

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE

v.

SEDLEY ALLEY

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No. M1999-00019-SC-DPE-PD
Filed March 24, 2006

RESPONSE TO NOTICE OF FILING OF DOCUMENT

The District Court's recent order means that the disputed issues in this case now must be resolved by the Sixth Circuit in Sedley Alley's pending appeal. Alley v. Bell, 6th Cir. No. 05-6876. In addition, Sedley Alley may appeal the District Court's most recent order, which he intends to do. This Court should therefore not set an execution date, exactly as occurred previously when this Court confronted identical circumstances.

1. As Sedley Alley has noted, an execution date is improper given his pending Sixth Circuit appeal, the pendency of *Abdur'Rahman* in the Sixth Circuit, and the unsettled federal law applicable to this case:

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

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

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

See Sedley Alley’s Response To Motion To Set Execution Date, p. 3, ¶9.

2. Further, as noted previously, the last time this Court refused to set an execution date, Sedley Alley’s 60(b) proceedings had been addressed by a panel of the Sixth Circuit but a rehearing petition was imminent – and later granted. Now, Sedley Alley’s 60(b) proceedings have not even been considered by a Sixth Circuit panel. *A fortiori*, just as an execution date was inappropriate when the Sixth Circuit *en banc* was still considering the case, no date should be set now when a Sixth Circuit panel has yet to consider the current appeal. See Sedley Alley’s Response, p. 4, ¶11.

3. If anything, current circumstances more strongly militate against setting an execution date, because there have been additional legal developments which leave the resolution of Sedley Alley’s federal appeal in flux:

a. On February 24, 2006, the Sixth Circuit ordered supplemental briefing in *Abdur’Rahman*. On March 17, 2006, the parties filed supplemental briefs on the unresolved question in the Sixth Circuit of what constitutes “extraordinary circumstances” warranting relief under Fed.R.Civ.P. 60(b)(6) in a capital habeas proceeding. That very issue is presented in Sedley Alley’s appeal.

b. In concluding that Sedley Alley cannot proceed on his fraud and misrepresentation claims under Rule 60(b), the District Court has reached a conclusion directly at odds with the opinion of five Sixth Circuit judges: Judges Cole, Martin, Daughtrey, Moore, and Clay. See Alley v. Bell, 405 F.3d at 372 (Cole, J., concurring). This indicates the substantial probability that the District Court’s decision on these matters will,

in fact, be overturned on appeal.¹

c. Not only is *Abdur'Rahman* pending on appeal concerning the application of Rule 60(b) in habeas proceedings (See Sedley Alley's Response, ¶¶7a & 7b), the Sixth Circuit is also considering the availability of Rule 60(b) relief in two additional habeas appeals, including:

1) Johnson v. Bell, 6th Cir. No. 05-6925, which, like *Alley*, involves the scope of relief available in cases involving allegations that there was fraud, misconduct and/or misrepresentation during initial habeas corpus proceedings; and

2) Price v. Lewis, 6th Cir. No. 05-6592.

4. The pendency in the Sixth Circuit of *Abdur'Rahman*, *Alley*, *Johnson*, and *Price* confirm that "In light of the ongoing federal litigation, the unsettled federal law on the issue involved in this litigation, and the potential for further rulings by the federal courts that could render ineffectual any date set, . . . the interests of judicial economy and finality militate against setting an execution date at this time." State v. Alley, No. M1991-00019-SC-DPE-DD (Tenn. Jan. 6, 2005).

5. Rather, this Court should await the Sixth Circuit's resolution of the significant, unresolved issues concerning the application of Fed.R.Civ.P. 60(b).

¹ Sedley Alley's grounds for equitable relief are substantial. A document filed by the District Attorney General and part of the federal record stated that all *Brady* materials had been disclosed to Sedley Alley long ago. That statement is false. Material exculpatory evidence was withheld, but was not discovered by Sedley Alley until after his federal habeas proceedings had concluded. Such evidence establishes, for example, that the victim's death occurred many hours after the prosecution claimed, and at a time when surveillance records conclusively establish that Sedley Alley was, in fact, at his residence. This evidence establishes that Alley is not guilty. Judge Cole and his colleagues have concluded that Sedley Alley is entitled to have the substance of his fraud allegations considered by the District Court. The District Court, however, has failed to consider such allegations on the merits.

CONCLUSION

For these reasons, and all the reasons stated in Sedley Alley's initial response (incorporated by reference), the motion to set an execution date should be denied at the present time.

Respectfully Submitted,

Paul R. Bottei (#17036)
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

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 March, 2006.
