, as author and co-author, 127 books, chapters, monographs, journal articles, and other publications or abstracts, primarily in the area of anesthesiology. I have also made video presentations and other private-sector publications, contributed to conference proceedings and newsletters and created electronic World Wide Web, and/or Internet publications related to my work.

7. I have lectured, appeared on panels, and served as a visiting professor throughout the United States and in Paris, Hong Kong and Japan.

8. I have been retained as an expert witness in approximately 30 malpractice cases and given about 10 depositions.

9. My credentials are set forth in greater detail in the curriculum vitae, a true and correct copy of which is attached hereto, incorporated herein, and marked as Lubarsky Exhibit 1.

10. Together with Leonidas Koniaris, M.D., Teresa A. Zimmers, Ph.D.,and Jonathan P. Sheldon, J.D., I conducted the research and reported the findings contained in "Inadequate anesthesia in lethal injection for execution" in THE LANCET, volume 365, pages 1412-14, published on April 16, 2005, a true and correct copy of which is attached hereto, incorporated herein, and marked as Lubarsky Exhibit 2.

11. THE LANCET is one of the most prestigious medical journals in the world. All publications go through a rigorous process of review for both pertinence and scientific method. Usually at least two reviewers eminent in the field being investigated provide input to an editor in charge of the section in which the paper will be published. Among the methods evaluated are how data were collected, and statistical analysis of that data. Furthermore, conclusions are carefully monitored for faithfulness to the data described in the paper.

12. Our research dealt with the process of injecting a person sentenced to death with a succession of three chemicals: thiopental (also known as sodium pentothal), pancuronium bromide, and potassium chloride, and raised the question whether the levels of thiopental in the bloodstream of the person being executed were high enough to produce unconsciousness throughout the execution and whether the protocols provided by Texas and Virginia would absolutely produce a foolproof method of humane execution.

13. Each of the propositions of fact set forth in the LANCET article as aforesaid reflects my opinion to a reasonable degree of scientific certainty.

14. Based on our research, the article concludes that toxicology reports from the four lethal injection jurisdictions which provided them showed that postmortem concentrations of thiopental (sodium pentothal) in the blood of persons who had been executed were lower than that required for surgery in 43 of

49 cases reported (88%), and 21 (43%) inmates had concentrations consistent with awareness. This conclusion reflects my opinion to a reasonable degree of scientific certainty.

15. In light of my research and conclusions from the LANCET article, I have reviewed the protocol for execution of a death sentence in Tennessee, including interrogatory answers and deposition excerpts of Warden Ricky Bell, a memorandum opinion in the case of *Abdur'Rahman v. Sundquist*, the Tennessee Supreme Court opinion in *Abdur'Rahman v. Bredesen*, a physician's order for James L. Jones, and the autopsy of Robert Coe.

16. According to the response of Warden Ricky Bell to interrogatories in the case of *Abu-Ali Abdur'Rahman v. Sundquist*, it appears that three different drugs are employed: 5 grams of sodium pentothal, also known as thiopental; 10 mg pancuronium bromide (10 10cc vials containing 1 mg pancuronium bromide); and 100cc injectable solution of potassium chloride.

17. As an initial matter, the description of the drugs involved highlights the type of confusion and error in the mixing and administration of drugs which can lead to inadequate anesthesia. For instance, the Warden's response indicates that 5 grams (5000 milligrams) of sodium pentothal, also known as thiopental, is administered in a 50cc, or 50 ml, solution. The concentration of the thiopental, therefore, is 100 mg/ml. Thiopental, however, is never mixed in that fashion, and

the physician's order is for 5 grams in a 25 mg/ml solution (which is the standard mixing concentration). It is not clear that thiopental can be reliably mixed at 100mg/ml.

18. Thiopental, is an ultra-short acting substance which produces shallow anesthesia. Pancuronium bromide is not an anesthetic. It is a paralytic agent, which stops breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. The third chemical, potassium chloride, burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping.

19. Thus, adequate anesthesia is necessary to mitigate the suffering of the condemned. If adequate anesthesia has not been administered, or does not get to the patient, or wears off during the procedure, the condemned will feel the pain caused by the suffocation and administration of the potassium chloride. However, the condemned will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise.

20. The Coe autopsy shows the level of thiopental to be 10200ng/ml, which is .0102 mg/ml, which is 10.2 mg/L. This means that assuming post mortem

thiopental levels reflect those at death, which, according to an extensive review of the medical literature they do, Mr. Coe was probably awake, suffocating in silence, and felt the searing pain of injection of intravenous potassium chloride. The drug level in Mr. Coe is entirely consistent with a thiopental underdose if the warden had administered a single 50cc syringe with the concentration ordered by the physician - i.e. ¼ of the intended dose, and one which would clearly be insufficient to last through the execution process.

21. With a reasonable degree of medical certainty, the post mortem drug levels of thiopental measured in Mr. Coe would not be sufficient to produce unconsciousness or anesthesia.

22. Drugs that are sequestered in the body tissues as thiopental is undergo a post mortem redistribution that is slight and likely to increase blood levels compared to actual levels at death. This means that the post mortem levels are actually higher than those at death, meaning that the inadequate levels of anesthesia predicted by Mr. Coe's autopsy were even more inadequate at the time of death.

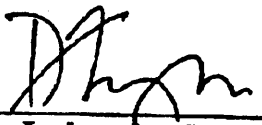
23. While the correctional officials might deem the injection of medications as proof of anesthesia, this is a false notion. It is only by continuously measuring effect that one can conclude that anesthesia is present. That is the reason that animal euthanasia protocols prohibit the use of pancuronium as it

masks the awakening of the animal. That is the reason continuous presence of a highly trained individual is necessary during surgery. Merely pushing a syringe into an intravenous line is no guarantee that the drug will reach the intended recipient, nor that the recipient will experience the desired effect.

24. I conclude, given the Tennessee protocol, and to a reasonable degree of scientific certainty, that a person subjected to the protocol would very possibly not be adequately anesthetized and would have a reasonably high chance of suffering a cruel and inhumane death, for the reasons set forth in "Inadequate anesthesia in lethal injection for execution" in THE LANCET, as aforesaid.

Further, the affiant saith naught.

I declare under penalty of perjury that the foregoing is true and correct.



David A. Lubarsky, M.D., M.B.A.
Emanuel M. Papper Professor and Chair
Department of Anesthesiology,
Perioperative Medicine and Pain Management
University of Miami Miller School of Medicine
and
Professor
Department of Management
University of Miami School of Business

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:06-0340**
	)	**Judge Trauger**
GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution; JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; and JOHN DOES 1-100,	)	
	)	
Defendants.	)	

MEMORANDUM

Pending before the court is the Motion for Preliminary Injunction filed by the plaintiff, Sedley Alley (Docket No. 23), to which defendants George Little and Ricky Bell have responded (Docket No. 24), and the plaintiff has replied (Docket No. 25). For the reasons discussed herein, the plaintiff's motion will granted.

FACTS and PROCEDURAL HISTORY

The plaintiff is a condemned inmate at Riverbend Maximum Security Institution in Nashville, Tennessee.[1] His execution has been scheduled for 1:00 a.m. on May 17, 2006.

In 1989, the Tennessee Supreme Court affirmed the plaintiff's death sentence. On January 14, 2004, that court set for the plaintiff a June 3, 2004 execution date. On May 19, 2004, the United States District Court for the Western District of Tennessee granted his request for a stay of execution based on a then-pending Sixth Circuit decision regarding whether to treat a Rule 60(b) motion as a habeas petition. (*See* Docket No. 16 at 4.) Following the resolution of these issues, the Tennessee Supreme Court, on March 29, 2006, set the plaintiff's current execution date. Using § 1983 as the vehicle for his claims, he brought a challenge to Tennessee's lethal injection protocol on April 11, 2006.

On May 2, 2006, this court ordered the case held in abeyance pending the United States Supreme Court's resolution of *Hill v. McDonough*, which will address whether an inmate may use § 1983 as a vehicle for such claims. (*See* Docket No. 22.) The plaintiff now seeks injunctive relief from his execution pending the Supreme Court's disposition in *Hill*. (*See* Docket No. 23 at 1.)

ANALYSIS

[1]A full recitation of the facts is provided in this court's Memorandum of May 2, 2006. (*See* Docket No. 21) Unless otherwise indicated, all facts here have been drawn from the plaintiff's Complaint (Docket No. 1) and from his Response to Motion to Dismiss of Defendants Little and Bell (Docket No. 19).

The defendants claim that an injunction is unnecessary because *Hill* "will not address the validity of any lethal injection protocol, much less Tennessee's." (*See* Docket No. 24 at 1.) Before this court may analyze the plaintiff's challenge to Tennessee's lethal injection protocol, however, it first must ensure that it has subject-matter jurisdiction over his claims. *See Ins. Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 (1982). While the defendants urge the court to go directly to the merits of the plaintiff's § 1983 claim without pausing to consider whether his challenge instead should be construed as a second habeas petition, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *See id.*

Were the plaintiff's challenge to be converted to a second habeas petition, this court would lack jurisdiction over it and would be required to transfer it to the Sixth Circuit for appellate review. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) ("[W]hen a second or successive petition for habeas relief is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631."); *see also In re Sapp*, 118 F.3d 460, 463 (6th Cir. 1997) (noting that a district judge had properly determined that, if an inmate's method-of-execution challenge were to be characterized as a second habeas petition, the district court would lack jurisdiction over the claim). As explained in this court's May 2, 2006 Memorandum, this court must await guidance from the Supreme Court before determining whether such a conversion is appropriate in this case and, consequently, whether it has jurisdiction over the plaintiff's challenge. (*See* Docket No. 21 at 6-7 (holding this case in abeyance pending the resolution of *Hill*).)

Accordingly, a preliminary injunction is required in order to maintain the status quo pending the Supreme Court's decision. *See Hill v. Crosby*, 126 S. Ct. 1189, 1190 (2006)

(staying an inmate's execution pending the Supreme Court's determination as to whether § 1983 was a proper vehicle for his claims); *see also Rutherford v. Crosby*, 126 S. Ct. 1191, 1191 (2006) (staying an inmate's execution pending the Supreme Court's consideration of his petition for certiorari).[2]

A brief review of the four-factor analysis traditionally employed when considering whether to grant a preliminary injunction leads to the same conclusion. These factors include (1) the likelihood that the moving party will be irreparably harmed absent a preliminary injunction; (2) the prospect that others will be harmed if the court grants the preliminary injunction; (3) the public interest in granting the preliminary injunction; and (4) the likelihood that the party seeking the preliminary injunction will prevail on the merits of his claim. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). These factors are not prerequisites that each must be met, but rather are "interrelated considerations that must be balanced together." *Id.* at 153. The Sixth Circuit has recognized that courts applying this test to motions for preliminary injunctions must make decisions based upon "incomplete factual findings and legal research." *Id.* (internal quotation omitted). Bearing this obstacle in mind, the court now turns to an analysis of each of the four factors.

Detailed discussion of the first factor clearly is not necessary in execution-related cases such as this one. Absent a preliminary injunction, the plaintiff will be executed on May 17, 2006, just weeks before a likely decision in *Hill*, which could give him the right to pursue the

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[2]Unlike other defendants confronted with challenges that are identical or nearly identical to the one in this case, the defendants here do not consent to an injunction pending *Hill* but, instead, press for the plaintiff's execution to occur as scheduled. *Cf. Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (unpublished); *Roane v. Gonzales*, No. 05-2337 (D.D.C. Feb. 24, 2006) (unpublished).

challenge the defendants now seek to dismiss. *See Jackson v. Taylor*, No. 06-300-SLR ¶ 4 (D. Del. May 9, 2006) (noting that the Supreme Court is expected to issue its *Hill* decision by June 30, 2006). The plaintiff's case thus presents the ultimate demonstration of irreparable harm.

Next the court examines the harm to others that might result from granting this injunction. The state will incur costs from delaying the execution, and the living relatives of the plaintiff's victim may be distressed at the delay. However, in light of the fact that the Supreme Court is expected to issue an opinion in *Hill* before June 30, 2006, the potential harm from a few weeks' delay is far outweighed by the potential harm to the plaintiff if this injunction is not granted. *See Jackson*, No. 06-300-SLR ¶ 4.

Turning to the next factor, the public does, as the defendant asserts, have an interest in executing sentences. (*See* Docket No. 24 at 5.) However, there is an interest at stake in this case that is at least as great as Tennessee's interest in seeing the plaintiff's death sentence carried out: the protection the Eighth Amendment affords each citizen of the United States. *See DePew v. Anderson,* 311 F.3d 742, 748 (6th Cir. 2002) ("[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights") (citing *Reid v. Covert,* 354 U.S. 1, 45-46, (1957) (Frankfurter, J., concurring)). Taking into account the detriment caused by delaying the public's "moral judgment," *see Calderon v. Thompson*, 523 U.S. 538, 556 (1998), the public interest weighs in favor of maintaining the status quo until the Supreme Court rules.

The court now moves to a brief examination of the plaintiff's ability to prevail on the merits of his challenge to Tennessee's lethal injection protocol. In cases like this one, where the other three factors militate in the plaintiff's favor, a district court is within its discretion to issue a preliminary injunction if the merits of his case "present a sufficiently serious question to justify

further investigation." *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1230 (6th Cir. 1985); *Roth v. Bank of the Commonwealth,* 583 F.2d 527, 537-38 (6th Cir.1978), *cert. dismissed,* 442 U.S. 925 (1979). One such "serious question" is at issue here. The plaintiff, by providing expert testimony that the current lethal injection protocol causes excruciating deaths, has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims to survive his relatively light burden. The preliminary injunction stage is not the time to weigh the plaintiff's expert against the defendants'. It is in order to preserve that dispute—and the unanswered jurisdictional issue pending in *Hill*—that this court must grant a preliminary injunction.

Finally, it is important to note that any alleged "undue delay" on the part of the plaintiff does not warrant denial of the preliminary injunction. The plaintiff brought his first habeas petition before the federal courts in 1998 and, subsequently, brought a Rule 60(b) petition that was eventually held to be a second habeas attempt. *See Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002) (rehearing denied Dec. 20, 2002); *Alley v. Bell*, 405 F.3d 371 (6th Cir. 2005) (remanding the case to the district court to determine whether the motion could be considered a proper 60(b) motion); *Alley v. Bell*, No. 04-5596 (W.D. Tenn, Nov. 28, 2005) (motion to alter or amend judgment denied Mar. 22, 2006) (unpublished). While those actions were pending, the plaintiff's execution was stayed, and accordingly, it was not yet determined that the plaintiff would actually be executed. In fact, the plaintiff may well have faced ripeness issues had he challenged the lethal injection protocols before that determination was made. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (9th Cir. 1997), *aff'd*, 523 U.S. 637, 640 (1998) (holding that an Eighth Amendment competency challenge was premature where the execution had been

stayed pending other challenges).[3]

The plaintiff cannot be said to have unduly delayed by failing to challenge his method of execution before it was certain that the execution in the challenged manner would occur. The record demonstrates that soon after learning that an execution would in fact occur—seven days after the Western District of Tennessee denied his motion to alter or amend judgment on his Rule 60(b) motion and just one day after the Tennessee Supreme Court set a new execution date—the plaintiff wrote Commissioner George Little, expressing his objections to the lethal injection protocol. (Docket No. 25, Ex. 1.) After failing to receive a response, the plaintiff filed this action on April 11, 2006. Under such circumstances, it would be strange jurisprudence to dismiss this action for "undue delay."

Accordingly, given the potentially dispositive nature of the Supreme Court's upcoming decision in *Hill*, as well as the fact that traditional preliminary injunction analysis weighs in favor of its being granted, a preliminary injunction will issue in this case.

CONCLUSION

The plaintiff's Motion for Preliminary Injunction will be granted and his execution stayed pending further orders of the court.

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[3]The lack of "undue delay" in this case is well illustrated by a comparison to *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997). In that case, which was also a § 1983 action, the Sixth Circuit upheld the district court's determination that it lacked subject matter jurisdiction. *Id.* In addition, the court noted that the plaintiff had unduly delayed in bringing his action. The court projected that the plaintiff could have brought his claim anywhere between ten to fifteen years before he did so. *Id.* Presumably, the plaintiff before the Sixth Circuit in that case did not face the ripeness issues that Alley would have faced had he brought his Eighth Amendment challenge while his habeas petitions were outstanding.

An appropriate order will enter.

ALETA A. TRAUGER
United States District Judge

APPENDIX 3

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 06-5650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY,

Plaintiff-Appellee,

v.

GEORGE LITTLE, et. al.

Defendants-Appellants.

On Motion to Vacate from the United States District Court for the Middle District of Tennessee

Before: **BOGGS, Chief Judge; and RYAN and BATCHELDER, Circuit Judges.**

BOGGS, Chief Judge. Defendant Tennessee Commissioner of Corrections and others challenge the district court's grant of a preliminary injunction and order staying the execution, scheduled for 1:00 a.m. on May 17, 2006, of plaintiff Sedley Alley. Alley was convicted of kidnaping, rape, and first-degree murder and sentenced to death in 1987. We **VACATE** the injunction and stay.

I

On March 29, 2006, the Tennessee Supreme Court set Alley's execution date. On April 11, 2006, Alley filed what he denominated an action pursuant to 42 U.S.C. § 1983, challenging Tennessee's lethal injection protocol. The district court initially held the action in abeyance during

the pendency of the United States Supreme Court's consideration of *Hill v. McDonough*, No. 05-8794 (U.S., argued Apr. 25, 2006). *Alley v. Little*, 2006 WL 1207611 (M.D. Tenn., May 2, 2006) The question taken up by the Court in *Hill* is whether § 1983 is a proper vehicle by which a death row inmate may bring a challenge to the protocol of chemicals typically used by states in lethal injection execution procedures.[1] Alley filed a motion on May 4, 2006, for a stay of execution pending the outcome of *Hill*. (Motion for Preliminary Injunction, No. 3:06-340, May 4, 2006) The motion noted that the Court's decision would determine whether Alley's complaint as to the constitutionality of the lethal injection protocol "may proceed under 42 U.S.C. § 1983 or should be considered a habeas corpus petition . . . ." (Motion for Preliminary Injunction, 1) Alley noted that the Court had issued a stay in Hill's case, which raised essentially the same challenge to the protocol. *See Hill v. Crosby*, 546 U.S. __ , 126 S.Ct. 1189 (Jan. 25, 2006). His motion noted that the Supreme Court and other courts, including the Eighth Circuit and the United States District Court for District of Columbia, had granted stays of execution in other cases, pending the outcome of *Hill*. (Motion for Preliminary Injunction, 2, citing *Rutherford v. Crosby*, 546 U.S. ___, 126 S.Ct. 1191

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[1] The parties in *Hill v. McDonough* agreed on the exact wording of the two questions presented to the Court:

> 1. Whether 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, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254.
>
> 2. Whether, under this Court's decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983. (Brief for Petitioner, i; Brief for Respondent, i)

(2006); *Taylor v. Crawford*, No. 06-1379 (8th Cir. 2006) (en banc); *Roane v. United States*, No. 05-2337 (D.D.C.))

In considering Alley's motion, the district court first asked whether it had subject-matter jurisdiction, noting that, "[w]ere the plaintiff's challenge to be converted to a second habeas petition, this court would lack jurisdiction over it and would be required to transfer it to the Sixth Circuit for appellate review." (Order of May 11, 2006, No. 3:06-0340, 3, *citing In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *In re Sapp*, 118 F.3d 460, 463 (6th Cir. 1997)) The district court determined that it must "await guidance from the Supreme Court before determining whether such conversion is appropriate in this case and, consequently, whether it has jurisdiction over the plaintiff's challenge." (Order of May 11, 2006, 3) The court concluded that it must therefore issue a stay pending the outcome in *Hill*.

Separately, the district court reasoned that the traditional four-factor analysis as to whether to grant a preliminary injunction also favored the issuance of a stay. *See Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (setting out the factors). The district court found that all four factors, including irreparable harm to the moving party, the relative absence of harm to other parties following an injunction, the quantum of public interest in granting the motion, and the likelihood of ultimate success on the merits, militated toward granting the stay. (Order of May 11, 2006, 4-6.)

The district court issued the stay sought by Alley. We now review.

II

We hold that the district court abused its discretion in issuing the preliminary injunction and stay. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532 (6th Cir. 2004) (noting standard of review for grants of preliminary injunctions).

First, we state that, regardless of a prediction as to the outcome in *Hill*, we will, *arguendo*, treat Alley's action as a properly filed § 1983 claim and that, even so understood, this suit affords no basis for the stay that has been granted. The nub of Alley's claim is that the protocol, as concocted and administered, is unconstitutional on the grounds that it is cruel and unusual punishment under the Eighth Amendment and otherwise and simultaneously violative of the Ninth Amendment. (Complaint, No. 3:06-cv-00340, Apr. 11, 2006, 1-2) That is not the law of the republic as it stands today. No federal court has found the lethal injection protocol as such to be unconstitutional. We will not do so today.

If we assume, as we do, that Alley may challenge the lethal injection chemical protocol through a § 1983 action, we then weigh the merits of the district court's stay, based on the reason furnished in its opinion. The court first states that the stay must be granted because the Supreme Court is considering whether this action can even be brought properly under § 1983. Such a view is a wrong as a matter of law. The Supreme Court's consideration of a procedural matter such as this can not freeze in place all actions in the lower federal courts under existing law. If the Supreme Court ultimately holds that this action should not be cognizable at all, obviously the injunctive relief of a stay would not be justified. On the other hand, if the Court were to hold that the case can properly be brought, in a procedural sense, it would place us exactly where we find ourselves now

by assuming it is proper. We thus obviate any justification for a stay based on the possibility of the Supreme Court's ruling as we assume it will.

Second, we note that the importance of the pendency of *Hill v. McDonough* to our case is far from clear or conventionally accepted. The Supreme Court, though possessing the power to do so, has not issued a nationwide stay of lethal injection executions until it hands down a decision in *Hill*. Fifteen executions, all by lethal injection, have taken place in the United States since the writ of certiorari was granted in *Hill* on January 25, 2006. Three have occurred since the April 26, 2006 oral arguments. The Supreme Court has specifically declined stays in several of these cases, even where the inmates have raised nearly identical claims regarding their states' lethal injection protocols to the one presented in our case. In *Donahue v. Bieghler*, 126 S.Ct. 1190 (2006), the Supreme Court acted on January 27, 2006, to *vacate* a stay that had been entered by the Seventh Circuit. Marvin Bieghler was executed the same day. The Court likewise denied a stay on January 31, 2006, in *Elizalde v. Livingston*, 126 S. Ct. 2006 (2006), and Jaime Elizalde was put to death the same day. The Court acted similarly in the case of the man most recently executed in the United States. In *Wilson v. Livingston*, 2006 WL 1174531 (U.S., May 4, 2006), the Court denied a stay, and Jackie Wilson was executed the same day. Given the Supreme Court's own pattern of conduct regarding cases in which inmates are raising claims like the one in our case, we cannot conclude that the Supreme Court has established any new precedent that would favor a stay of Alley's execution pending the outcome in *Hill*.

Third, we turn to the alternative basis the district court relies on, based on the traditional four-factor test for preliminary injunctions. We do not agree with the district court's conclusion as to the

test's application in Alley's case. The district court correctly found that Alley, the moving party, is threatened with irreparable harm. This interest must be weighed against the state's interest in carrying out punishment. The state's interest is not to be underestimated. The Supreme Court has instructed that the "State's interests in finality are compelling" and that the "powerful and legitimate interest in punishing the guilty" attaches to both "the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citations and internal quotations omitted) Even considering the countervailing interests of Alley and the state, the small likelihood of Alley's success on the merits ultimately decides the matter. That likelihood, such as it exists at all, is unsupported by current law, which offers no basis for finding lethal injection protocols unconstitutional. Moreover, since the Supreme Court is not even considering the constitutionality of the lethal injection protocol in *Hill*, the prospect of a change in that feature of existing jurisprudence is as speculative as any other claim about possible future changes in governing law. Such speculation does not impact our assessment as to the likelihood of Alley's success on the merits under existing law.

Fourth, we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol. He 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. Another Tennessee death row inmate, Abu-Ali Abdur'Rahman, petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002. *Abdur'Rahman v. Bredesen*, 181 S.W. 3d 292, 299-300 (Tenn. 2005) Alley's execution date was set on January 16, 2004, for June 3rd of that year, following the Supreme Court's denial of a writ of certiorari to review our court's decision not to grant habeas relief. *Alley v. Bell*, 540 U.S. 839

(2003); *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004). Lethal injection has been the only method of execution in Tennessee since 2000 for all death row inmates save those who affirmatively express a preference for electrocution. Tenn. Code Ann. § 40-23-114. Alley had ample time in which to express such a preference and/or file his current grievance. Instead, he waited until thirty-six days before his currently scheduled execution date.

Alley argues that his current claim would not have been ripe for judicial consideration had he filed it much earlier than the date on which he submitted his complaint. He notes that the Tennessee Supreme Court set his current date of execution on March 29, 2006. He points out further that his action, which he styled a motion made pursuant to Fed. R. Civ. P. 60(b), seeking relief from the district court's denial of his habeas petition, was until quite lately pending in the district court. He 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, following the district court's final disposal of the Rule 60(b) motion, 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. We have been cited no precedent, and our independent research has yielded none, where a claim such as the one Alley 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 federal habeas. *See Calderon*, 523 U.S. at 556 ("A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief."). We find a passage from our opinion in *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997), sufficiently apposite to the case now before us to warrant quotation:

Even were we to consider the merits of McQueen's claim, we would not permit his claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. The legal bases of such a challenge have been apparent for many years. . . . 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, even if jurisdiction were otherwise proper. (internal citations omitted)

III

We **VACATE** the preliminary injunction and stay.

APPENDIX 4

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0164p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SEDLEY ALLEY,
Plaintiff-Appellee,

v.

GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction, et al.,
Defendants-Appellants,

JOHN DOES 1-100, et al.,
Defendants.

No. 06-5650

Filed: May 16, 2006

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

*Judge Gibbons recused herself in this case.

BOYCE F. MARTIN, JR., Circuit Judge, with whom DAUGHTREY, MOORE, COLE, and CLAY, Circuit Judges, join, dissenting from the denial of rehearing en banc.

The Supreme Court recently heard oral arguments in *Hill v. McDonough*, No. 05-8794, and is expected to issue a decision before the end of the current Term in June. The Court's decision will impact Alley's case either by allowing him or not allowing him to challenge the method of his execution pursuant to 42 U.S.C. § 1983. If Alley is executed on Wednesday and the Supreme Court decides *Hill* in his favor next month, this Court will effectively have locked the barn door after the horse has already escaped. If we uphold the stay entered by the district court, as I would, and the Supreme Court decides *Hill* against Alley's interests, Tennessee may proceed with the execution in June.

To me, this balancing of interests weighs heavily in favor of upholding the stay entered by the district court. Moreover, the dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result. *Compare Rutherford v. Crosby*, 546 U.S. ___, 126 S.Ct. 1189 (Jan. 25, 2006); *Taylor v. Crawford*, No. 06-1379 (8th Cir. Feb. 1, 2006) (en banc); *Roane v. Gonzales*, No. 05-2337 (D.D.C. Feb. 24, 2006), *with Wilson v. Livingston*, 2006 U.S. App. LEXIS 10958 (5th Cir. May 2, 2006), *stay denied*, 2006 U.S. LEXIS 3670 (U.S., May 4, 2006); *Donahue v. Bieghler*, 126 S.Ct. 1190 (U.S., Jan 27, 2006). This adds another arbitrary factor into the equation of death and thus far, there has been no logic behind the Supreme Court's decision as to who lives and who dies. Until the Supreme Court sorts this out, I would uphold the stay issued in this case, and all cases that come before this Court, and therefore dissent from the Court's contrary holding.

We review a district court's decision to enter a stay for abuse of discretion. *See Yolton v. El Paso Tenn. Pipeline, Co.*, 435 F.3d 571, 577 (6th Cir. 2006). Our four factor analysis requires us to consider the petitioner's likelihood of success on the merits, whether the petitioner will suffer irreparable harm if a stay is not entered, whether others will be harmed by the entry of a stay, and the public interest in a stay. These factors must be balanced to determine whether a stay ought to be entered.

First, it is clear that petitioner will suffer irreparable harm if a stay is not entered. He will be dead. This will of course moot any challenge he could mount should the Supreme Court decide *Hill* to allow a §1983 suit.

Second, we consider whether others will be harmed by the stay. As the district court noted, the state may incur financial costs and relatives of the plaintiff's victim might experience emotional harm. These are serious interests that we ought to credit. Nevertheless, the fact that the Supreme Court will issue a decision by the end of next month militates against finding these interests overwhelming. Death, of course, is different. A delay of less than two months — awaiting a highly relevant Supreme Court decision — is worth the wait when human life is at stake.

Third, we consider the public interest. Certainly the public interest in carrying out criminal sentences is strong. On the other hand, the public also has an interest in not carrying out cruel and unusual punishment or terminating human life prematurely. Finally, the public interest in uniform adjudication by the federal courts is not to be disregarded. The fact is that fifteen executions have been carried out despite *Hill*. Other courts have issued stays putting executions on hold pending the *Hill*'s disposition. This patchwork justice is intolerable when dealing with the imposition of the death penalty and undermines the public interest in uniform adjudication.

Finally, we consider Alley's likelihood of success on the merits. The panel decision declares that there is only a "small" likelihood of success on the merits and finds that this "ultimately decides the matter." I disagree. The district court found that Alley "by providing expert testimony that the current lethal injection protocol causes excruciating deaths, has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims." Dist. Ct. Op. at 6. The panel decision does not make clear why this Court should disregard the district court's explicit factual finding, particularly given the abuse of discretion standard it purports to apply. From the executions that have proceeded recently, including one last week, we have additional evidence of the problems with this procedure. Although Alley's claim may not be a clear winner, I do not believe that it is a clear loser, and there is a likelihood that Alley will be able to show that lethal injection amounts to cruel and unusual punishment. In light of this, I would not find that this factor "ultimately decides the matter." Rather, viewing all four factors, and because death is different, I would find that the district court did not abuse its discretion by entering a stay pending the Supreme Court's resolution of *Hill*.

No doubt the march toward death is powerful. Currently, however, the march is anything but orderly. The current administration of the death penalty in light of the pending decision of *Hill* is more like a march in dozens of different directions, which I believe is more costly, more inefficient, and more arbitrary, than entering the stay and waiting temporarily for some (hopefully) clear guidance. The arbitrariness of death penalty administration is not ameliorated by the fact that *Hill* involves what the panel terms "a procedural matter." Rather, administration of the death penalty can only be made more arbitrary by the possibility that after *Hill*, some current death row inmates may be able to show in court that the practice of lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment, while other currently similarly situated inmates will have already been put to death through a method deemed to violate the Constitution. I would wait for the Supreme Court to resolve the issue and would affirm the district court's decision entering the stay.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk