

dismissed the action on April 28, 2006, for failure to state a claim upon which relief may be granted, and the Sixth Circuit affirmed. *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006). On May 16, 2006, the Sixth Circuit denied rehearing of its decision and denied Alley's motion for a stay of execution.

The second federal proceeding, filed April 11, 2006, challenged the constitutionality of Tennessee's lethal injection protocol. On May 2, 2006, the district court ordered that the matter be held in abeyance pending disposition of the decision of the United States Supreme Court in *Hill v. McDonough*, No. 05-8794 (U.S. argued April 26, 2006). The court subsequently granted a preliminary injunction and stay of execution on May 11, 2006, but the Sixth Circuit vacated the district court's order the next day, *Alley v. Little*, No. 06-5650, 2006 WL 1313365 (6th Cir. May 12, 2006), and then denied rehearing and a further request for a stay of execution. *Alley v. Little*, No. 06-5650, 2006 WL 1320433 (6th Cir. May 16, 2006).

On May 16, 2006, Alley filed petitions for a writ of certiorari and accompanying stay motions from the decisions in both § 1983 actions and from the Sixth Circuit's decision on the appeal from the denial of Alley's Rule 60(b) motion to reopen his original habeas corpus proceeding. Those petitions and motions remain pending. *Alley v. Bell*, Nos. 05-10960 and 05A1043 (U.S.); *Alley v. Key et al.*, Nos. 05-10958 and 05A1041 (U.S.); *Alley v. Little et al.*, Nos. 05-10959 and 05A1042 (U.S.).

In the meantime, however, on or about May 10, 2006, the governor received what he deemed to be a request to grant a reprieve and to order that DNA testing be conducted on certain trial evidence. The governor referred the request to the Board of Probation and Parole, which held a hearing on May 15, 2006. At the conclusion of the hearing, the Board voted 4-3 to recommend a reprieve. On May 16, 2006, the governor granted a fifteen-day reprieve to “continue in effect until May 31, 2006.” The stated purpose of the reprieve was to allow Alley “to return to state court and to seek permission to test those additional items that were not included in his 2004 [DNA] petition.” (Executive Reprieve and accompanying statement attached)

The executive reprieve was granted despite the fact that the Tennessee judiciary had already rejected Alley’s request for DNA testing under Tennessee’s Post-Conviction DNA Analysis Act. *See Alley v. Tennessee*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). Indeed, both the trial court and the Court of Criminal Appeals concluded that, even if “potentially favorable” results were obtained through DNA analysis, it would not negate the remaining evidence, which “strongly identifies [Alley] as the perpetrator.” *Id.*, slip op. at 11-14. In rendering its decision, the Court of Criminal Appeals summarized much of that evidence.¹ *Id.* at 11. Likewise, in its recent decision affirming the denial of DNA

¹Like the situation now potentially facing the Shelby County Criminal Court, the 2004 DNA proceedings were expedited due to the eleventh-hour nature of the filing — a mere 30 days before Alley’s previous execution date. Alley filed his 2004 post-conviction DNA petition on May 4, 2004; the trial court denied relief on May 17, 2004; and the Court of Criminal Appeals affirmed the decision of the trial

analysis under 42 U.S.C. § 1983, the Sixth Circuit Court of Appeals concluded, after reviewing the evidence against Alley, that “[t]he compelling evidence of his guilt . . . strongly suggests that he could never accurately be considered actually innocent of the crime, no matter the result of the analysis he now seeks.” *Alley v. Key, supra*, slip op. at 5. Furthermore, even aside from the state trial court’s analysis regarding the materiality of Alley’s proposed DNA testing in 2004, the court noted “serious questions regarding [Alley’s] motivation . . . for raising the issue at this time” and found that the timing of Alley’s petition was “highly suspect.”

The statement accompanying the governor’s reprieve correctly observed that the propriety of DNA testing is a matter that is “properly the province of our court system.” In fact, a judicial mechanism to obtain post-conviction DNA analysis unquestionably has been available to Alley since 2001, and one petition has already been rejected. Moreover, the factors leading to the dismissal of Alley’s 2004 DNA petition still exist, and there is no more likelihood of success now on any renewed petition than in 2004.

Because the executive reprieve expires by its own terms on May 31, 2006, and because the governor’s expressed intent was to grant a brief reprieve for not more than fifteen days, the State of Tennessee requests that this Court re-set Alley’s execution forthwith for June 1, 2006. As shown above, there has been no judicial stay of this Court’s March 29, 2006, order, and Alley should not be permitted to reap a judicial

court on May 26, 2004. This Court denied Alley’s application to appeal on October 4, 2004, after the district court had already stayed his June 3, 2004, execution.

windfall from executive largesse by parlaying a “brief” executive reprieve into an extended stay. The reprieve should be confined to its terms.

This Court should re-set Alley’s execution date for June 1, 2006.²

Respectfully submitted,

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²To the extent any provision of Rule 12.4(E), Rules of the Supreme Court of Tennessee, may be read to prohibit the State from seeking, or the Court from setting, a new execution date at this juncture, the Court, under its general authority to make rules of practice for the better disposal of business before it, *see* Tenn. Code Ann. § 16-3-401, should suspend its rule in the interest of justice. Likewise, should the Court deem a response to the State’s motion appropriate or necessary, the Court should direct that any such response be expedited.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by first class mail, postage prepaid, and by email, to Henry Martin and Paul Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, on this the 18th day of May, 2006.

/s/ Jennifer L. Smith

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