

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE

v.

SEDLEY ALLEY

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No. M1991-00019-SC-DPE-PD
Filed: December 5, 2005

RESPONSE TO MOTION TO SET EXECUTION DATE

Sedley Alley objects to the State of Tennessee's request for a new execution date. The state's motion is premature and impermissible: Sedley Alley's execution remains stayed; his case remains pending in federal court and he is seeking further relief in the District Court and, if necessary, the Sixth Circuit; the law in the Sixth Circuit is unsettled, with *Abdur'Rahman* pending before that Court; which creates great potential for further federal rulings which would invalidate any date. This Court should deny the state's motion, exactly as it did the last time the state sought an execution date under similar circumstances. See Exhibit 1. The motion must be denied for the following reasons:

1. On May 19, 2004, the United States District Court for the Western District of Tennessee issued a stay of execution. That order mandates a stay of execution "pending the outcome of this matter."

2. The United States District Court November 29, 2005 order on the Rule 60(b) motion *is not* a final order. It is subject to revision by the District Court on Petitioner's motion for reconsideration under Fed.R.Civ.P. 59(e). See Bank of California N.A. v. Arthur Andersen & Co., 709 F.2d 1174, 1176 (7th Cir. 1983). Petitioner has until December 12, 2005 to file such a motion, and he fully intends to do so.

3. Because the November 29 order is not final in the District Court, the stay remains in effect, contrary to the State's assertions. See Poret v. Sigler, 355 U.S. 60, 78 S.Ct.

144 (1957)(per curiam)(stay remains “in effect until final disposition of the case in the District Court.”). Any date set while the stay remains in effect would be void. 28 U.S.C. §2251.

4. Further, the order denying Alley’s Rule 60(b) motion is an appealable order. Inryco, Inc. v. Metropolitan Engineering Co., 708 F.2d 1225, 1232 (7th Cir. 1983). Sedley Alley thus has the right to appeal, and, should the District Court not modify its prior order under Fed.R.Civ.P. 59, he will exercise that right to appeal, just like Abu-Ali Abdur’Rahman, who previously received full appellate review of the denial of his Rule 60(b) motion (See In Re Abdur’Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc)), and whose case remains pending on remand from the United States Supreme Court.

5. Given this right to appeal, there will be no final resolution of Sedley Alley’s motion until an appellate mandate issues, which simply has not yet occurred. See e.g., Belyeu v. Johnson, 82 F.3d 613, 615 (5th Cir. 1996) (per curiam) (district court order granting stay of execution remained in effect until issuance of appellate mandate). See Lambert v. Barrett, 159 U.S. 660 (1895).

6. Moreover, the issues before the federal courts are substantial. In fact, five judges have already noted the substance of the issues pending before the federal courts. See e.g., Alley v. Bell, 405 F.3d 371, 372-373 (6th Cir. 2005) (en banc) (Cole, J., concurring).

7. Importantly, now that the Supreme Court has decided Gonzalez v. Crosby, 545 U.S. ____, 125 S.Ct. 2641 (2005), the Sixth Circuit is currently grappling with the meaning and application of *Gonzalez* in more than one case. Those cases include:

a. *Abdur’Rahman*, which was remanded from the United States Supreme Court and remains pending in the Sixth Circuit. See In Re Abdur’Rahman, 6th Cir. Nos. 02-

6547, 02-6548; Bell v. Abdur'Rahman, 545 U.S. ____, 125 S.Ct. 2991 (2005) (vacating and remanding for further consideration of Abdur'Rahman's Rule 60(b) motion); and

b. Henderson v. Collins, 6th Cir. Nos. 03-3988, 03-4054, 03-4080, which was recently argued.

8. Thus, the law in the Sixth Circuit about the proper application of *Gonzalez* is currently in flux. Should *Alley* end up on appeal in the near future, there will be three different panels considering the issues, and a clear possibility of ultimate *en banc* review, as previously occurred in *Abdur'Rahman*.

9. The circumstances are thus similar to those which existed the last time this Court denied an execution date. At that time, this Court denied an execution date given uncertainty in the federal law and pending federal proceedings in both Sedley Alley's case and other related cases. Then, Sedley Alley's 60(b) proceedings were not final in the Sixth Circuit, and *Abdur'Rahman* had yet to be considered on certiorari. This Court denied the state's motion, wisely noting that the time was not ripe to set an execution date:

Alley alleges that he intends to file a petition for rehearing *en banc* in the Sixth Circuit Court of Appeals. Furthermore, the State of Tennessee has announced its intention to file a petition for writ of certiorari in *In Re Abdur'Rahman, supra*. In light of the ongoing federal litigation, the unsettled federal law on the issue involved in this litigation, and the potential for further rulings by the federal courts that could render ineffectual any date set, the Court concludes that the interests of judicial economy and finality militate against setting an execution date at this time. It is therefore ordered that the State's Motion To Reset Date Of Execution is DENIED.

State v. Alley, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 6, 2005) (emphasis supplied) (Exhibit 1).

10. Exactly as occurred last time the state filed a similar motion:

a. There is “ongoing litigation” in Sedley Alley’s case, Sedley Alley’s federal proceedings are not final, and he intends to pursue further relief (which last time he fully secured on reconsideration, See Alley v. Bell, 405 F.3d 371 (6th Cir. 2005) (en banc);

b. *Abdur’Rahman* remains pending and is not final; and

c. With two and potentially three similar cases pending in the Sixth Circuit, there is indeed “unsettled federal law on the issue involved in this litigation,” which creates the same “potential for further rulings by the federal courts that could render ineffectual any date set.”

11. In fact, last time this Court denied an execution date, Sedley Alley was seeking rehearing in the Sixth Circuit. This time, he is still in the District Court and has not even had his appeal initially heard by the Sixth Circuit. *A fortiori*, an execution date is premature at this time.

12. Just as this Court previously denied the state’s motion, this Court should deny the state’s motion this time as well, pending a final ruling by the federal courts.

CONCLUSION

The motion to set execution date should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served by first-class mail upon counsel for the state, Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243, this ____ day of December, 2005.

DESIGNATION AND NOTICE OF COUNSEL

As counsel for Sedley Alley, Paul R. Bottei would request that any order of this Court be served via facsimile to FAX 615-736-5265.

Exhibit 1

Order Denying Motion To Set Execution Date