

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE)
)
 v.) No. M1991-00019-SC-DPE-DD
) FILED: December 23, 2004
 SEDLEY ALLEY)

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 in accordance with the order of the United States District Court for the Western District of Tennessee, which remains in full effect. In addition, the state is judicially estopped from seeking an execution date. Further, an execution date is improper while Sedley Alley currently has proceedings pending before the United States Supreme Court. 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. See Exhibit 1 (Order granting stay of execution).

2. While it is true that a panel of the Sixth Circuit has recently issued an opinion vacating that stay of execution, the Sixth Circuit has not issued a final judgment in this case. The panel’s order is interlocutory and is subject to revision on rehearing, including rehearing *en banc*.

3. Under federal law, the decision of an appellate court does not become final until the court of appeals issues a mandate. Under Fed.R.App.P. 41, “An appellate court’s decision is not final until its mandate issues.” Bryant v. Ford Motor Co., 886 F.2d 1526, 1529 (9th Cir. 1989); Mary Ann Pensiero Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988).

4. As the Eleventh Circuit has explained: “Until the mandate issues, an appellate

judgment is not final; the decision reached in the opinion may be revised by the panel, or reconsidered by the *en banc* court, or *certiorari* may be granted by the Supreme Court.” Flagship Marine Services, Inc. v. Belcher Towing Co., 23 F.3d 341, 342 (11th Cir. 1994) (per curiam).

5. Rather, under the Federal Rules of Appellate Procedure, a mandate would not issue until (at the earliest) 7 days following the denial of any timely filed petition for rehearing. Fed.R.App.P. 41(b). It remains stayed until that time.

6. In this case, no mandate has issued from the Sixth Circuit, and Sedley Alley is preparing (and will be filing) a timely petition for rehearing *en banc* in the Sixth Circuit which must be ruled upon before any mandate may issue.

7. Because a mandate has not issued, the stay of execution entered by the United States District Court for the Western District of Tennessee remains in full force and effect. That order has not been finally overturned by the Sixth Circuit. And indeed, the *en banc* Sixth Circuit may very well reverse the panel and ultimately affirm the District Court stay.

8. Under similar circumstances, the United States Court of Appeals for the Fifth Circuit has properly recognized that when a United States District Court has entered a stay of execution, that stay remains in effect until the court of appeals issues its mandate. 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).

9. Indeed, any time a United States District Court enters an injunctive order (as occurred here), that District Court order remains in effect until the appellate court issues

a formal mandate. See e.g., Missouri Portland Cement Co. v. Cargill, Inc., 418 U.S. 919, 94 S.Ct. 3210 (1974)(Douglas, J.); Public Service Company of New Hampshire v. Patch, 167 F.3d 29, 36 (1st Cir. 1998)(where district court entered injunction, “a timely petition for reconsideration will stay the mandate – and thus maintain the [district court] injunction in effect until the petition is disposed of. Fed.R.App.P. 41(a).”).

10. With the District Court stay order remaining in full effect, this Court lacks the authority to set an execution date, as any such date would violate Article VI §2 of the Constitution and 28 U.S.C. §2251. See e.g., Cooper v. Aaron, 358 U.S. 1 (1958)(under Supremacy Clause, state officials bound by federal court orders).

11. In fact, the situation here is nearly identical to the case of *Abdur’Rahman v. State*, in which this Court refused to set an execution date in December,2002:

a. In *Abdur’Rahman*, the United States Supreme Court entered a stay of execution, but on December 10, 2002, it dismissed Abdur’Rahman’s petition for writ of certiorari. Abdur’Rahman v. Bell, 537 U.S. 88 (2002).

b. On December 11, 2002, the state then sought an execution date. The Supreme Court decision, however, was not final, as Abdur’Rahman had the right to seek rehearing under U.S.S.Ct.R. 44.

c. While this Court eventually set an execution date in *Abdur’Rahman*, it did so only in March , 2003 – after the United States Supreme Court decision became final upon the denial of rehearing. This Court refused to set an execution while the federal stay remained in effect. See Exhibit 2 (Order in *Abdur’Rahman v. State*). See also Abdur’Rahman v. Bell, 537 U.S. 1227 (2003)(rehearing petition denied February 24, 2003).

d. As in *Abdur’Rahman*, therefore, the state’s motion must be denied

given the vitality of the District Court's stay order.

12. In addition, the state is judicially estopped from seeking an execution date:

a. In the Sixth Circuit, to avoid an initial *en banc* hearing, counsel for the state asserted that "the *en banc* court will have ample opportunity to review the case on rehearing." State's Response To Petitioner's Petition For Initial *En Banc* Hearing, p. 3 (filed in Sixth Circuit June 1, 2004).

b. Based on the state's argument, the Sixth Circuit denied initial *en banc* review.

c. By now seeking an execution date after having successfully made this representation to the Sixth Circuit, the state is judicially estopped from seeking an execution date until the *en banc* Sixth Circuit has exercised that "opportunity to review the case on rehearing." See Great Earth Companies v. Simons, 288 F.3d 878, 892 (6th Cir. 2002) (applying principles of judicial estoppel).

13. Further, it is improper to set an execution date because Sedley Alley has other litigation currently pending in federal court. Specifically, Sedley Alley currently has pending a petition for writ of certiorari in the case of *Alley v. Tennessee*, U.S.No. 04-7718, in which he is seeking disclosure of physical evidence necessary to establish his claims of innocence. See Exhibit 3 (Petition for writ of certiorari). Sedley Alley has followed the orderly processes of the State of Tennessee to seek disclosure of that evidence in the Court of Criminal Appeals and this Court, and has now invoked his right to review in the United States Supreme Court. Thus, this Court should not set an execution date which would interfere with his ability to seek relief in the United States Supreme Court.

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, 2004.

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

Exhibit 2

Exhibit 3