IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY,	)	
Plaintiff/Appellee,	)	
	)	**No. 06-5650**
v.	)	
	)	
GEORGE LITTLE, et al.,	)	**EXPEDITED ACTION REQUESTED**
Defendants/Appellants.	)	**Execution Scheduled for May 17, 2006**

DEFENDANT'S MOTION TO VACATE ORDER STAYING EXECUTION

On May 11, 2006, for the second time in two years, a federal district court stayed the scheduled execution of Sedley Alley's sentence on the basis of a purely procedural issue.[1] Alley was sentenced to death for abducting, and then brutally raping and murdering nineteen-year-old Suzanne Marie Collins with a thirty-one-inch tree branch on July 11, 1985. The district court stayed the execution this time on the basis of the grant of certiorari in *Hill v. McDonough*, No. 05-8794 (U.S.), *cert. granted*, 126 S.Ct. 1189 (Jan. 25, 2006), and Alley's subsequent filing of an action

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[1]On May 19, 2004, the federal district court for the Western District of Tennessee stayed Alley's then-scheduled execution on the basis of the pendency in this Court of *Abdur'Rahman v. Bell*, Nos. 02-6547/6548 (6th Cir.) *See Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004), *rehearing en banc granted*, 405 F.3d 371 (6th Cir. 2005).

under 42 U.S.C. § 1983 challenging Tennessee's lethal injection protocol. But if comity and federalism mean anything, they have to mean that the State's efforts to enforce its own lawful judgment cannot repeatedly be frustrated simply because there happen to be procedural questions of federal law to be ironed out, particularly when resolution of those questions will make no difference.

Defendants move that this Court vacate the order of the district court granting a preliminary injunction and staying plaintiff Alley's execution, because the district court abused its discretion. The district court's ruling flies in the face of the Supreme Court's directive that, "before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harm to the parties, but also *the extent to which the inmate has delayed unnecessarily in bringing the claim*." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (emphasis added). It also flies in the face of this Court's concept of what constitutes unnecessary delay in bringing a claim like plaintiff's. *See In re Sapp*, 118 F.3d 460 (6th Cir. 1997); *see also Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005) (citing *Nelson*, 541 U.S. 637) (denying stay of execution "primarily because the motion was untimely").

There is simply no justifiable basis on which to grant a stay in this case on the basis of the grant of certiorari in *Hill*, as there is no way in which the plaintiff here could derive any benefit from the decision to be rendered in *Hill*. If plaintiff's action

is a habeas petition, then it is successive and clearly barred by AEDPA. *See* 28 U.S.C. § 2244(b). And if, as plaintiff asserted by filing it as such,[2] and as defendants have assumed arguendo, plaintiff's action is indeed a § 1983 complaint, then it was untimely, as was plaintiff's subsequent motion for a preliminary injunction. *See Hicks*, 431 F.3d at 917. For the purpose of determining whether to stay plaintiff's execution, there is simply *no* need for the district court to "await guidance from the Supreme Court before determining whether [to treat the action as a habeas petition]." R. 27, Memorandum , p. 3. *See Donahue v. Bieghler*, 126 S.Ct. 1190 (2006) (vacating stay of execution issued by Seventh Circuit on basis of *Hill*, where § 1983 complaint challenging lethal injection protocol had not been treated as successive petition but had been dismissed because prisoner delayed unnecessarily in seeking relief).[3] *Cf. Hill v. Crosby*, 126 S.Ct. 1189 (2006); *Rutherford v. Crosby*, 126 S.Ct. 1191 (2006)

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[2]When plaintiff moved for a preliminary injunction in the district court, he asserted that this Court's precedent "appears to indicate that [the district court] lacks jurisdiction." R. 23, Motion, p. 3. It certainly appears, then, that plaintiff filed his § 1983 action in order to seize upon the grant of certiorari in *Hill* and gain yet another delay in his execution, much as he did in 2004 when he filed a Rule 60(b) motion in his habeas case twenty-two days before his then-scheduled execution. As the Supreme Court has instructed, equity courts must be mindful of such "obvious attempt[s] at manipulation." *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653, 654 (1992).

[3]*See Bieghler v. Donahue*, No. 1:06cv00136 (S.D.Ind. Jan. 26, 2006) (entry order of dismissal) (citing *Nelson v. Campbell*, 541 U.S. 637 (2004) and *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005)).

(granting stays of execution where district court had actually dismissed action as successive petition and Eleventh Circuit had affirmed on that basis).

I. PLAINTIFF DELAYED UNNECESSARILY IN BRINGING HIS CLAIM.

Plaintiff was sentenced to die for his crime in 1987. *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989). In 2000, he knew, or should have known, that the method by which his sentence would be executed would be lethal injection. *See* Tenn. Code Ann. § 40-23-114; 2000 Tenn.Pub.Acts, ch. 614, § 1. By at least June 2003, if not three years prior thereto, he knew, or should have known, about the details of the state's lethal injection protocol, because a state trial court had issued a ruling in another case in which a similarly situated prisoner had likewise challenged it. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). And in October 2003, when the United States Supreme Court denied review of this Court's decision affirming the denial of habeas relief, *see Alley v. Bell*, 540 U.S. 839 (2003), plaintiff knew, or should have known, of the impending execution of his sentence. Indeed, on January 16, 2004, the Tennessee Supreme Court set an execution date of June 3, 2004. *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004).

Yet plaintiff waited for two and a half years thereafter — until April 11, 2006, just thirty-six days prior to his *rescheduled* execution date — to file his action challenging the lethal injection protocol. His motion for a preliminary injunction

came on May 4, 2006, just thirteen days before the execution date. This constitutes unnecessary delay, as this Court has recognized. *See Hicks*, 431 F.3d at 917 (finding motion for stay untimely where inmate intervened in § 1983 action six months after denial of certiorari in his habeas case and six days before scheduled execution); *In re Sapp*, 118 F.3d at 462 (finding undue delay where action filed fourteen days *before* denial of certiorari in habeas case and forty-three days before subsequently scheduled execution date). *See also Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004) (finding undue delay where action filed six weeks after denial of certiorari in habeas case and ten weeks before scheduled execution).

The district court clearly erred, then, when it determined that plaintiff had not unduly delayed "by failing to challenge his method of execution before it was certain that the execution in the challenged manner would occur." The uncertainty was created, according to the district court, by the pendency of plaintiff's Rule 60(b) motion to reopen his habeas case. But the pendency of the Rule 60(b) motion did not foreclose plaintiff from challenging the state's lethal injection protocol. Indeed, four months went by while plaintiff faced a June 3, 2004, execution date before the execution was stayed on the basis of his May 12, 2004, Rule 60(b) motion — a mere fifteen days before the then-scheduled execution date. Contrary to the district court's assertion, it would not be "strange jurisprudence" at all to conclude that plaintiff

delayed unduly by failing to challenge the lethal injection protocol at this time. What *is* "strange," in defendants' view, is a legal system that would willingly embrace such transparently manipulative delaying tactics.

This Court's cases make clear that, 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 the Supreme Court that marks the end of his habeas corpus case. Indeed, the Supreme 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," 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 v. Thompson, 523 U.S. 538, 556 (1998) (citations omitted) (emphasis added).[4]

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

II. THE BALANCE OF THE FACTORS FOR GRANTING INJUNCTIVE RELIEF WEIGH IN FAVOR OF DENYING RELIEF.

Not only does plaintiff's unnecessary delay in filing his claim deprive him of any entitlement to a stay of his execution, it also warrants the dismissal of his complaint. *See In re Sapp*, 118 F.3d at 464. There is, therefore, no likelihood of success on the merits of that complaint, much less a strong one — the first of four factors to be balanced in weighing whether to grant injunctive relief. S*ee Tumblebus Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*, 126 S.Ct. 361 (2005); *see also id.* (question whether movant is likely to succeed is a question of law that is reviewed de novo; ultimate determination whether the four factors weigh in favor of granting injunctive relief are reviewed for abuse of discretion).

The district court also clearly erred when it determined that the remaining three factors "militate in the plaintiff's favor." R. 27, Memorandum, p. 5.[5] While it is

[5]As a consequence of this determination, the district court further determined that plaintiff presented a "sufficiently serious question" on the underlying merits of his claim, concluding that plaintiff's proffered expert testimony made an "adequate showing," and stating that the "preliminary injunction stage is not the time to weigh the plaintiff's expert against the defendants'." R. Memorandum, pp. 5-6. But even if the underlying merits of plaintiff's complaint need be considered, any determination of a likelihood of success must involve just such a weighing; it cannot be limited to a determination whether plaintiff merely made a prima facie showing. And as defendants argued to the district court, the merits of plaintiff's claims had already been fully litigated in state court, by another inmate, with the court concluding that "there is less than a remote chance that the prisoner will be subjected to unnecessary physical pain or psychological suffering under Tennessee's lethal

obviously true that plaintiff stands to lose his life when his sentence is executed, it cannot be ignored that this is only the result of lawful punishment for his own heinous conduct. And with the execution of plaintiff's sentence having previously been delayed for nearly two years, the harm that would befall the State by virtue of yet another stay would be substantial.

As this Court has observed, when a claim is very belated and raised at the last minute, "the significant and irreparable harm of execution is balanced by an equally significant and irreparable harm to the legal process, a harm not fully repairable by action after appeal." *In re Sapp*, 118 F.3d at 465. By observing only that "[t]he state will incur costs from delaying the execution, and the living relatives of the plaintiff's victim may be distressed at the delay," R. 27, Memorandum, p. 5, the district court completely minimized the toll that another stay would take on the legitimate, and "all but paramount,"interests of the State, *Calderon*, 523 U.S. at 557 — not to mention those of the victims of this crime. At this juncture, they should be fully entitled to expect, with nearly twenty-one years having elapsed since Suzanne Collins' murder, and with plaintiff's three-tier review having long since concluded, that plaintiff's sentence would finally be carried out. *See id.*, 523 U.S. at 556 (State must be allowed

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injection method." R. 16-1, Motion to Dismiss, p. 13. *See Abdur'Rahman*, 181 S.W.3d at 307-309..

to "execute its moral judgment in the case," thus allowing "the victims of crime [to] move forward knowing the moral judgment will be carried out").

CONCLUSION

For the reasons stated, the order of the district court granting a preliminary injunction and staying plaintiff's execution should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by facsimile to Paul R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37202 on this the _____ day of May, 2006.

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JOSEPH F. WHALEN
Associate Solicitor General