CAPITAL CASE
EXECUTION DATE 6/28/06 1:00 a.m.

No. 05-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2005

SEDLEY ALLEY,

Petitioner,

v.

GEORGE LITTLE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Counsel for Petitioner Sedley Alley

Motion For Leave To Proceed *In Forma Pauperis*

Petitioner Sedley Alley respectfully moves this Court to grant him leave to proceed *in forma pauperis*. In support thereof, Mr. Alley shows:

1. A Tennessee jury convicted Mr. Alley of first-degree murder and sentenced him to death. State v. Alley, 776 S.W.2d 506 (Tenn. 1989).

2. Mr. Alley filed in the United States District Court for the Western District of Tennessee a habeas corpus petition. Pursuant to 21 U.S.C. § 848(q), the District Court appointed undersigned counsel to represent Mr. Alley in all appropriate proceedings respecting Mr. Alley's death sentence.

3. The District Court and the United States Court of Appeals for the Sixth Circuit have allowed Alley to proceed *in forma pauperis* in this action.

WHEREFORE, Sedley Alley respectfully requests that this Court:

1. Grant him leave to proceed *in forma pauperis*; and

2. Grant such other relief as this Court deems just.

Respectfully submitted,

Paul R. Bottei
Assistant Federal Public Defender
Middle District of Tennessee
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CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by hand on Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 26th day of June 2006.

Paul R Bottin

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QUESTIONS PRESENTED

In Hill v. McDonough, 547 U.S. ___, ___ (2006), this Court noted that when faced with challenges to a method of execution, lower courts have "invoked their equitable powers to dismiss suits they saw as . . . filed too late in the day." Any proper determination of timeliness involves a two-fold assessment: (1) A determination when a challenge becomes ripe under Article III; and (2) A determination whether the plaintiff unduly delayed once his dispute ripened.

The lower courts, however, have applied widely divergent standards for assessing timeliness. For example, the Fifth Circuit has overlooked Article III's ripeness doctrine to conclude that, to be timely, a challenge to a method of execution must be asserted upon the conclusion of direct appeal – even if an execution would occur (if at all) years later. The Ninth Circuit, on the other hand, has recognized that a challenge ripens upon the setting of an execution date (cf. Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)) or, if applicable, upon an inmate's choice of execution method - any challenge raised shortly thereafter is not dilatory. Here, the Sixth Circuit has asserted that Sedley Alley's challenge is untimely – even though Alley filed shortly after the setting of an execution date and before the method of execution was even established when he declined the Warden's invitation to choose a method.

This case provides the appropriate vehicle for resolving the circuit split and establishing a uniform rule for assessing when a §1983 challenge to a method of execution is dilatory. The questions presented are:

1. When does a condemned inmate's 42 U.S.C. § 1983 challenge to a proposed execution method become ripe under Article III?

2. What constitutes undue delay in filing a 42 U.S.C. §1983 challenge to a proposed execution method?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting a preliminary injunction (Appendix 1) is unreported. The Sixth Circuit opinion vacating the District Court's preliminary injunction (Appendix 2) is unreported. The opinion of the Sixth Circuit denying rehearing en banc (Appendix 3) is reported at 447 F.3d 976. The District Court's opinion dismissing Petitioner's 42 U.S.C. § 1983 action (Appendix 4) is unreported. The Sixth Circuit opinion affirming the District Court (Appendix 5) is unreported.

The opinion of the Sixth Circuit denying en banc rehearing (Appendix 6) is unreported.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion affirming the District Court's dismissal of Petitioner's 1983 action on June 24, 2006. On June 26, 2006, the Sixth Circuit Court of Appeals denied *en banc* rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "Cruel and unusual punishments (shall not) be inflicted."

The Fourteenth Amendment to the United States Constitution provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

42 U.S.C. § 1983 provides that "Every person who, under color of [State law] subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...."

STATEMENT OF THE CASE

This case involves a question of timing: What constitutes an unreasonable delay for a condemned inmate's filing of a challenge to the method proposed for his execution? Answering this question requires resolution of its necessary antecedent: When does such an execution method challenge become ripe for federal review? Facts germane to these questions are therefore dates of relevant events. Those dates are as follows.

On January 8, 1990, this Court denied Sedley Alley's petition requesting certiorari review of his State court conviction and resulting death sentence. Alley v. Tennessee, 493 U.S. 1036 (1990). At this time, State law provided that Mr. Alley's death sentence would be carried out by electrocution.

Sedley Alley sought post-conviction relief. On October 6, 2003, this Court denied Mr. Alley's petition requesting certiorari review of the federal courts' denial of habeas relief, and on December 8, 2003, this Court denied Mr. Alley's request for rehearing.

On December 9, 2003, the State requested that the Tennessee Supreme Court set a date for Mr. Alley's execution. On January 16, 2004, that Court set June 3, 2004, as the date for Mr. Alley's execution.

On May 20, 2004, the United States District Court for the Western District of

Tennessee stayed Mr. Alley's execution pending resolution of Fed. R. Civ. P. 60(b) proceedings Alley had before that court. On December 14, 2004, the Sixth Circuit vacated the District Court's stay. The State reacted by requesting that the Tennessee Supreme Court set a new date for Alley's execution. On January 6, 2005, that court declined to do so. It noted that the federal law respecting the interaction of Rule 60(b) and federal habeas proceedings remained in flux, Mr. Alley's Rule 60(b) proceedings remained pending in the District Court, and these proceedings could "render ineffectual" any date the court might set.

On November 28, 2005, the District Court denied Mr. Alley's request that it grant him Rule 60(b) relief. The State requested that the Tennessee Supreme Court set an execution date. On March 29, 2006, that Court obliged, setting May 17, 2006, as the new date for Alley's execution.

The very next day, on March 30, 2006, Mr. Alley wrote Tennessee Commissioner of Corrections George Little, expressing specific objections he had to the lethal injection protocol he surmised the State might use to execute him. On April 6, 2006, Commissioner Little informed Sedley Alley that he had received Alley's objections, but he wanted additional time to consult with legal counsel about them.

Having not heard back from Commissioner Little, on April 11, 2006, Mr. Alley filed his 1983 action challenging the apparent lethal injection protocol the State

would use at his proposed execution. Two days later, Commissioner Little rejected Alley's objections.

On April 19, 2006, pursuant to Tenn. Code Ann. § 40-23-114, Warden Ricky Bell requested that Alley fill out an Affidavit choosing either lethal injection or electrocution as his execution method. Alley declined to make a choice. Under Tennessee law, Alley's silence established lethal injection as the method for his execution.

On May 11, 2006, the District Court for the Middle District of Tennessee entered a preliminary injunction enjoining Mr. Alley's execution pending this Court's decision in *Hill v. McDonough*. On May 12, 2006, a Sixth Circuit panel vacated the District Court's order. It expressed its view that Mr. Alley had unduly delayed filing his 1983 action and this reason would warrant dismissal of that action.

On May 15, 2006, Tennessee Governor Phil Bredesen granted Alley a fifteen day reprieve to provide him an opportunity to obtain from Tennessee's courts evidence Alley desires to subject to DNA testing. On June 2, 2006, the Tennessee Supreme Court set a new execution date of June 28, 2006.

On June 19, 2006, the District Court dismissed Mr. Alley's 1983 action. While it indicated its belief that Mr. Alley's action had only recently become ripe and hence was not subject to even a "robust" application of the undue delay doctrine, it

considered itself bound by the Sixth Circuit's opinion vacating its grant of injunctive relief. The Sixth Circuit affirmed. Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The circuits are split on the question this case presents: When must a condemned inmate bring a challenge to the method for his proposed execution? This case offers this Court an ideal opportunity to identify for the lower courts procedural dates that are properly considered in making this determination. While, like all cases, it has dates when certiorari was denied on direct appeal, certiorari was denied in habeas proceedings, and an execution date was set, this case also presents dates when (1) the initial execution date was stayed and subsequently passed; (2) the State's motion to reset an execution date was denied; (3) a second execution date was set; (4) an execution method was established after the State offered the inmate a choice of two execution methods; and (5) an inmate's objections to the presumed execution protocol were rejected by the State. This case thus presents virtually every conceivable date that could go into a federal court's resolution of when an execution method challenge ripens and what period of time thereafter can constitute an unreasonable delay for the filing of that challenge. And Alley presents this Court an argument that is, in and of itself, persuasive: His method challenge ripened only after an execution date was set and lethal injection was established as the method for that

proposed execution. Certiorari should be granted.

I. THE CIRCUIT SPLIT

As Judge Martin of the Sixth Circuit has recognized, there is currently a "dysfunctional patchwork of stays and executions going on in this country." Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006)(Martin, J., dissenting from denial of rehearing *en banc*)(attached as Appendix 3). A major source of this dysfunctional patchwork involves the conflicting views of the lower courts on when a plaintiff has a ripe challenge to the method proposed for his execution and when he must bring such a challenge to avoid summary dismissal for undue delay.

In the context of an action seeking injunctive relief, such as a challenge to an execution method, a claim is not ripe for a federal courts' consideration unless the plaintiff is "immediately in danger" of sustaining a concrete harm. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). This immediate danger/concrete harm requirement assures that when considering whether to grant injunctive relief, federal courts have before them the necessary prerequisites for the exercise of Judicial Power: concrete controversies presenting concrete facts. See Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc., 454 U.S. 464, 472-73 (1982). In considering the timeliness of inmates' actions seeking to enjoin specific events during an execution, the lower courts have markedly different

views about what dates drive the ripeness determination.

The Fifth Circuit believes that the date the inmate's conviction and sentence become final on direct appeal controls – even if there is no scheduled execution. See Smith v. Johnson, 440 F.3d 262 (5th Cir. 2006); Neville v. Johnson, 440 F.3d 221 (5th Cir. 2006); White v. Johnson, 429 F.3d 572, 573 (5th Cir. 2005); Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004). Thus, in the Fifth Circuit, execution method challenges brought as early as ten days after habeas certiorari denial, which do not require a stay of execution to be heard, are summarily dismissed as dilatory. See White, 429 F.3d 572.

The Eleventh Circuit has suggested that the date a State adopts a single execution method applicable to all inmates guides the ripeness determination. In Rutherford v. Crosby, 438 F.3d 1087 (11th Cir.), vacated and remanded, 547 U.S. ___ (June 19, 2006), the court recounted that the State had enacted a lethal injection statute six years prior to the inmate's 1983 action and no evidence existed that any of the protocols had changed in that six-year period. Id., 438 F.3d at 1092. It therefore concluded that the inmate's lethal injection challenge had been available for years, and he had unduly delayed by bringing his 1983 action four days before his scheduled execution.

The Ninth Circuit has offered differing views. Two Ninth Circuit panels have

determined that an execution method challenge becomes ripe when the execution method is established. In Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998), the court specifically dismissed a §1983 action challenging execution by lethal gas on ripeness grounds. California, like Tennessee, requires an inmate to elect the method of execution, and where no such election of lethal gas had been made, the panel made clear that "plaintiffs' claims are not ripe for decision." Id. at 1160. This decision followed on the heels of Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997), which held that Poland's challenge to lethal gas was "not ripe for us" where no such choice had been made. Id.

Another Ninth Circuit panel has indicated that the date an execution date is set informs the ripeness determination. Beardslee v. Woodford, 395 F.3d 1064, 1069 (9th Cir. 2005). As a result, that panel tolerated an execution method challenge brought thirty days from the proposed execution date because that date had been just recently set. Id.

In this case, the Sixth Circuit affirmed the District Court's reluctant dismissal of Mr. Alley's lawsuit for undue delay without suggesting any date on which it believes Alley's lawsuit became ripe. This unguided dismissal is consonant with another Sixth Circuit case offering no guidance as to when an execution method challenge becomes ripe. See Hicks v. Taft, 2005 U.S. App. LEXIS 27377 (6th Cir.

2005).[1]

As the above discussion demonstrates, there exists conflict among the circuits as to what constitutes an undue delay in bringing a § 1983 execution method challenge. It is therefore necessary for this Court to intervene and establish a framework to guide the lower courts in making ripeness/undue delay determinations. As the next section demonstrates, this case offers the ideal vehicle for resolving the circuit conflict.

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[1] This lack of analysis has prompted a District Court in the Sixth Circuit to strike out on its own in search of a date relevant to the ripeness determination. In Cooey v. Taft, 2006 U.S. Dist. LEXIS 24496 (S.D. Ohio April 28, 2006), the United States District Court for the Southern District of Ohio determined that an execution method challenge becomes ripe when the plaintiff has exhausted all of his state and federal avenues of relief, i.e., when the United States Supreme Court denies certiorari in the plaintiff's habeas corpus proceedings or otherwise issues a decision foreclosing federal habeas corpus relief. Cooey, 2006 U.S. Dist. LEXIS at *9.

Other district courts have issued conflicting opinions regarding the ripeness/undue delay issue, many within the Fourth Circuit. See Baker v. Saar, 402 F.Supp.2d 606 (D.Maryland 2005)(undue delay where plaintiff waited until seven days before the scheduled execution to file his challenge and where the lethal injection protocol at issue had been in effect for over one year); Evans v. Saar, 412 F.Supp.2d 519 (D.Maryland 2006)(no undue delay despite the establishment of a lethal injection protocol *two* years prior, even though the inmate filed his lethal injection challenge just two weeks before his scheduled execution); Oken v. Sizer, 321 F.Supp.2d 658 (D.Maryland 2004)(no undue delay in challenge to lethal injection protocol filed the day plaintiff was scheduled to be executed); Reid v. Johnson, 333 F.Supp.2d 543 (E.D.Va. 2005)(undue delay found because the inmate's challenge to execution protocol could have been made at any point after he was sentenced to death); Rowsey, et al., v. Beck, 2004 U.S. Dist. LEXIS 3324 (E.D.N.C. 2004)(no undue delay even though the inmate's 1983 action was brought just one week prior to the inmate's execution).

II. THIS CASE PRESENTS THE ENTIRE UNIVERSE OF DATES THAT COULD POSSIBLY BE RELEVANT IN THE RIPENESS/UNDUE DELAY DETERMINATION

Given the varying State statutes governing implementation of execution methods, Federal courts considering method challenges face a panoply of dates relevant to determining the timeliness of bringing such a challenge: (1) the denial of certiorari on direct appeal; (2) the denial of certiorari on habeas proceedings; (3) the setting of an execution date; (4) the staying of an execution date and the passing of that date; (5) the denial of a State's motion to reset an execution date; (6) the setting of a second execution date; (7) the establishing of an execution method upon offering the inmate a choice of two methods; and (8) the State's rejection of an inmate's objections to the presumed execution protocol. As discussed in the Statement of Facts section, *supra*, this case presents each and every one of these facts. Because this case thus contains every conceivable date applicable to untangling the ball of confusion the lower courts have created regarding what constitutes undue delay, it is an ideal vehicle for this Court's use in establishing what dates control that determination.

III. SEDLEY ALLEY'S ARGUMENT IN THE LOWER COURTS WARRANTS REVIEW

Admittedly, if Sedley Alley presented this Court a frivolous argument

respecting why his method challenge should not have been dismissed as untimely, granting certiorari would be improper. Sedley Alley, however, presents an argument that the District Court found persuasive and that is supported by this Court's reasoning in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

In the lower courts Sedley Alley argued that he was not "immediately in danger" of suffering a "concrete harm" until two events took place: (1) on March 29, 2006, the Tennessee Supreme Court set a May 17, 2006, execution date; and (2) on April 19, 2006, lethal injection was established as the execution method when Mr. Alley declined the Warden's invitation to choose a method.

In granting Sedley Alley a preliminary injunction, the District Court considered Sedley Alley's ripeness argument and found it convincing:

> While (plaintiff's habeas) actions were pending, the plaintiff's execution was stayed, and accordingly, it was not yet determined that the plaintiff would actually be executed. In fact, the plaintiff may well have faced ripeness issues had he challenged the lethal injection protocols before that determination was made. See Martinez-Villareal v. Stewart, 118 F.3d 628, 630 (9th Cir. 1997), aff'd, 523 U.S. 637, 640 (1998) .... The plaintiff cannot be said to have unduly delayed by failing to challenge his method of execution before it was certain that the execution in the challenged manner would occur.... Under such circumstances, it would be strange jurisprudence to dismiss this action for "undue delay".

Alley v. Little, No. 06-0340 (M.D.Tenn. May 11, 2006), at pp. 6-7(attached as Appendix 1).

While a Sixth Circuit panel vacated the District Court's injunction, a reasoned consideration of the ripeness doctrine reveals a fundamental error in the panel's reasoning. The panel concluded that, "The threat of grievous harm of lethal injection loomed at least since the establishment of the 2004 execution date." Alley v. Little, 2006 U.S. App. LEXIS 1285, *11 (6th Cir. 2006)(attached as Appendix 2). The panel fails to recognize, however, that the harm that threatened Alley in 2004 was an execution set to take place on June 3, 2004. That date came and passed, and with it passed any harm threatening Alley. Mr. Alley's present lawsuit challenges the harm that threatens him now. It is this harm that makes Alley present lawsuit only recently ripe. See Anderson v. Green, 513 U.S. 557 (1995)(when a prior potential harm in the past dissipates, a claim is no longer ripe or justiciable, and the potential for imminent harm must re-occur before a justiciable controversy exists).

In subsequently dismissing Alley's lethal injection challenge on the merits, the District Court considered itself bound by the panel's injunction opinion on undue delay. It nonetheless stated that while it was dismissing Alley's 1983 action, it did so reluctantly:

> Although this court remains concerned about the interaction between a robust application of the "unnecessary delay" doctrine and traditional concepts of ripeness in the death penalty context, see Martinez-Villareal v. Stewart, 118 F.3d 628, 630 (9th Cir. 1997), aff'd, 523 U.S. 637, 640 (1998), it is not the function of this court to address such concerns, but

> rather to apply the law of the Sixth Circuit. The law of the Sixth Circuit is that unnecessary delay warrants dismissal, and that this case was unnecessarily delayed. See Alley, 2006 WL 1313365 at *6.

Alley v. Little, No. 06-0340, p.3 (M.D.Tenn. June 16, 2006)(attached as Appendix 4). The Sixth Circuit's opinion affirming this dismissal sheds no additional light on why the District Court's view is erroneous.

Like the District Court, this Court itself recognizes the soundness of Sedley Alley's argument. In Martinez-Villareal, this Court held that a claim challenging a person's competence for execution is not ripe until execution is imminent. This Court held that ripeness thus occurs when an execution date is set, after which there must be a judicial determination whether the individual comprehends the meaning of the impending execution. Martinez-Villareal, 523 U.S. at 643; see also Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999)(competency to be executed claim ripens when execution date set).

The logic of Martinez-Villareal confirms the strength of Sedley Alley's position. A competency to be executed claim ripens upon the setting of an execution date, because, absent an execution date and the imminent threat of execution, there is no ripe case or controversy about whether the individual comprehends his execution. There is no Eighth Amendment violation if a person fails to comprehend an execution that might not occur; there is an Eighth Amendment violation if a person

fails to comprehend an execution that is threatened to occur – a threat which occurs when a date of execution is set. Similarly, there is no Eighth Amendment violation to a claimed future lethal injection, if that injection might not occur. There is, however, an Eighth Amendment violation when that injection is threatened to occur – a threat which, in Alley's view, occurs (at the earliest) when a date of execution is set.

As the District Court recognizes, and as this Court's reasoning in Martinez-Villareal confirms, Sedley Alley presents a persuasive argument demonstrating why he was not dilatory in bringing his execution method challenge. That challenge did not ripen until an execution date was set and lethal injection was established as the method for that proposed execution. Sedley Alley cannot be penalized for failing to bring an action until it ripened into a justiciable lawsuit. Mr. Alley's case therefore not only presents an ideal vehicle for this Court's resolution of the circuit split currently afflicting the circuits, it warrants review on its own merits.[2]

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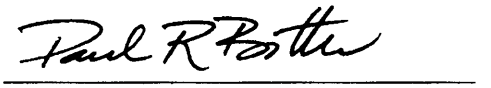
[2] In its opinion affirming the District Court's reluctant dismissal for undue delay, the Sixth Circuit panel reaffirms its previous view, expressed in its order vacating the District Court's previous injunction, that Sedley Alley cannot make a showing of success on the merits. As discussed in Mr. Alley's certiorari petition currently before this Court in the injunction proceedings, the panel is patently incorrect. While the panel makes a broad brush statement that the constitutionality of lethal injection is the law of the republic, it nowhere mentions the sworn statement of Dr. David Lubarsky, M.D., that, to a reasonable degree of medical certainty, the (continued...)

CONCLUSION

This Court should grant certiorari to resolve the divergent answers the circuits have given to the question left open in Hill: What constitutes undue delay in initiating an action challenging the constitutionality of the method proposed for an inmate's execution?

Respectfully submitted,



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Counsel for Petitioner Sedley Alley

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by hand on Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 26th day of June 2006.

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[2](...continued)
protocol proposed for Alley's execution will subject him to torture.

Appendix 1

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:06-0340**
	)	**Judge Trauger**
GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction; RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution; JOHN DOE PHYSICIANS 1-100; JOHN DOE PHARMACISTS 1-100; JOHN DOE MEDICAL PERSONNEL 1-100; JOHN DOE EXECUTIONERS 1-100; and JOHN DOES 1-100,	)	
	)	
Defendants.	)	

MEMORANDUM

Pending before the court is the Motion for Preliminary Injunction filed by the plaintiff, Sedley Alley (Docket No. 23), to which defendants George Little and Ricky Bell have responded (Docket No. 24), and the plaintiff has replied (Docket No. 25). For the reasons discussed herein, the plaintiff's motion will granted.

FACTS and PROCEDURAL HISTORY

The plaintiff is a condemned inmate at Riverbend Maximum Security Institution in Nashville, Tennessee.[1] His execution has been scheduled for 1:00 a.m. on May 17, 2006.

In 1989, the Tennessee Supreme Court affirmed the plaintiff's death sentence. On January 14, 2004, that court set for the plaintiff a June 3, 2004 execution date. On May 19, 2004, the United States District Court for the Western District of Tennessee granted his request for a stay of execution based on a then-pending Sixth Circuit decision regarding whether to treat a Rule 60(b) motion as a habeas petition. (*See* Docket No. 16 at 4.) Following the resolution of these issues, the Tennessee Supreme Court, on March 29, 2006, set the plaintiff's current execution date. Using § 1983 as the vehicle for his claims, he brought a challenge to Tennessee's lethal injection protocol on April 11, 2006.

On May 2, 2006, this court ordered the case held in abeyance pending the United States Supreme Court's resolution of *Hill v. McDonough*, which will address whether an inmate may use § 1983 as a vehicle for such claims. (*See* Docket No. 22.) The plaintiff now seeks injunctive relief from his execution pending the Supreme Court's disposition in *Hill*. (*See* Docket No. 23 at 1.)

ANALYSIS

[1]A full recitation of the facts is provided in this court's Memorandum of May 2, 2006. (*See* Docket No. 21) Unless otherwise indicated, all facts here have been drawn from the plaintiff's Complaint (Docket No. 1) and from his Response to Motion to Dismiss of Defendants Little and Bell (Docket No. 19).

The defendants claim that an injunction is unnecessary because *Hill* "will not address the validity of any lethal injection protocol, much less Tennessee's." (*See* Docket No. 24 at 1.) Before this court may analyze the plaintiff's challenge to Tennessee's lethal injection protocol, however, it first must ensure that it has subject-matter jurisdiction over his claims. *See Ins. Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 (1982). While the defendants urge the court to go directly to the merits of the plaintiff's § 1983 claim without pausing to consider whether his challenge instead should be construed as a second habeas petition, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *See id.*

Were the plaintiff's challenge to be converted to a second habeas petition, this court would lack jurisdiction over it and would be required to transfer it to the Sixth Circuit for appellate review. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) ("[W]hen a second or successive petition for habeas relief is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631."); *see also In re Sapp*, 118 F.3d 460, 463 (6th Cir. 1997) (noting that a district judge had properly determined that, if an inmate's method-of-execution challenge were to be characterized as a second habeas petition, the district court would lack jurisdiction over the claim). As explained in this court's May 2, 2006 Memorandum, this court must await guidance from the Supreme Court before determining whether such a conversion is appropriate in this case and, consequently, whether it has jurisdiction over the plaintiff's challenge. (*See* Docket No. 21 at 6-7 (holding this case in abeyance pending the resolution of *Hill*).)

Accordingly, a preliminary injunction is required in order to maintain the status quo pending the Supreme Court's decision. *See Hill v. Crosby*, 126 S. Ct. 1189, 1190 (2006)

(staying an inmate's execution pending the Supreme Court's determination as to whether § 1983 was a proper vehicle for his claims); *see also Rutherford v. Crosby*, 126 S. Ct. 1191, 1191 (2006) (staying an inmate's execution pending the Supreme Court's consideration of his petition for certiorari).[2]

A brief review of the four-factor analysis traditionally employed when considering whether to grant a preliminary injunction leads to the same conclusion. These factors include (1) the likelihood that the moving party will be irreparably harmed absent a preliminary injunction; (2) the prospect that others will be harmed if the court grants the preliminary injunction; (3) the public interest in granting the preliminary injunction; and (4) the likelihood that the party seeking the preliminary injunction will prevail on the merits of his claim. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). These factors are not prerequisites that each must be met, but rather are "interrelated considerations that must be balanced together." *Id.* at 153. The Sixth Circuit has recognized that courts applying this test to motions for preliminary injunctions must make decisions based upon "incomplete factual findings and legal research." *Id.* (internal quotation omitted). Bearing this obstacle in mind, the court now turns to an analysis of each of the four factors.

Detailed discussion of the first factor clearly is not necessary in execution-related cases such as this one. Absent a preliminary injunction, the plaintiff will be executed on May 17, 2006, just weeks before a likely decision in *Hill*, which could give him the right to pursue the

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[2]Unlike other defendants confronted with challenges that are identical or nearly identical to the one in this case, the defendants here do not consent to an injunction pending *Hill* but, instead, press for the plaintiff's execution to occur as scheduled. *Cf. Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (unpublished); *Roane v. Gonzales*, No. 05-2337 (D.D.C. Feb. 24, 2006) (unpublished).

challenge the defendants now seek to dismiss. *See Jackson v. Taylor*, No. 06-300-SLR ¶ 4 (D. Del. May 9, 2006) (noting that the Supreme Court is expected to issue its *Hill* decision by June 30, 2006). The plaintiff's case thus presents the ultimate demonstration of irreparable harm.

Next the court examines the harm to others that might result from granting this injunction. The state will incur costs from delaying the execution, and the living relatives of the plaintiff's victim may be distressed at the delay. However, in light of the fact that the Supreme Court is expected to issue an opinion in *Hill* before June 30, 2006, the potential harm from a few weeks' delay is far outweighed by the potential harm to the plaintiff if this injunction is not granted. *See Jackson*, No. 06-300-SLR ¶ 4.

Turning to the next factor, the public does, as the defendant asserts, have an interest in executing sentences. (*See* Docket No. 24 at 5.) However, there is an interest at stake in this case that is at least as great as Tennessee's interest in seeing the plaintiff's death sentence carried out: the protection the Eighth Amendment affords each citizen of the United States. *See DePew v. Anderson,* 311 F.3d 742, 748 (6th Cir. 2002) ("[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights") (citing *Reid v. Covert,* 354 U.S. 1, 45-46, (1957) (Frankfurter, J., concurring)). Taking into account the detriment caused by delaying the public's "moral judgment," *see Calderon v. Thompson*, 523 U.S. 538, 556 (1998), the public interest weighs in favor of maintaining the status quo until the Supreme Court rules.

The court now moves to a brief examination of the plaintiff's ability to prevail on the merits of his challenge to Tennessee's lethal injection protocol. In cases like this one, where the other three factors militate in the plaintiff's favor, a district court is within its discretion to issue a preliminary injunction if the merits of his case "present a sufficiently serious question to justify

further investigation." *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1230 (6th Cir. 1985); *Roth v. Bank of the Commonwealth,* 583 F.2d 527, 537-38 (6th Cir.1978), *cert. dismissed,* 442 U.S. 925 (1979). One such "serious question" is at issue here. The plaintiff, by providing expert testimony that the current lethal injection protocol causes excruciating deaths, has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims to survive his relatively light burden. The preliminary injunction stage is not the time to weigh the plaintiff's expert against the defendants'. It is in order to preserve that dispute—and the unanswered jurisdictional issue pending in *Hill*—that this court must grant a preliminary injunction.

Finally, it is important to note that any alleged "undue delay" on the part of the plaintiff does not warrant denial of the preliminary injunction. The plaintiff brought his first habeas petition before the federal courts in 1998 and, subsequently, brought a Rule 60(b) petition that was eventually held to be a second habeas attempt. *See Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002) (rehearing denied Dec. 20, 2002); *Alley v. Bell*, 405 F.3d 371 (6th Cir. 2005) (remanding the case to the district court to determine whether the motion could be considered a proper 60(b) motion); *Alley v. Bell*, No. 04-5596 (W.D. Tenn, Nov. 28, 2005) (motion to alter or amend judgment denied Mar. 22, 2006) (unpublished). While those actions were pending, the plaintiff's execution was stayed, and accordingly, it was not yet determined that the plaintiff would actually be executed. In fact, the plaintiff may well have faced ripeness issues had he challenged the lethal injection protocols before that determination was made. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (9th Cir. 1997), *aff'd*, 523 U.S. 637, 640 (1998) (holding that an Eighth Amendment competency challenge was premature where the execution had been

stayed pending other challenges).[3]

The plaintiff cannot be said to have unduly delayed by failing to challenge his method of execution before it was certain that the execution in the challenged manner would occur. The record demonstrates that soon after learning that an execution would in fact occur—seven days after the Western District of Tennessee denied his motion to alter or amend judgment on his Rule 60(b) motion and just one day after the Tennessee Supreme Court set a new execution date—the plaintiff wrote Commissioner George Little, expressing his objections to the lethal injection protocol. (Docket No. 25, Ex. 1.) After failing to receive a response, the plaintiff filed this action on April 11, 2006. Under such circumstances, it would be strange jurisprudence to dismiss this action for "undue delay."

Accordingly, given the potentially dispositive nature of the Supreme Court's upcoming decision in *Hill*, as well as the fact that traditional preliminary injunction analysis weighs in favor of its being granted, a preliminary injunction will issue in this case.

CONCLUSION

The plaintiff's Motion for Preliminary Injunction will be granted and his execution stayed pending further orders of the court.

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[3]The lack of "undue delay" in this case is well illustrated by a comparison to *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997). In that case, which was also a § 1983 action, the Sixth Circuit upheld the district court's determination that it lacked subject matter jurisdiction. *Id.* In addition, the court noted that the plaintiff had unduly delayed in bringing his action. The court projected that the plaintiff could have brought his claim anywhere between ten to fifteen years before he did so. *Id.* Presumably, the plaintiff before the Sixth Circuit in that case did not face the ripeness issues that Alley would have faced had he brought his Eighth Amendment challenge while his habeas petitions were outstanding.

An appropriate order will enter.

ALETA A. TRAUGER
United States District Judge

Appendix 2

H

This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,Sixth Circuit.

Sedley **ALLEY**, Plaintiff-Appellee,

v.

George **LITTLE**, et. al. Defendants-Appellants.

No. 06-5650.

May 12, 2006.

Background: State death row inmate brought § 1983 action challenging Tennessee's lethal injection protocol. The United States District Court for the Middle District of Tennessee, 2006 WL 1207611, Aleta A. Trauger, J., granted inmate's motion for a preliminary injunction and order staying his execution pending the United States Supreme Court's consideration of an analogous case. Commissioner of Corrections appealed.

Holdings: The Court of Appeals, Boggs, Chief Judge, held that:

1(1) lethal injection protocol was not cruel and unusual punishment, and

2(2) inmate was not entitled to preliminary injunction staying his execution.

Injunction and stay vacated.

[1] Sentencing and Punishment 350H ⇐1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of Execution. Most Cited Cases

Tennessee's lethal injection protocol, as concocted and administered, was not cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⇐1798

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1798 k. Stay of Execution. Most Cited Cases

State death row inmate who brought § 1983 action challenging Tennessee's lethal injection protocol was not entitled to a stay of his execution pending the United States Supreme Court's consideration of a procedural matter in an analogous case. U.S.C.A. Const.Amend. 8.

[3] Civil Rights 78 ⇐1457(5)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(5) k. Criminal Law Enforcement; Prisons. Most Cited Cases

State death row inmate was not entitled to preliminary injunction staying his execution pending the outcome of his § 1983 action challenging Tennessee's lethal injection protocol, even though he was threatened with irreparable harm, given state's interest in carrying out punishment, small likelihood of inmate's success on the merits, and inmate's unnecessary delay in challenging the lethal injection protocol. 42 U.S.C.A. § 1983.

On Motion to Vacate from the United States

Slip Copy, 2006 WL 1313365 (C.A.6 (Tenn.)), 2006 Fed.App. 0344N
(Cite as: Slip Copy)

District Court for the Middle District of Tennessee.

Paul R. Bottei, Asst. F.P. Defender, Federal Public Defender's Office, Nashville, TN, for Plaintiff-Appellee.
Mark A. Hudson, Asst. Atty. General, Joseph F. Whalen, III, Asst. Atty. General, Office of the Attorney General, Nashville, TN, for Defendants-Appellants.

Before BOGGS, Chief Judge; and RYAN and BATCHELDER, Circuit Judges.
BOGGS, Chief Judge.
*1 Defendant Tennessee Commissioner of Corrections and others challenge the district court's grant of a preliminary injunction and order staying the execution, scheduled for 1:00 a.m. on May 17, 2006, of plaintiff Sedley Alley. Alley was convicted of kidnaping, rape, and first-degree murder and sentenced to death in 1987. We VACATE the injunction and stay.

I

On March 29, 2006, the Tennessee Supreme Court set Alley's execution date. On April 11, 2006, Alley filed what he denominated an action pursuant to 42 U.S.C. § 1983, challenging Tennessee's lethal injection protocol. The district court initially held the action in abeyance during the pendency of the United States Supreme Court's consideration of *Hill v. McDonough,* No. 05-8794 (U.S., argued Apr. 25, 2006). *Alley v. Little,* 2006 WL 1207611 (M.D.Tenn., May 2, 2006) The question taken up by the Court in *Hill* is whether § 1983 is a proper vehicle by which a death row inmate may bring a challenge to the protocol of chemicals typically used by states in lethal injection execution procedures.[FN1] Alley filed a motion on May 4, 2006, for a stay of execution pending the outcome of *Hill.* (Motion for Preliminary Injunction, No. 3:06-340, May 4, 2006) The motion noted that the Court's decision would determine whether Alley's complaint as to the constitutionality of the lethal injection protocol "may proceed under 42 U.S.C. § 1983 or should be considered a habeas corpus petition...." (Motion for Preliminary Injunction, 1) Alley noted that the Court had issued a stay in Hill's case, which raised essentially the same challenge to the protocol. *See Hill v. Crosby,* 546 U.S. ----, 126 S.Ct. 1189, 163 L.Ed.2d 1144 (Jan. 25, 2006). His motion noted that the Supreme Court and other courts, including the Eighth Circuit and the United States District Court for District of Columbia, had granted stays of execution in other cases, pending the outcome of *Hill.* (Motion for Preliminary Injunction, 2, citing *Rutherford v. Crosby,* 546 U.S. ----, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006); *Taylor v. Crawford,* No. 06-1379 (8th Cir.2006) (en banc); *Roane v. United States,* No. 05-2337 (D.D.C.))

In considering Alley's motion, the district court first asked whether it had subject-matter jurisdiction, noting that, "[w]ere the plaintiff's challenge to be converted to a second habeas petition, this court would lack jurisdiction over it and would be required to transfer it to the Sixth Circuit for appellate review." (Order of May 11, 2006, No. 3:06-0340, 3, *citing In re Sims,* 111 F.3d 45, 47 (6th Cir.1997); *In re Sapp,* 118 F.3d 460, 463 (6th Cir.1997)) The district court determined that it must "await guidance from the Supreme Court before determining whether such conversion is appropriate in this case and, consequently, whether it has jurisdiction over the plaintiff's challenge." (Order of May 11, 2006, 3) The court concluded that it must therefore issue a stay pending the outcome in *Hill.*

*2 Separately, the district court reasoned that the traditional four-factor analysis as to whether to grant a preliminary injunction also favored the issuance of a stay. *See Edward Rose & Sons,* 384 F.3d 258, 261 (6th Cir.2004) (setting out the factors). The district court found that all four factors, including irreparable harm to the moving party, the relative absence of harm to other parties following an injunction, the quantum of public interest in granting the motion, and the likelihood of ultimate success on the merits, militated toward granting the stay. (Order of May 11, 2006, 4-6.)

The district court issued the stay sought by Alley. We now review.

II

We hold that the district court abused its discretion in issuing the preliminary injunction and stay. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532 (6th Cir.2004) (noting standard of review for grants of preliminary injunctions).

[1] First, we state that, regardless of a prediction as to the outcome in *Hill*, we will, *arguendo*, treat Alley's action as a properly filed § 1983 claim and that, even so understood, this suit affords no basis for the stay that has been granted. The nub of Alley's claim is that the protocol, as concocted and administered, is unconstitutional on the grounds that it is cruel and unusual punishment under the Eighth Amendment and otherwise and simultaneously violative of the Ninth Amendment. (Complaint, No. 3:06-cv-00340, Apr. 11, 2006, 1-2) That is not the law of the republic as it stands today. No federal court has found the lethal injection protocol as such to be unconstitutional. We will not do so today.

[2] If we assume, as we do, that Alley may challenge the lethal injection chemical protocol through a § 1983 action, we then weigh the merits of the district court's stay, based on the reason furnished in its opinion. The court first states that the stay must be granted because the Supreme Court is considering whether this action can even be brought properly under § 1983. Such a view is a wrong as a matter of law. The Supreme Court's consideration of a procedural matter such as this can not freeze in place all actions in the lower federal courts under existing law. If the Supreme Court ultimately holds that this action should not be cognizable at all, obviously the injunctive relief of a stay would not be justified. On the other hand, if the Court were to hold that the case can properly be brought, in a procedural sense, it would place us exactly where we find ourselves now by assuming it is proper. We thus obviate any justification for a stay based on the possibility of the Supreme Court's ruling as we assume it will.

Second, we note that the importance of the pendency of *Hill v. McDonough* to our case is far from clear or conventionally accepted. The Supreme Court, though possessing the power to do so, has not issued a nationwide stay of lethal injection executions until it hands down a decision in *Hill*. Fifteen executions, all by lethal injection, have taken place in the United States since the writ of certiorari was granted in *Hill* on January 25, 2006. Three have occurred since the April 26, 2006 oral arguments. The Supreme Court has specifically declined stays in several of these cases, even where the inmates have raised nearly identical claims regarding their states' lethal injection protocols to the one presented in our case. In *Donahue v. Bieghler*, ---U.S. ----, 126 S.Ct. 1190, 163 L.Ed.2d 1144 (2006), the Supreme Court acted on January 27, 2006, to *vacate* a stay that had been entered by the Seventh Circuit. Marvin Bieghler was executed the same day. The Court likewise denied a stay on January 31, 2006, in *Elizalde v. Livingston*, 126 S.Ct. 2006 (2006), and Jaime Elizalde was put to death the same day. The Court acted similarly in the case of the man most recently executed in the United States. In *Wilson v. Livingston*, 2006 WL 1174531 (U.S., May 4, 2006), the Court denied a stay, and Jackie Wilson was executed the same day. Given the Supreme Court's own pattern of conduct regarding cases in which inmates are raising claims like the one in our case, we cannot conclude that the Supreme Court has established any new precedent that would favor a stay of Alley's execution pending the outcome in *Hill*.

*3 [3] Third, we turn to the alternative basis the district court relies on, based on the traditional four-factor test for preliminary injunctions. We do not agree with the district court's conclusion as to the test's application in Alley's case. The district court correctly found that Alley, the moving party, is threatened with irreparable harm. This interest must be weighed against the state's interest in carrying out punishment. The state's interest is not to be underestimated. The Supreme Court has instructed that the "State's interests in finality are compelling" and that the "powerful and legitimate interest in punishing the guilty" attaches to both " the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (citations and internal quotations omitted) Even considering the countervailing interests of Alley and the state, the small likelihood of Alley's success on the merits ultimately decides the matter. That likelihood, such

as it exists at all, is unsupported by current law, which offers no basis for finding lethal injection protocols unconstitutional. Moreover, since the Supreme Court is not even considering the constitutionality of the lethal injection protocol in *Hill,* the prospect of a change in that feature of existing jurisprudence is as speculative as any other claim about possible future changes in governing law. Such speculation does not impact our assessment as to the likelihood of Alley's success on the merits under existing law.

Fourth, we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol. He was on notice as to both the particulars of the protocol and the availability of making a claim such as the one he now raises for several years before he filed his last-minute complaint. Another Tennessee death row inmate, Abu-Ali Abdur'Rahman, petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002. *Abdur'Rahman v. Bredesen,* 181 S.W.3d 292, 299-300 (Tenn.2005) Alley's execution date was set on January 16, 2004, for June 3rd of that year, following the Supreme Court's denial of a writ of certiorari to review our court's decision not to grant habeas relief. *Alley v. Bell,* 540 U.S. 839, 124 S.Ct. 99, 157 L.Ed.2d 72 (2003); *State v. Alley,* No. M1991-00019-SC-DPE-DD (Tenn. Jan. 16, 2004). Lethal injection has been the only method of execution in Tennessee since 2000 for all death row inmates save those who affirmatively express a preference for electrocution. Tenn.Code Ann. § 40-23-114. Alley had ample time in which to express such a preference and/or file his current grievance. Instead, he waited until thirty-six days before his currently scheduled execution date.

Alley argues that his current claim would not have been ripe for judicial consideration had he filed it much earlier than the date on which he submitted his complaint. He notes that the Tennessee Supreme Court set his current date of execution on March 29, 2006. He points out further that his action, which he styled a motion made pursuant to Fed.R.Civ.P. 60(b) , seeking relief from the district court's denial of his habeas petition, was until quite lately pending in the district court. He contends that he did not suffer an imminent (and therefore justiciable) threat of the harms associated with the lethal injection protocol until after the Tennessee Supreme Court took steps, following the district court's final disposal of the Rule 60(b) motion, to set the execution date of May 17, 2006. This can not be right. The threat of the grievous harms of lethal injection loomed at least since the establishment of the 2004 execution date. We have been cited no precedent, and our independent research has yielded none, where a claim such as the one Alley now raises has been rejected for lack of ripeness at any time following the setting of an initial execution date and following the denial of certiorari on initial federal habeas. *See Calderon,* 523 U.S. at 556 ("A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief."). We find a passage from our opinion in *In re Sapp,* 118 F.3d 460, 464 (6th Cir.1997), sufficiently apposite to the case now before us to warrant quotation:

> ***4** Even were we to consider the merits of McQueen's claim, we would not permit his claim that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Petitioner has known of the possibility of execution for over fifteen years. It has been ten years since a Kentucky governor first signed a death warrant for his electrocution. The legal bases of such a challenge have been apparent for many years.... Even though, in petitioner's mind, every year or every day may bring new support for his arguments, the claims themselves have long been available, and have needlessly and inexcusably been withheld. Thus, equity would not permit the consideration of this claim for that reason alone, even if jurisdiction were otherwise proper. (internal citations omitted)

III

We VACATE the preliminary injunction and stay.

FN1. The parties in *Hill v. McDonough* agreed on the exact wording of the two questions presented to the Court:

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254.
2. Whether, under this Court's decision in *Nelson v. Campbell,* 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983. (Brief for Petitioner, i; Brief for Respondent, i)

C.A.6 (Tenn.),2006.
Alley v. Little
Slip Copy, 2006 WL 1313365 (C.A.6 (Tenn.)), 2006 Fed.App. 0344N

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Appendix 3

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447 F.3d 976

Page 1

447 F.3d 976, 2006 Fed.App. 0164P
(Cite as: 447 F.3d 976)

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2006 FED. App. 0164P

United States Court of Appeals,Sixth Circuit.

Sedley **ALLEY**, Plaintiff-Appellee,

v.

George **LITTLE**, in his official capacity as Tennessee's Commissioner of Correction, et al., Defendants-Appellants,

John Does 1-100, et al., Defendants.

No. 06-5650.

May 16, 2006.

Paul R. Bottei, Asst. F.P. Defender, Federal Public Defender's Office, Nashville, TN, for Plaintiff-Appellee.

Mark A. Hudson, Asst. Atty. General, Joseph F. Whalen, III, Asst. Atty. General, Office of the Attorney General, Nashville, TN, for Defendants-Appellants.

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.[FN*]

FN* Judge Gibbons recused herself in this case.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

BOYCE F. MARTIN, JR., Circuit Judge, with whom DAUGHTREY, MOORE, COLE, and CLAY , Circuit Judges, join, dissenting from the denial of rehearing en banc.

The Supreme Court recently heard oral arguments in *Hill v. McDonough,* No. 05-8794, and is expected to issue a decision before the end of the current Term in June. The Court's decision will impact Alley's case either by allowing him or not allowing him to challenge the method of his execution pursuant to 42 U.S.C. § 1983. If Alley is executed on Wednesday and the Supreme Court decides *Hill* in his favor next month, this Court will effectively have locked the barn door after the horse has already escaped. If we uphold the stay entered by the district court, as I would, and the Supreme Court decides *Hill* against Alley's interests, Tennessee may proceed with the execution in June.

To me, this balancing of interests weighs heavily in favor of upholding the stay entered by the district court. Moreover, the dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result. *Compare Rutherford v. Crosby,* 546 U.S. ----, 126 S.Ct. 1191, 163 L.Ed.2d 1144 (2006); *Taylor v. Crawford,* No. 06-1379 (8th Cir. Feb. 1, 2006) (en banc); *Roane v. Gonzales,* No. 05-2337 (D.D.C. Feb. 24, 2006), *with Wilson v. Livingston,* 2006 WL 1159270, 2006 U.S.App. LEXIS 10958 (5th Cir. May 2, 2006), *stay denied,* --- U.S. ----, 126 S.Ct. 1942, --- L.Ed.2d ---- (2006); *Donahue v. Bieghler,* --- U.S. ----, 126 S.Ct. 1190, 163 L.Ed.2d 1144 (2006). This adds another arbitrary factor into the

equation of death and thus far, there has been no logic behind the Supreme Court's decision as to who lives and who dies. Until the Supreme Court sorts this out, I would uphold the stay issued in this case, and all cases that come before this Court, and therefore dissent from the Court's contrary holding.

We review a district court's decision to enter a stay for abuse of discretion. *See Yolton v. El Paso Tenn. Pipeline, Co.*, 435 F.3d 571, 577 (6th Cir.2006). Our four factor analysis requires us to consider the petitioner's likelihood of success on the merits, whether the petitioner will suffer irreparable harm if a stay is not entered, whether others will be harmed by the entry of a stay, and the public interest in a stay. These factors must be balanced to ***978** determine whether a stay ought to be entered.

First, it is clear that petitioner will suffer irreparable harm if a stay is not entered. He will be dead. This will of course moot any challenge he could mount should the Supreme Court decide *Hill* to allow a § 1983 suit.

Second, we consider whether others will be harmed by the stay. As the district court noted, the state may incur financial costs and relatives of the plaintiff's victim might experience emotional harm. These are serious interests that we ought to credit. Nevertheless, the fact that the Supreme Court will issue a decision by the end of next month militates against finding these interests overwhelming. Death, of course, is different. A delay of less than two months-awaiting a highly relevant Supreme Court decision-is worth the wait when human life is at stake.

Third, we consider the public interest. Certainly the public interest in carrying out criminal sentences is strong. On the other hand, the public also has an interest in not carrying out cruel and unusual punishment or terminating human life prematurely. Finally, the public interest in uniform adjudication by the federal courts is not to be disregarded. The fact is that fifteen executions have been carried out despite *Hill*. Other courts have issued stays putting executions on hold pending the *Hill* 's disposition. This patchwork justice is intolerable when dealing with the imposition of the death penalty and undermines the public interest in uniform adjudication.

Finally, we consider Alley's likelihood of success on the merits. The panel decision declares that there is only a "small" likelihood of success on the merits and finds that this "ultimately decides the matter." I disagree. The district court found that Alley "by providing expert testimony that the current lethal injection protocol causes excruciating deaths, has made an adequate showing on the merits of his Eighth and Fourteenth Amendment claims." Dist. Ct. Op. at 6. The panel decision does not make clear why this Court should disregard the district court's explicit factual finding, particularly given the abuse of discretion standard it purports to apply. From the executions that have proceeded recently, including one last week, we have additional evidence of the problems with this procedure. Although Alley's claim may not be a clear winner, I do not believe that it is a clear loser, and there is a likelihood that Alley will be able to show that lethal injection amounts to cruel and unusual punishment. In light of this, I would not find that this factor " ultimately decides the matter." Rather, viewing all four factors, and because death is different, I would find that the district court did not abuse its discretion by entering a stay pending the Supreme Court's resolution of *Hill*.

No doubt the march toward death is powerful. Currently, however, the march is anything but orderly. The current administration of the death penalty in light of the pending decision of *Hill* is more like a march in dozens of different directions, which I believe is more costly, more inefficient, and more arbitrary, than entering the stay and waiting temporarily for some (hopefully) clear guidance. The arbitrariness of death penalty administration is not ameliorated by the fact that *Hill* involves what the panel terms "a procedural matter." Rather, administration of the death penalty can only be made more arbitrary by the possibility that after *Hill*, some current death row inmates may be able to show in court that the practice of lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment, while other currently similarly situated inmates will have already been

put to death through a method deemed to violate the Constitution. I would wait for the *979 Supreme Court to resolve the issue and would affirm the district court's decision entering the stay.

C.A.6,2006.
Alley v. Little
447 F.3d 976, 2006 Fed.App. 0164P

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Appendix 4

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:06-0340
	)	Judge Trauger
GEORGE LITTLE, in his official capacity as Tennessee's Commissioner of Correction;	)	
RICKY BELL, in his official capacity as Warden, Riverbend Maximum Security Institution;	)	
JOHN DOE PHYSICIANS 1-100;	)	
JOHN DOE PHARMACISTS 1-100;	)	
JOHN DOE MEDICAL PERSONNEL 1-100;	)	
JOHN DOE EXECUTIONERS 1-100; and	)	
JOHN DOES 1-100,	)	
	)	
Defendants.	)	

MEMORANDUM

Pending before the court is the Motion to Dismiss of Defendants Little and Bell (Docket No. 15), to which the plaintiff has responded (Docket No. 19) and the defendant has replied (Docket No. 20). Also pending is the plaintiff's Motion for Status Conference (Docket No. 35), to which the defendant has responded (Docket No. 37). On May 2, 2006, the court held the Motion to Dismiss in abeyance pending the United States Supreme Court's decision in *Hill v. McDonough*, No. 05-8794, 2006 WL 1584710 (U.S. June 12, 2006) (slip op.). (*See* Docket No. 22.) The Supreme Court issued its decision in *Hill* on June 12, 2006. *See id.* For the reasons discussed herein, the Motion to Dismiss of Defendants Little and Bell will be granted and, accordingly, the plaintiff's Motion for Status Conference will be denied.

PROCEDURAL HISTORY

On May 2, 2006, pending the Supreme Court's decision in *Hill*, this court held in abeyance the Motion to Dismiss of Defendants Little and Bell. (*See* Docket No. 22.) The issue before the Supreme Court in *Hill* was whether a death-sentenced inmate who sought to enjoin his execution in order to pursue a challenge to his state's lethal injection protocol could bring such a challenge under 42 U.S.C. § 1983 or whether the challenge instead had to be characterized as a habeas corpus petition under 28 U.S.C. § 2254. *See Hill*, 2006 WL 1584710, at *3. Citing the Supreme Court's rapidly approaching decision in *Hill*, this court held the plaintiff's case in abeyance because, as in *Hill*, the plaintiff's challenge to Tennessee's lethal injection protocol used § 1983 as a vehicle, despite the Sixth Circuit's clear instruction that such claims were to be treated as habeas petitions. (*See* Docket No. 21 at 5, 7.)

On May 4, 2006, with *Hill* not yet decided, the plaintiff sought injunctive relief to prohibit the defendants from executing him as planned. (*See* Docket No. 23.) The court granted the plaintiff's Motion for Preliminary Injunction on May 11th, 2006. (*See* Docket No. 28.) That same day, the defendants appealed this court's decision to the United States Court of Appeals for the Sixth Circuit. (*See* Docket No. 29.)

The following day, a Sixth Circuit panel vacated this court's injunction. *See Alley v. Little*, No. 06-5650, 2006 WL 1313365 (6th Cir. May 12, 2006) (slip op.), *reh'g en banc denied, Alley v. Little*, --- F.3d ---, No. 06-5650, 2006 WL 1320433 (6th Cir. May 16, 2006). In so doing, the Sixth Circuit assumed *arguendo* that the plaintiff's motion was properly filed as a § 1983 claim and determined that "even so understood, this suit affords no basis for the stay that has been granted." *See id.* at *2. The panel based its determination on, among other things, "the

small likelihood of Alley's success on the merits" and the "unnecessary delay" with which, it found, the plaintiff had challenged the protocol. *See id.* at *3.

ANALYSIS

With its issuance of *Hill* earlier this week, the Supreme Court reiterated a state's "important interest in the timely enforcement of a sentence" and emphasized that "the federal courts can and should protect states from dilatory . . . suits." *See Hill*, 2006 WL 1584710, at *8.[1] The Court also highlighted the equitable powers of the federal courts "to dismiss suits [that are] speculative or filed too late in the day." *See id.* at *10; *see also Smith v. Johnson*, 440 F.3d 262, 263 (5th Cir. 2006). According to the Sixth Circuit, this case was filed too late in the day. *Alley*, 2006 WL 1313365 at *6 ("we take note of the unnecessary delay with which Alley brought his challenge to Tennessee's lethal injection protocol"). Although this court remains concerned about the interaction between a robust application of the "unnecessary delay" doctrine and traditional concepts of ripeness in the death penalty context, *see Martinez-Villareal v. Stewart*, 118 F.3d 628, 630 (9th Cir. 1997), *aff'd*, 523 U.S. 637, 640 (1998), it is not the function of this court to address such concerns, but rather to apply the law of the Sixth Circuit. The law of the Sixth Circuit is that unnecessary delay warrants dismissal, and that this case was unnecessarily delayed. *See Alley*, 2006 WL 1313365 at *6. This action, therefore, must be dismissed.

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[1]The Supreme Court in *Hill* also found that plaintiffs such as the one in this case could properly use § 1983 as a vehicle for their challenges to lethal injection protocols. *See Hill v. McDonough*, No. 05-8794, 2006 WL 1584710, at *3 (U.S. June 12, 2006) (slip op.). Even given the plaintiff's renewed ability to pursue his challenge under this statute, however, the Sixth Circuit's determination that he was dilatory in his pursuit of these claims ultimately is fatal to his case.

CONCLUSION

In accordance with the Sixth Circuit's finding that the plaintiff unduly delayed the filing of his challenge to Tennessee's lethal injection protocol, the Motion to Dismiss of Defendants Little and Bell will be granted and, accordingly, the plaintiff's Motion for Status Conference will be denied.

An appropriate order will enter.

ALETA A. TRAUGER
United States District Judge

Appendix 5

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 06-5816

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 2 4 2006

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Plaintiff-Appellant,

v.

GEORGE LITTLE, et al.,

Defendants-Appellees.

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

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

BOGGS, Chief Judge. We **AFFIRM** the district court's grant of the defendants' motion to dismiss Sedley Alley's challenge to Tennessee's lethal injection protocol pursuant to 42 U.S.C. § 1983. Order, June 14, 2006, Case No. 3:06-0340.

The Supreme Court has recently furnished relevant guidance. In Hill v. McDonough, No. 05-8794, 543 U.S. ___ (2006), 2006 WL 1584710 (U.S. June 12, 2006) (slip op.), the Court held unanimously that death row inmates may sue under § 1983 to enjoin the state's use of the prevailing lethal injection protocol on the grounds that it allegedly amounts to cruel and unusual punishment in violation of the Eighth Amendment.

Justice Kennedy's opinion also held that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the

State and the victims of crime have an important interest in the timely enforcement of a sentence." (Hill at 9) (slip op.) (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998). The Court added, perhaps by way of emphasis, that its "conclusions today do not diminish that interest, nor do they deprive federal courts of the means to protect it." Ibid. The opinion further acknowledged the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Ibid. (citing Nelson v. Campbell, 541 U.S. 637, 649-50 (2004)).

The Court noted that federal courts weighing petitioners' §1983 challenges to lethal injection should continue to consider various features of a filing when locating the proper balance of equities. These include "a showing of a significant possibility of success on the merits" and the timeliness of the appeal. Timeliness is particularly relevant when an appeal is brought in the strongly disfavored circumstance in which its full consideration would necessitate a stay of execution. Id. at 10 (citing Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983) and Nelson, 541 U.S. at 650).

The Court took note of two cases, one from this circuit, in which "federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day." Ibid. In Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005), we ruled that a last-minute petition by a death row inmate, filed six days before his scheduled execution, did not warrant a stay of the execution even though the district court had permitted him to intervene in a fellow inmate's § 1983 challenge to the constitutionality of Ohio's lethal injection protocol. We held the "district court . . . did not abuse its discretion in weighing the criteria for the granting of a stay . . . and denying the relief requested, primarily because the motion was untimely." (citing Nelson, 541 U.S. at 649, and quoting the phrase "a court may consider the last minute nature of an application to stay execution in deciding whether to grant equitable relief"). In White v. Johnson, 429 F.3d 572 (5th Cir. 2005), the

Fifth Circuit affirmed the dismissal of a condemned's "last-minute" § 1983 challenge to Texas's lethal injection protocol on the grounds that it was "dilatory." Justice Kennedy wrote the "federal courts can and should protect States from dilatory or speculative suits . . . ." Hill at 10.

It is perhaps for this reason that the Supreme Court, though it possesses the power to do so, has not, in the days following its ruling in Hill, stayed all executions in the United States pending the further litigation of the many petitioners nationwide who have filed § 1983 challenges to the nearly identical lethal injection protocol used by virtually all death penalty states.

In the brief interval since Hill, the Fifth Circuit decided a case with a procedural history quite similar to ours. Lamont Reese was sentenced to death in Texas state court in 2000. After exhausting his available state remedies, he sought relief in federal court. The Fifth Circuit denied his application for a COA in May 2004. *See* Reese v. Dretke, No. 03-10839 (5th Cir. 2004) The Supreme Court denied certiorari on October 18, 2004. Reese v. Dretke, 543 U.S. 944 (2004) Reese filed a § 1983 challenge to Texas's lethal injection protocol on May 25, 2006, less than one month before his scheduled execution on June 20th. (This is comparable to the chronology in our case: Alley filed his § 1983 action on April 11, 2006, five weeks before his originally scheduled execution date of May 17th.) In considering Reese's petition, the Fifth Circuit cited Hill for the proposition that "a plaintiff cannot wait until a stay must be granted to enable it [sic] to develop facts and take the case to trial–not when there is no satisfactory explanation for the delay." Reese v. Livingston, 2006 WL 1681090, *2 (5th Cir., June 20, 2006). The court denied Reese's request for a stay of execution during the pendency of his § 1983 challenge to the lethal injection protocol. The United States Supreme Court, acting also on June 20th, likewise denied a stay and denied Reese's petition for a writ of certiorari. Reese was executed the same day.

In our case, the district court's ruling of June 14th appears to have interpreted one of our court's quite recent opinions in the matter of Sedley Alley as standing for the proposition that "[t]he law of the Sixth Circuit is that unnecessary delay warrants dismissal, and that this case was unnecessarily delayed." Order, June 14, 2006, Case No. 3:06-0340, at 3 (citing Alley v. Bell, 2006 WL 1313365 at *6). We do not read the district court's opinion, nor or own opinion, as demanding that a tardily filed action under § 1983 be dismissed. Indeed, we think the district court more accurately evoked the full sense of the same opinion when it wrote, only a few lines earlier, that our "panel based its determination [to vacate the district court's injunction] on, among other things, 'the small likelihood of Alley's success on the merits' and the 'unnecessary delay' with which . . . the plaintiff had challenged the protocol." Order, June 14, 2006, Case No. 3:06-0340, at 2-3 (citing and quoting Alley v. Bell, 2006 WL 1313365 at *3). Close reading of our opinion reveals that our ruling was not based solely on the untimeliness of Alley's § 1983 petition. As we wrote:

> Even considering the countervailing interests of Alley and the state, the small likelihood of Alley's success on the merits ultimately decides the matter. That likelihood, such as it exists at all, is unsupported by current law, which offers no basis for finding lethal injection protocols unconstitutional. Moreover, since the Supreme Court is not even considering the constitutionality of the lethal injection protocol in Hill, the prospect of a change in that feature of existing jurisprudence is as speculative as any other claim about possible future changes in governing law. Such speculation does not impact our assessment as to the likelihood of Alley's success on the merits under existing law.

Alley v. Bell, 2006 WL 1313365 at *3.

The point here is that, as the Supreme Court has instructed in Hill and Nelson, as we have indicated in Hicks, and as the Fifth Circuit explained in Reese, the timeliness of a petitioner's filing is an important–but is not the only important–consideration when a federal court determines the appropriate method of disposing of a death row inmate's § 1983 challenge to lethal injection.

To be sure, the district court's reliance on the untimeliness of Alley's petition was neither wrong nor inadequate to support its ruling of June 14th. Alley's filing was very late in coming.

Alley's brief cites Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) as prohibiting courts from considering challenges such as the one in our case before a petitioner's execution reaches imminence. We reject this reading of this precedent. In that case, unlike in ours, the defendant's claim under Ford v. Wainwright, 477 U.S. 399 (1986), had originally been dismissed without prejudice. The Supreme Court's ruling merely allowed the claim to proceed in a habeas petition at a later date. The Court noted that the lower courts had specifically left open the possibility that the defendant's Ford claim could proceed in a future filing. Id. at 640. No such procedural history informs the posture of the § 1983 claim in our case. Moreover, we note that claims involving mental competency are inherently different from the § 1983 petition before us in at least one respect: mental competency is subject to variance over time. It is indeed possible that last-minute first-instance Ford petitions could be justified by a change in a defendant's mental health.

Extreme untimeliness is a sufficient but not necessarily compelling factor when deciding how to dispose of a § 1983 challenge to lethal injection. While reaffirming our view of the very small likelihood of Alley's success on the merits, we **AFFIRM** the district court's ruling of June 14, 2006, based as it was on the untimeliness of Alley's petition.

Appendix 6

No. 06-5816

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 26 2006

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Plaintiff-Appellant,

v.

GEORGE LITTLE, IN HIS OFFICIAL CAPACITY AS TENNESSEE'S COMMISSIONER OF CORRECTIONS, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, MCKEAGUE, and GRIFFIN, Circuit Judges.*

The court having received a petition for rehearing en banc of the decision issued June 24, 2006, and the petition having been circulated to all non-recused active judges of this court, less than a majority of whom favored the suggestion,

It is **ORDERED** that the petition be and hereby is denied. The mandate shall issue forthwith.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Judge Gibbons recused herself from participation in this ruling.