05A1030

No. A-_____
(Capital Case: Execution Date May 17, 2006)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2005

SEDLEY ALLEY	)
	)
Applicant	)
	)
v.	)
	)
WILLIAM KEY,	)
Criminal Court Clerk,	)
Thirtieth Judicial District,	)
At Memphis, Tennessee	)
	)
Defendant-Respondent	)
	)
WILLIAM L. GIBBONS,	)
District Attorney General,	)
In His Official Capacity	)
	)
Intervenor-Respondent	)

To The Honorable John Paul Stevens, Circuit Justice For The United States Court of Appeals For The Sixth Circuit:

APPLICATION FOR ORDER
REQUIRING PRESERVATION OF EVIDENCE

To conduct DNA testing to establish his actual innocence, Sedley Alley has filed a complaint under 42 U.S.C. §1983 seeking release of evidence introduced at trial which has been in the custody of Respondent William Key, the Criminal Court Clerk for the 30th Judicial District at Memphis. In the District Court, Mr. Key (through counsel) initially assured the District Court that the evidence, housed in a vault in his office, would be preserved pending the District Court's ruling. The District Court denied the release of evidence, and Sedley Alley has appealed. Alley v. Key, 6th Cir. No. 06-5552.

To ensure the integrity of the evidence pending the final disposition of this case, Sedley Alley moved both the District Court and the Sixth Circuit for an order requiring the continued preservation of the evidence. See Exhibit1 (District Court Motion); Exhibit 2 (Sixth Circuit Motion). Both courts, however, have denied the motion. See Exhibit 3 (District Court order denying motion for preservation of evidence); Exhibit 4 (Sixth Circuit opinion, p. 8: denying motion to preserve evidence).

Under 28 U.S.C. §1651 and all other applicable law, in the interests of justice, and to ensure the integrity of the evidence which is the subject of Applicant's pending federal litigation, Your Honor should enter an order requiring the complete preservation of the evidence pending the federal courts' determination of the Sedley Alley's constitutional rights to release of that evidence for DNA testing.

I.
SEDLEY ALLEY HAS SOUGHT RELEASE OF EVIDENCE TO CONDUCT DNA TESTING TO PROVE THAT HE IS ACTUALLY INNOCENT

This case involves a sexual assault and murder. To establish his actual innocence through DNA testing, Sedley Alley has sought release of evidence (to test at his own cost) to "identify the perpetrator and exonerate Alley through court process and/or provide him a basis for relief through an application for executive clemency, commutation, or reprieve." R. 6:Complaint, p. 1.

Specifically, Sedley Alley has requested release of (1) the victim's white underwear found at the scene (R. 6, Amended Complaint, ¶10e, Item 5); (2) a pair of red underwear also found at the scene which is likely the perpetrator's (Id., ¶10f, Item 6);(3) a stick found inside the victim which protruded near the left and right inner thighs where semen was detected (Id., ¶10k); (4) the victim's

shorts (Id., ¶10c, Item 3a); (5) her bra (Id., ¶10d, Item 3b); (6) her shirt (Id., ¶10a, Item 1); and (7) her shoes and a sock (Id., ¶10b,h,i, Items 2, 8, 9.)

Especially with regard to the two pairs of underwear and stick, Sedley Alley expects to identify semen, urine, skin cells, or other biological samples from the perpetrator, just as biological materials were detected on swabs from the victim.[1]

When subjected to DNA testing, all of these critical items of evidence can conclusively identify the perpetrator and exonerate Alley: identical male DNA on the two pairs of underwear, the stick, and fingernail scrapings from the victim would conclusively identify the assailant. Indeed, DNA testing of similar evidence has led to exoneration in the cases of Larry Peterson in New Jersey,[2]

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[1] See R. 15 (Plaintiff's Supplemental Memorandum In Support Of Motion For Immediate Release Of Evidence, Exs. 1 & 2: "seminal type – substance detected" reported for swabs of left and right inner thighs, vaginal and nasopharyngeal swabs). Sedley Alley has also sought to test additional items found near the body which would contain biological evidence (likely in the form of saliva, sweat, or skin cells), including styrofoam drinking cups (R. 6, Amended Complaint, ¶10j, Items10, 11, 12)(Apx. 7); beer bottles located near the body (Id., ¶10n, Items 36, 37, 38)(Apx. 7), and grass samples and blood-stained grass found under the body or in proximity to the body. Id., ¶¶10l & m, Items 14, 18, 19, 20, 21, 22, 23, 24 (Apx. 7).

[2] Peterson was tried for capital murder in 1989. Similar to Alley's case, the victim had been sexually assaulted and murdered; her partially clothed body was found in a wooded area, her legs were spread and a stick had been inserted into her vagina. See State v. Peterson, 364 N.J. Super. 387, 397 (App. Div. 2003). Peterson was convicted and sentenced to life imprisonment, including based on individuals who claimed Peterson's guilty knowledge of crime details not released to the public, including the fact that a stick had been inserted in the victim's vagina. The state's forensic expert testified that seven hairs from the victim's body and crime scene were microscopic matches to Peterson. A jailhouse informant also testified that Peterson confessed while awaiting trial. Id.

Peterson sought to have semen on the murder victim's pants, material from underneath her fingernails, and hairs found on and near her body tested. Peterson also sought re-examination of the rape kit items *even though when the victim's body swabs were examined and tested by the State's forensic expert on 1989, no semen or spermatozoa were detected in any of the victim's body swabs.* DNA testing was ordered and, in the re-examination, critical semen evidence was identified which had been completely overlooked in the original examination -- there was sperm on every body orifice swab. The DNA results showed that the hairs microscopically matched to Peterson actually belonged

(continued...)

Kenneth Wyniemko in Michigan,[3] and Nicholas Yarris, who had been sentenced to death in Pennsylvania.[4]

II.
SEDLEY ALLEY IS ENTITLED TO FULL PRESERVATION OF THE EVIDENCE

It goes without saying that if this critical evidence is damaged or destroyed – even unintentionally – Sedley Alley cannot conduct DNA testing and prove his actual innocence with the most compelling proof of his innocence: DNA. The federal courts have full power to ensure that the subject matter of the suit before it remains intact pending the federal courts' final resolution of the matter.

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[2](...continued)
to the victim. The DNA also showed that the sperm in the victim's mouth came from an unknown man, the same man whose sperm was also in the victim's vagina and whose DNA was found underneath the victim's nails.

Based on the results, Peterson's conviction was vacated. See Laura Mansnerus, Citing DNA, Court Annuls Murder Conviction from 1989, N.Y. Times, July 30, 2005 at 2; See Maurice Possley, Convict Seeks New Trial on Basis of Flawed Hair Analysis, CHI. TRIB., Jul. 29, 2005.

[3] Wyniemko was exonerated of rape when post-conviction DNA testing of saliva from a cigarette butt, nylons stuffed in the victim's mouth, and material under the victim's fingernails excluded him as the source of the DNA. While the results from each piece of evidence alone would not have been sufficient to establish Wyniemko's innocence - and in fact, at his original trial, Wyniemko was excluded through rudimentary testing as the source of all of the crime scene evidence - it was the DNA testing, which established that all of the crime scene evidence came from the *same* unknown male, that led the original prosecutor to concede that "the DNA absolutely excludes" Wyniemko as the perpetrator. Kim North Shine, DNA Tests Exonerate Man After Nearly A Decade in Prison, Suspect Is To Be Set Free, DETROIT FREE PRESS, June 12, 2003.

[4] Yarris was exonerated after twenty one years on death row in Pennsylvania prisons for the 1981 abduction, rape and murder after DNA testing showed that Yarris's DNA did not match semen found on the victim's underwear, which was consistent with DNA from skin cells found under her fingernails and in gloves believed to have been worn by the killer. See also Michael A. Fuoco, DNA Test Said To Clear Death Row Inmate Jailed 21 Years In Rape, Murder Case, POST-GAZETTE, July 29, 2003.

This Court has made clear that the federal courts have equitable powers to enjoin the loss or destruction of property which is the subject of a federal suit. Erhardt v. Boaro, 113 U.S. 537 (1885)(equitably enjoining destruction of land during pendency of suit); United States v. Gear, 44 U.S. (3 How.) 120 (1845). And where destruction of the evidence would "seriously impair the federal court's flexibility and authority to decide [this] case," Your Honor may properly order the evidence preserved and enjoin any destruction or damage to the evidence. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970). See 28 U.S.C. §2283.

Under these circumstances, preservation of the evidence to allow future DNA testing is appropriate. Cherrix v. Braxton, 131 F.Supp. 756, 774 (E.D.Va. 2001)(district court ordered preservation of evidence for DNA testing). In fact, under Arizona v. Youngblood, 488 U.S. 51 (1988), this Court has held that knowing or bad-faith destruction of exculpatory evidence violates an individual's right to due process of law.

Here, as in *Cherrix*, all are aware of the significance of the evidence to this lawsuit and Sedley Alley's claims of actual innocence. Sedley Alley needs to be able to test the evidence to establish his actual innocence: Destruction or damage to the evidence and a subsequent argument about the destruction of the evidence is no substitute. Especially where the evidence is in the custody of an adverse party, preservation of the evidence is warranted. Abdah v. Bush, 2005 U.S.Dist.Lexis 17189 (D.D.C. 2005) (preservation order entered); Al-Marri v. Bush, 2005 U.S.Dist.Lexis 17195 (D.D.C. 2005)(same).[5]

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[5] The Sixth Circuit denied the motion for preservation of evidence "seeing little threat to the preservation of the evidence under the status quo, and given the substance of the other rulings contained in this opinion . . . ." Exhibit 4, p. 8. As *Abdah* and *Al-Marri* establish, however, to have evidence preserved which is in the possession of an adverse party, a party need not conclusively (continued...)

The simple facts that the evidence is in Defendant Key's possession and that such evidence is critical to Sedley Alley's proof of actual innocence are sufficient to warrant an order preserving the evidence pending the disposition of this lawsuit. Even so, were Sedley Alley required to establish anything more, he can easily do so. He faces irreparable harm if the evidence is damaged or destroyed, there is no harm to the Defendant or the state in preserving the evidence, and the public interest lies in the preservation of the evidence as well. In addition, Sedley Alley shows a substantial likelihood of ultimate relief on his constitutional claims.

Indeed, Sedley Alley has maintained that Defendant Key must disclose the evidence because: (1) Sedley Alley has an Eighth and Fourteenth Amendment right to disclosure of the evidence to establish actual innocence; (2) He has a due process right to the production of exculpatory evidence; (3) He has a procedural due process right to production of the evidence; and (4) He has a substantive due process right to disclosure.

Sedley Alley is likely to prevail in his claims to disclosure of evidence for DNA testing because, first and foremost, he already has significant evidence establishing that he is actually innocent of the offense. That evidence includes, for example: unconstitutionally-withheld proof that, contrary to the prosecution's theory at trial (claiming that Alley killed the victim at 11:00 p.m. on July 11, 1985), the victim actually died at 3:30 a.m. July 12, 1985 when Alley's whereabouts were

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[5](...continued)
establish the threats to the evidence. The point is that when evidence is in the other party's possession, that party has control over the evidence and can, without the opposing party knowing, damage or destroy the evidence. Where the District Attorney has not agreed to fully preserve the evidence pending the disposition of this matter, one can assume that there is, in fact, some threat to the preservation of the evidence, including through *ex parte* destructive testing by the state using inferior methods of analysis. Any threat is unacceptable under the circumstances.

well known to authorities;[6] proof that Alley was not the abductor (the abductor was described as 5'8" with a medium build, dark hair and a dark complexion, while Alley was 6'4" with a slender build, medium to long reddish-brown hair and a medium complexion);[7] it is the victim's boyfriend who matches the description of the abductor, he admits to being with her that night, and had a motive to kill her (jealousy);[8] other forensic evidence (tire tracks, shoe prints, hairs, and fingerprints) exclude Alley as the perpetrator;[9] and Alley's statement to authorities is unreliable, a false confession.[10]

In light of this already existing proof of Sedley Alley's actual innocence, he is likely to prevail on his claims that he is constitutionally entitled to the evidence to conduct DNA analysis. He has a substantial likelihood of securing relief on each of his grounds for release of the evidence:

(1) Under Herrera v. Collins, 506 U.S. 390 (1993), it is unconstitutional to execute an innocent person and clemency provides a failsafe for presenting evidence of actual innocence; under the Eighth and Fourteenth Amendments, these dual propositions mandate disclosure of evidence for DNA testing, especially to establish actual innocence in clemency proceedings (See e.g., Brief Of Appellant, *Alley v. Key*, 6th Cir. No. 06-5552, pp. 35-42; Harvey v. Horan, 285 F.3d 298, 314, 320 (4th Cir. 2002)(Luttig, J., respecting denial of rehearing);

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[6] Brief Of Appellant, *Alley v. Key*, 6th Cir. No. 06-5552, pp. 5-6 & nn. 4-5 (citing documents concerning time of withheld until 2004-2005).

[7] Id., p. 6 & n. 7

[8] Id., pp. 6-7 & n. 8 (citing affidavit of April Higuera).

[9] Id., p. 7 & nn. 9-10.

[10] Id., pp. 7-8 & nn. 11-12 (citing affidavit of Professor Richard Leo, Ph.D. and Drizin & Leo, The Problem Of False Confessions In The Post-DNA World, 82 N.C.L.Rev. 891 (2004).

(2) The due process right to production of exculpatory evidence (Brady v. Maryland, 373 U.S. 83 (1963), and the due process protection against destruction of exculpatory evidence (*Arizona v. Youngblood, supra*) prohibit state actors from withholding evidence which can conclusively establish innocence which, in effect, destroys such evidence by preventing its analysis (See e.g., Brief Of Appellant, *Alley v. Key*, 6th Cir. No. 06-5552, pp. 45-50; Godschalk v. Montgomery County District Attorney's Office, 177 F.Supp. 366 (E.D.Pa. 2001);

(3) Under the due process balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), Sedley Alley has a fundamental life and liberty interest, DNA testing will establish guilt or innocence with unquestioned accuracy at no cost to the state, and the state has no legitimate interest in executing an innocent person or withholding the evidence, where the state's interest is justice. In the balance of interests, disclosure is mandated when "guilt can be quickly and definitively determined by means of a simple test [and] there is no reason not to have it performed." Cooper v. Woodford, 358 F.3d 1117, 1125 (9th Cir. 2004)(Silverman, J., concurring). See Brief Of Appellant, *Alley v. Key*, 6th Cir. No. 06-5552, pp. 50-55.

(4) It violates substantive due process to allow an execution to proceed while the state withholds evidence which can establish actual innocence. This shocks the conscience and involves "patent arbitrariness" where the state simply has no interest in allowing the execution of an innocent person nor any legitimate interest in prohibiting such testing. Harvey v. Horan, 285 F.3d at 319 (Luttig, J., respecting denial of rehearing).

III

YOUR HONOR SHOULD ORDER THE PRESERVATION OF THE EVIDENCE

For all these reasons, Your Honor should order full preservation of the evidence on which Sedley Alley seeks to conduct DNA analysis. An order should be entered which provides that: All such evidence shall remain in the custody of Respondent Key in its current state and location; and that any and all such evidence shall be fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source whatsoever, pending the final disposition of this matter on review in the United States Court of Appeals for the Sixth Circuit and/or the United States Supreme Court.

Respectfully Submitted,

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By: Paul R Bottei

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing application has been served via overnight mail to Lenard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and to Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 11th day of May, 2006.

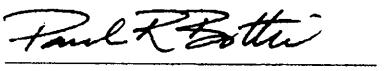

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY Plaintiff v. WILLIAM R. KEY, Criminal Court Clerk Thirtieth Judicial District At Memphis JOHN DOES 1-100 Defendants	)	No. 2:06-cv-2201-SHM-dkv

MOTION TO PRESERVE ALL EVIDENCE PENDING
FINAL RESOLUTION OF APPEAL

It is undisputed that Defendant Key has in his possession the physical evidence sought by Plaintiff in his complaint. Mr. Key has that evidence secured in a vault in the Criminal Court Clerk's Office. This Court has previously ordered that all such evidence be preserved, based on the representation of Mr. Key's counsel that it would be. To avoid any confusion or irreparable harm to such evidence, this Court should order that the *status quo* shall remain as to any and all evidence which is the subject of this suit (as identified in Amended Complaint ¶10); that all such evidence shall remain in the custody of Defendant Key in its current state and location; and that any and all such evidence shall be fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source whatsoever, pending the final disposition of this matter on review (including in the Sixth Circuit and/or United States Supreme Court), and pending further order of this Court.

Respectfully Submitted,

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/s/ Paul R. Bottei

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via e-mail to Lenard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and via electronic filing to Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 21st day of April, 2006.

/s/ Paul R. Bottei

Exhibit 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY Plaintiff-Appellant vs. WILLIAM R. KEY, Criminal Court Clerk, Thirtieth Judicial District At Memphis Defendant-Appellee JOHN DOES 1-100 Defendants-Appellees WILLIAM L. GIBBONS, District Attorney General, In His Official Capacity Intervenor-Appellee	)	No. 06-5552

MOTION TO PRESERVE ALL EVIDENCE PENDING
FINAL RESOLUTION OF APPEAL

I. FACTS

This case involves Plaintiff's constitutional rights to conduct DNA analysis of evidence in the possession of Defendant-Appellee Key. It is undisputed that Mr. Key has in his possession the physical evidence sought by Plaintiff in this suit. The evidence is secured in a vault in the Office of the Criminal Court Clerk, in Memphis,

Tennessee. The District Court has previously ordered that all such evidence be preserved, based on the representation of Mr. Key's counsel that it would be preserved.

To avoid any confusion or irreparable harm to such evidence while this case is on appeal, Appellant has asked the District Court to order that the *status quo* remain as to any and all evidence which is the subject of this suit (as identified in Amended Complaint ¶10), and that all such evidence shall remain in the custody of Defendant-Appellee Key in its current state and location; and that any and all such evidence shall be fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source whatsoever, pending the final disposition of this matter on review in this Court and/or the United States Supreme Court), and pending further order of the District Court. The District Court has yet to rule on this pending motion and the Intervenor has opposed that motion.

To ensure full preservation of the evidence throughout appeal, Sedley Alley also asks for the same relief from this Court: This Court should order that all evidence remain in the custody of Defendant-Appellee Key in its current state and location, and all such evidence should be ordered fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source

whatsoever, pending the final disposition of this matter on review in this Court and/or the United States Supreme Court.

II. THIS COURT SHOULD ORDER ALL THE EVIDENCE PRESERVED

There is little question that this Court has inherent power to issue an order preserving the evidence at issue, and that this Court retains the power to preserve, in aid of its jurisdiction, the subject matter of this lawsuit under 28 U.S.C. §1651 and 2283.

Indeed, any tampering with, or destruction of, any part of the evidence at issue would "seriously impair the federal court's flexibility and authority to decide [this] case." Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295, 90 S.Ct. 1739, 1747 (1970). It would "interfere with the federal court's own path to judgment." In Re Diet Drugs Products Liability Litigation, 282 F.3d 220, 234 (3d Cir. 2002). Tampering with, or destruction of, any of the evidence would create the very type of "irreconcilable conflict" with the course of the federal suit that federal courts can prohibit. Bradley v. Little, 1992 U.S.App.Lexis 6301 (6th Cir. 2002) (Ryan, J.) Without question, allowing any loss or destruction of the evidence which is at issue would "truly interfere with the federal court's jurisdiction." Roth v. Bank of the Commonwealth, 583 F.2d 527, 535 (6th Cir. 1978).

Indeed, since the Nineteenth Century, the Supreme Court has made clear that

the federal courts have equitable powers to enjoin the loss or destruction of property which is the subject of a federal suit. Erhardt v. Boaro, 113 U.S. 537, 5 S.Ct. 565 (1885)(equitably enjoining destruction of land during pendency of suit); United States v. Gear, 44 U.S. (3 How.) 120 (1845). Those very same principles apply with full force here, where the Plaintiff's right to the evidence in question is the very subject of the dispute before this Court.

CONCLUSION

As requested in this motion, the motion to preserve all the evidence should be granted.

Respectfully Submitted,

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Paul R Bottei

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via first-class mail and e-mail to Lenard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and via hand delivery to Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 26th day of April, 2006.

Paul R Bottei

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**No. 2:06-CV-2201**
	)	
WILLIAM R. KEY, Criminal Court Clerk for the Thirtieth Judicial District,	)	
	)	
Defendant,	)	
and	)	
	)	
WILLIAM L. GIBBONS, District Attorney General for the Thirtieth Judicial District,	)	
	)	
Intervenor.	)	

ORDER DENYING MOTION TO PRESERVE ALL EVIDENCE PENDING FINAL RESOLUTION OF APPEAL

Before the Court is Plaintiff's April 21, 2006 Motion To Preserve All Evidence Pending Final Resolution Of Appeal ("Motion"). Plaintiff Sedley Alley is a death-sentenced inmate incarcerated at Riverbend Maximum Security Institution. Plaintiff has alleged, pursuant to 42 U.S.C. § 1983, that Defendant William R. Key violated various of Plaintiff's constitutional rights by refusing him access to physical evidence that, if subjected to D.N.A. testing, might demonstrate his innocence of the murder for which he was convicted and sentenced to death. See Amended

Complaint, doc. no. 6. The Court granted Defendant's and the Intervenor's Motions To Dismiss, concluding that Plaintiff had articulated no constitutional entitlement to the evidence pursuant to any of the various theories he asserted. See Order Of Dismissal, doc. no. 19. Judgment was entered on April 20, 2006. Plaintiff has appealed the Court's judgment. He brings the instant motion asking that the Court "order that the *status quo* shall remain as to any and all evidence which is the subject of this suit." Motion, doc. no. 21. To that end, Plaintiff requests that the Court order that the evidence not be moved or otherwise "touched" until his appeal is completed. Id. In essence, therefore, Plaintiff seeks an injunction pending his appeal of the Court's judgment.

The Intervenor, William L. Gibbons, filed an Opposition to Motion on April 25, 2006. Gibbons first asserts that, given the Court's determination that Plaintiff has no right to the evidence, there is no justification for enjoining Defendant Key, or anyone else, from handling the evidence. Further, Gibbons asserts that, even if some federal court oversight were appropriate in this matter, Plaintiff's requested injunction is overly broad because Plaintiff seeks more than the mere preservation of the evidence.

Plaintiff offers no explicit basis upon which this Court may exercise authority over the evidence at issue in this case. To the extent that the Court retains any residual authority over the

subject matter of this suit after a judgment has been entered and a notice of appeal filed, Fed. R. Civ. P. 62(c) controls. Rule 62(c) confirms the inherent equitable power of a district court to "preserve the *status quo*" by issuing an injunction pending appeal. 11 Fed. Prac. & Proc. Civ.2d § 2904 (citing Newton v. Consolidated Gas Co. of New York, 258 U.S. 165, 177 (1922)). Rule 62(c) applies expressly to cases involving the appeal of an "interlocutory or final judgment granting, dissolving, or denying an injunction." The essence of Plaintiff's suit, indeed the core of the relief he seeks, is injunctive. Thus, in dismissing Plaintiff's suit, the Court has denied his request for injunctive relief. Rule 62(c) would appear to be the only basis upon which this Court can consider the instant motion.

As with any other request for injunctive relief, in determining whether to issue an injunction pending appeal pursuant to Rule 62(c), the Court is required to weigh four factors:

> (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent the requested injunction; (3) whether issuance of the injunction will substantially injure the other parties in the proceeding; and (4) where the public interest lies.

11 Fed. Prac. & Proc. Civ.2d § 2904. For the reasons discussed in the Court's Order Of Dismissal, Plaintiff has not demonstrated a likelihood of success on the merits of his § 1983 action. Moreover, he has not demonstrated, or attempted to demonstrate, that he will be irreparably injured absent an injunction pending

appeal. Plaintiff does not allege that Key or Gibbons intends to harm, taint, or otherwise damage the evidence at issue during his appeal. Although he asserts that an injunction is necessary to "avoid any confusion or irreparable harm," he does not substantiate the likelihood of such harm. Without some demonstration that irreparable injury is likely, the Court cannot grant the extraordinary remedy of enjoining the Defendant from taking any action concerning the evidence at issue in this case. Therefore, Plaintiff is not entitled to an injunction pending appeal.

The Court DENIES Plaintiff's Motion To Preserve All Evidence Pending Final Resolution Of Appeal.

IT IS SO ORDERED this 28TH day of April, 2006.

S/ SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

06-2201.Evidence

Exhibit 4

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 05-6876, 06-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAY – 9 2006

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Petitioner-Appellant,

v.

RICKY BELL (No. 05-6876),

Respondent-Appellee,

and

WILLIAM R. KEY (No. 06-5552),

Respondent-Appellee.

On Appeal from the United States District Court for the Western District of Tennessee

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

BOGGS, Chief Judge. Sedley Alley was convicted in 1987 by a Shelby County, Tennessee jury of kidnaping, rape, and first-degree murder. He is on death row. His habeas petition was denied by the district court, and that decision was affirmed by this panel. *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. Jan. 18, 2000), *aff'd*, 307 F.3d 380 (6th Cir. 2002), *cert. denied*, 540 U.S. 839 (2003).

No. 05-6876
Sedley Alley v. Ricky Bell

In October 2003, Alley sought relief from the district court's denial of habeas through a filing that he styled a motion made pursuant to Fed. R. Civ. P. 60(b). The district court stayed Alley's execution pending the relevant outcome of *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc). Following the decision in that case, this panel vacated the stay entered by the district court. *Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004). The en banc court unanimously vacated and remanded so that the district court might make a determination as to whether Alley's motion was a proper Rule 60(b) motion under *Abdur'Rahman* or instead a second or successive habeas petition. *Alley v. Bell*, 405 F.3d 371 (6th Cir. 2005) (en banc).

On November 28, 2005, the district court issued a 22-page denial of Alley's Rule 60(b) motion, ruling that his filing was properly construed not as a Rule 60(b) but rather as a second or successive habeas petition.

We now consider Alley's appeal from the district court's denial of his putative Rule 60(b) motion. This matter has come before us as 05-6876. While acknowledging the diligent and steadfast efforts of Alley's counsel in the prosecution of his client's case, we **AFFIRM** the decision of the court below that Alley's filing is equivalent to a second or successive habeas petition, and not a Rule 60(b). We further affirm the denial of that motion. Because we have ruled on the substance of this appeal, we also **DENY** Alley's motion for a stay of execution pending our consideration of the matter.

With respect to Alley's efforts, in a matter numbered 06-5552, to access and preserve certain physical evidence, we hereby **DENY** his "Motion to Preserve All Evidence Pending Final Resolution

of Appeal," and we **GRANT** his motion for expedited briefing in the appeal from the district court's dismissal of his action for injunctive relief under 42 U.S.C. § 1983.

I

In ruling on Alley's appeal from the district court's decision with respect to his putative Rule 60(b) motion, we take note of the care with which Judge Bernice B. Donald considered the content of Alley's filing. When it first considered Paragraph 35 of Alley's habeas petition (related to suppression of alleged exculpatory evidence, including *ex parte* contact by the trial judge with the jury and victim's family) in 2000, the district court found it procedurally defaulted on the grounds that it had never been raised in the state courts. *Alley v. Bell*, 101 F. Supp. 2d at 619; *see also Alley v. Bell*, no. 97-3159, R. 60 at 43, ¶ 35. Alley's Rule 60(b) claim with respect to ¶ 35 sought to show that fraud, misconduct, or misrepresentation by the state had led the district court to reach an improper conclusion with respect to that portion of his habeas petition. The district court correctly found that this portion of the Rule 60(b) motion was rooted in allegations of withheld evidence–a report by the Shelby County Sheriff's Department and handwritten notes by Assistant Medical Examiner Dr. Bell–that were unrelated to the evidence that formed the basis of the original ¶ 35 habeas claim. The court concluded:

> As such, [Alley] is not attacking [as would be appropriate through a 60(b) motion] the integrity of the Court's previous judgment denying habeas relief as to ¶ 35, and the newly proffered evidence may not be considered by this Court in a motion for relief from judgment. *See Gonzalez v. Crosby*, 545 U.S. at__, 125 S. Ct. 2641, 2646-47 (2005). Because the Court finds this claim to be a prohibited attempt at re-

> litigating the constitutionality of his conviction and sentence, the Court is required to treat this portion of Petitioner's motion for relief as the fundamental equivalent of a second or successive habeas application thus obviating the need to consider Petitioner's claim under either prong of the 'savings clause' [of 60(b)].

Alley v. Bell, 97-3159-D/V, Nov. 28, 2005, Order Denying Motion for Relief from Judgement, 12-13.

The district court reached similar conclusions with respect to the other claims contained in Alley's putative Rule 60(b) motion. Paragraph 28 of Alley's habeas petition claimed that the trial court's exclusion of certain evidence during the sentencing phase–videotapes of the defendant under hypnosis, purportedly supportive of his claim of schizophrenia–denied his fundamental right to present mitigating evidence. When it first considered the claim, the district court found that the evidence was inadmissible. 101 F. Supp. 2d at 640. Alley revived the claim on the basis of the Tennessee Supreme Court's intervening decision, *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003). However, as Alley has acknowledged, a habeas petitioner is not permitted to use a Rule 60(b) motion to apply a "purported change in the substantive law governing the claim." *Gonzalez*, 125 S. Ct. at 2647-48. The district court also noted that this portion of Alley's motion sought to "reassert a claim already denied on the merits," and that, under the terms of *Gonzalez*, it is therefore "in form and effect a prohibited second or successive habeas application." 97-3159-D/V, Order, 20.

Paragraph 29 of the habeas petition had urged that Tennessee's sentencing aggravating factor punishing "heinous, atrocious, and cruel" conduct was unconstitutionally vague. The district court held that the Tennessee Supreme Court had applied a valid and curing narrowing construction to the interpretation of that aggravating factor. 101 F. Supp. 2d at 643. The district court also denied Alley

a Certificate of Appealability on this claim. In his Rule 60(b) motion, Alley sought relief from the denial of the COA. In its order of November 28, 2005, the district court cited Payne v. Bell, 418 F.3d 644, 657-58 (6th Cir. 2005), noting that the Sixth Circuit has already considered the identical legal question and concluded that the Tennessee Supreme Court has applied a valid narrowing construction to the "heinous, atrocious, and cruel" factor, establishing that "reasonable jurists would [not] find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The district court then ruled that the petition for relief from its denial of the COA was without merit. We reach the same conclusion by a different road. First, we note that our court also denied the COA on this claim. Case No. 99-6659, Sixth Circuit Order, May 23rd, 2001 (granting COA only on issues 1, 2, 3, 6, and 9). Second, we note that, where a motion seeks to reopen a habeas appeal, it may be regarded as a successive habeas petition. *Calderon v. Thompson*, 523 U.S. 538, 553 (1998). Third, we find that where both the district court and this court have denied a COA on a particular claim, nothing in *Abdur'Rahman* permits the habeas petitioner to appeal further that denial through the use of a Rule 60(b) motion. Therefore, though the district court did, following examination of the merits of this claim, "deny" rather than "dismiss" this portion of his motion, we conclude explicitly that this claim was also equivalent to a second or successive habeas petition and not properly pursued in the format of a Rule 60(b).

We also affirm the district court's rejection of Alley's claim that Congress's "Act for the Relief of the Parents of Theresa Marie Schiavo," Pub. L. No 109-3, 119 Stat. 15, has relevance for his case and entitles him to relief for all claims denied on the basis of procedural default or the standard of review set forth in 28 U.S.C. §2254(d). It has none and entitles him to none. The district

court correctly concluded that the events and legislation arising from the Terri Schiavo matter do not create a set of "extraordinary circumstances" permitting the reopening of final judgment under Rule 60(b). *Gonzalez*, 125 S. Ct. at 2649. The Act gave jurisdiction to the United States District Court for the Middle District of Florida to consider claims relating to Terri Schiavo's physical condition. It also conferred standing on Ms. Schiavo's parents to bring such claims. Regardless of how Alley's claim here is characterized–as a proper Rule 60(b) motion or as a second or successive habeas petition–the plain language of the Act compels us to conclude that the legislation does not and can not have any relevance to this case.

Concluding that Alley's motion is properly construed as a second or successive habeas petition, we are compelled to affirm the district court's denial and dismissal of his purported Rule 60(b) motion. We do not here examine the merits of the underlying claims beyond the degree necessary to assess whether the motion is properly made as a Rule 60(b), as Alley steadfastly denies any desire to have it considered as a second or successive petition.

Alley's filings raise the possibility of some procedural conundrums. In treating this appeal from the denial of a Rule 60(b) motion on its own terms, rather than as a second or successive habeas petition that a district court found it to be (and the petitioner disclaims it to be), we acknowledge the possibility that this could be considered as authorizing an end-run around the requirements of AEDPA, 28 U.S.C. § 2244(b)(3)(E), which mandates that a denial of "authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

In the circumstances of this case, we find it unnecessary to resolve this difficulty, and express no opinion on it. However, for purposes of completeness, we do note that we are permitted to grant an applicant permission to file a second or successive habeas corpus petition under § 2244(b)(2) only where:

1) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

3) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Alley's motion does not satisfy these requirements.

II

We further consider Alley's efforts, in the matter numbered 06-5552, to access and preserve certain physical evidence relating to his case now in the custody of Tennessee.

On April 5, 2006, Alley filed an action in the district court pursuant to 42 U.S.C. § 1983 seeking injunctive relief in the form of access to this evidence for the purpose of DNA testing. On

April 20, the district court dismissed this complaint for failure to state a claim upon which relief may be granted. On April 21, Alley filed a "Motion to Preserve All Evidence Pending Final Resolution of Appeal" in the district court. Also on that date, he filed a notice of appeal from the district court's denial of his § 1983 filing. On April 27, Alley filed a similar motion in our court, styled a "Motion to Preserve All Evidence Pending Final Resolution of Appeal." This motion seeks an order that all physical evidence now in the custody of the state court "shall be fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source whatsoever, pending the final disposition of this matter . . . ." (Motion, April 27, 2006, 2) On April 28, the district court filed an order denying Alley's district court's motion to preserve evidence.

We grant Alley's motion for an expedited briefing schedule in the appeal from the district court's dismissal of his § 1983 complaint. However, seeing little threat to the preservation of the evidence under the status quo, and given the substance of the other rulings contained in this opinion, we deny the motion to preserve evidence.

IV

For the forgeoing reasons, in 05-6876, we **AFFIRM** the ruling of the court below, and we **DENY** Alley's motion for a stay of execution pending the outcome of the appeal of that decision. In 06-5552, we **DENY** the "Motion to Preserve All Evidence Pending Final Resolution of Appeal," and we **GRANT** the motion for expedited briefing in the appeal from the district court's dismissal of Alley's action for injunctive relief under 42 U.S.C. § 1983.