

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DONNIE E. JOHNSON)	
)	
Petitioner)	No. 97-3052-BBD
)	
v.)	Capital Case
)	Scheduled Execution Date:
RICKY BELL, Warden, Riverbend)	November 16, 2004, 1:00 a.m.
Maximum Security Institution)	
)	
Respondent.)	

MOTION FOR STAY OF EXECUTION

Pursuant to U.S.Const. Article III and Fed.R.Civ.P. 60(b), Petitioner Donnie Johnson has this day filed a motion for equitable relief and/or relief from judgment containing substantial claims entitling him to the relief he requests. The *en banc* Sixth Circuit, however, has yet to decide *Abdur'Rahman v. Bell*, 6th Cir. Nos. 02-6547, 02-6548, in which it is deciding under what circumstances relief from judgment is available in habeas corpus proceedings. A stay of execution is thus warranted not simply because *Abdur'Rahman* remains undecided, but also given the nature and strength of the grounds for relief pending before this Court – including meritorious assertions of misconduct and fraud which mandate relief. There is a clear probability of success on the merits, including clear proof that the Respondent previously filed with this Court an affidavit from Ronnie McCoy which is false. This Court, therefore, should grant a stay of execution pending *Abdur'Rahman*, pending further proceedings on the motion for relief, and pending final disposition of the motion.

I.
STAYS ARE GOVERNED BY EQUITABLE CONSIDERATIONS

Equitable considerations govern issuance of a stay. Nelson v. Campbell, 542 U.S. ___, ___, 124 S.Ct. 2117, 2126 (2004). As the Eleventh Circuit has explained, when faced with a request for a stay of execution:

We consider four factors in determining whether a stay of execution is appropriate under 28 U.S.C. §2251: ‘Whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest.

In Re Holladay, 331 F.3d 1169, 1177 (11th Cir. 2003)(granting stay of execution to allow consideration of successive application for habeas corpus relief). See also Ashcroft v. ACLU, 542 U.S. ___, ___, 124 S.Ct. 2783, 2791 (2004). Nelson v. Campbell, 542 U.S. at ___, 124 S.Ct. at 2117.

To obtain a stay, an applicant need not show actual success on the merits – only a likelihood of success. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12 (1987). See also McNary v. Haitan Centers Council, 505 U.S. 1234, 113 S.Ct. 3 (1992) (Blackmun, J., dissenting) (“[I]f each party’s chance of succeeding is equal, a strong showing on the equities can still carry the day for the applicant.”).

II.
DONNIE JOHNSON IS ENTITLED TO A STAY OF EXECUTION
PENDING *ABDUR’RAHMAN*, FURTHER PROCEEDINGS ON HIS MOTION
FOR EQUITABLE RELIEF, AND FINAL DISPOSITION OF THAT MOTION

Under the above standards, Donnie Johnson is entitled to a stay. It is “self-evident” that he will suffer irreparable injury if executed. In Re Holladay, 331 F.3d at 1177. See Wainwright v. Spenklink, 442 U.S. 901, 902, 99 S.Ct. 2421 (1979)(Rehnquist, J., dissenting). In addition, “We perceive no substantial harm that will flow to the state . . . or its citizens from postponing petitioner’s

execution to determine whether that execution would violate” the Constitution. In Re Holladay, 331 F.3d at 1177. The only real question is whether there is any likelihood of success on the merits. There is more than a mere likelihood of such success.

A.

THIS COURT SHOULD GRANT A STAY PENDING *ABDUR’RAHMAN*

To ultimately determine Donnie Johnson’s entitlement to relief, this Court must first be certain of the legal standards governing its inquiry on the motion. Thus, where *Abdur’Rahman* has yet to decide the scope of motions for relief from judgment, courts have appropriately exercised their equitable discretion to grant stays pending *Abdur’Rahman*. Stays has been granted and/or upheld in numerous cases where a favorable and/or broad ruling in *Abdur’Rahman* – when coupled with strong grounds for relief presented in a motion for relief – indicate that the movant may be entitled to relief.

Thus, the Supreme Court granted a stay in *Abdur’Rahman* itself – even though the Court did not ultimately grant relief. See Abdur’Rahman v. Bell, 535 U.S. 981, 122 S.Ct. 1463 (2002)(granting stay of execution); Abdur’Rahman v. Bell, 537 U.S. 88, 123 S.Ct. 594 (2002)(dismissing certiorari as improvidently granted). The Sixth Circuit itself granted a stay in *Abdur’Rahman* where Abdur’Rahman’s motion – as here – alleged, as grounds for relief, an intervening appellate decision. See Exhibit 1 (granting stay of execution). Similarly, the Eleventh Circuit granted a stay pending *Abdur’Rahman* where a motion for relief contained serious allegations of fraud, even though the court ultimately denied relief. See Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002)(granting stay); Gonzalez v. Secretary, 366 F.3d 1253 (11th Cir. 2004)(en banc)(denying relief on motion).

Similarly, in Alley v. Bell, W.D.Tenn.No. 97-3159 (May 19, 2004)(Exhibit 2) and Workman

v. Bell, W.D.Tenn. No. 94-2577 (Sept. 2, 2004)(Exhibit 3), this Court has granted stays of execution where the movants have sought equitable relief based on serious allegations of misconduct and fraud, and/or various intervening appellate decisions. The Sixth Circuit has refused to vacate the stays in both *Alley* and *Workman*. See Workman v. Bell, Nos.04-6037, 04-6038 (6th Cir. Sept. 20, 2004)(Exhibit 4); Alley v. Bell, No. 04-5596 (6th Cir. May 28, 2004)(Exhibit 5).

Likewise, in Cooley v. Bradshaw, 216 F.R.D. 408, 409, 414-415 (N.D. 2003), Judge Polster granted a stay, and that stay was likewise upheld by both the Sixth Circuit and the Supreme Court. See Cooley v. Bradshaw, 338 F.3d 615 (6th Cir. 2003)(en banc)(denying motion to vacate stay); Bradshaw v. Cooley, 539 U.S. ____ (2003)(same). See also Hutchison v. Bell, No. 04-5081 (6th Cir. May 25, 2004)(denying motion to vacate stay of execution granted to allow consideration of motion for relief from judgment)(Exhibit 6).

Given the pendency of *Abdur'Rahman*, and given that a favorable ruling in *Abdur'Rahman* may, when coupled with Donnie Johnson's grounds for relief (discussed *infra*) establish Johnson's entitlement to relief, a stay here is appropriate, just as it was in *Abdur'Rahman*, *Mobley*, *Alley*, *Workman*, *Cooley*, and *Hutchison*.

B.
THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS

Donnie Johnson demonstrates a likelihood of success on the merits of his motion, both on his allegations of misconduct, misrepresentation, and fraud, and on his grounds for relief based on intervening appellate decisions.

1.
THERE IS A LIKELIHOOD OF SUCCESS ON THE GROUNDS
OF MISCONDUCT, MISREPRESENTATION, OR FRAUD

Regardless of the ultimate scope of *Abdur'Rahman*, it plainly appears that, at a minimum, grounds of fraud, misrepresentation, or misconduct provide a basis for equitable relief from judgment. The Eleventh Circuit has reached this conclusion in Gonzalez v. Secretary, 366 F.3d 1253 (11th Cir. 2004)(en banc). Moreover, at oral argument in *Alley v. Bell*, 6th Cir. No. 04-5596, counsel for Respondent conceded that grounds of fraud may provide a basis for relief from judgment in a habeas case. This is a wise concession, especially in light of the Sixth Circuit's decision in Workman v. Bell, 227 F.3d 331 (6th Cir. 2000)(en banc), in which the Court unanimously agreed that an appellate mandate can be recalled based on fraud: "[W]hen the prosecution fails to reveal exculpatory evidence to the defense" there arises a "fraud upon the court . . . that calls into question the very legitimacy of a judgment." *Id.* at 335 (Merritt, J., for equally divided court). Thus, Donnie Johnson has a clear legal basis for relief in this Court.

Moreover, Mr. Johnson's claims of fraud and misconduct are substantial. In his habeas petition, Donnie Johnson asserted that Ronnie McCoy lied at trial and that the prosecution withheld exculpatory evidence demonstrating that McCoy received consideration for "turning state's evidence." Doc. No. 1: Petition For Writ Of Habeas Corpus, Claim 2. In support of his claims, Johnson provided a 1988 Presentence Report concerning McCoy, which states that McCoy received "immunity" for "turning state's evidence." To diffuse the effect of that report, the state filed a sworn affidavit from McCoy, in which McCoy professed that he had no idea why his presentence report stated that he had received immunity. Specifically relying on McCoy's affidavit, this Court denied habeas relief. Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary

Judgment at 116-117.

Since this Court denied relief, however, there is new evidence which clearly demonstrates that McCoy's affidavit to this Court was false. Specifically, as shown in Johnson's motion for equitable relief, Wayne Morrow (who wrote the presentence report) makes clear that McCoy's report says what it says because McCoy himself provided that information. See Motion For Equitable Relief, Exhibit 3. Morrow's affidavit thus establishes that the state filed a false affidavit in this Court, and this provides an adequate basis for this Court to grant relief from judgment as requested in the motion. Similarly, the fact that McCoy and the prosecution falsely asserted at trial that McCoy received no benefits confirms this Court's power to intervene. See Abrahamsen v. Trans-State Express Inc., 92 F.3d 425 (6th Cir. 1996)(relief from judgment proper where party withheld evidence and presented false testimony to district court).

These circumstances clearly establish that Donnie Johnson was unjustly denied habeas corpus relief because of the fraud, misconduct, and misrepresentations of the state. Rather, the process in this Court was tainted by the presentation of McCoy's false affidavit, as well as McCoy's false statement to the trial court, upon which this Court previously relied as well. Under these circumstances, this Court has ample power to reopen the proceedings, inquire into the fundamental fairness of its habeas judgment, and ultimately grant relief. Banks v. Dretke, 540 U.S. ____, 124 S.Ct. 1256 (2004) makes clear that the state cannot withhold exculpatory evidence, and that a petitioner may be heard on his claims once such exculpatory evidence becomes available.

Even under the most cramped view of the availability of relief from judgment in federal habeas proceedings, Donnie Johnson has shown a likelihood of success on the merits. He also requires additional process from this Court. A stay is therefore warranted to allow this Court to

properly and fully consider such grounds for relief, and afterwards to grant Donnie Johnson the relief he requests. See In Re Lott, 366 F.3d 431 (6th Cir. 2004)(granting stay of execution on second habeas petition to allow full consideration of *Brady* claims); See also Kirkpatrick v. Bell, 64 Fed.Appx. 495 (6th Cir. 2003)(granting stay of execution to allow full hearing on claims for relief).

2.

DONNIE JOHNSON DEMONSTRATES A LIKELIHOOD OF RELIEF
BASED ON INTERVENING APPELLATE DECISIONS

As explained in his motion for equitable relief, Donnie Johnson may also properly invoke this Court's equitable powers in light of intervening appellate decisions. It is clear that intervening legal developments provide clear grounds for equitable relief and/or relief from judgment. See e.g., Overbee v. Van Waters, 765 F.2d 578, 580-581 (6th Cir. 1985)(non-habeas case); Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(granting relief from judgment to state in habeas proceedings based on intervening law); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989). See Gonzalez v. Secretary, 366 F.3d 1253, 1309 (11th Cir. 2004)(en banc)(Opinion of Tjoflat, J.)(Rule 60(b)(6) the "perfect vehicle" for reconsidering a habeas judgment in light of intervening law); See also Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003)(granting relief from judgment in habeas proceeding in light of Sixth Circuit's intervening decision in *Davis v. Mitchell*).

There are at least three intervening appellate decisions which establish clear error in this Court's prior judgment: (1) Banks v. Dretke, 540 U.S. ____ (2004); (2) Cone v. Bell, 359 F.3d 785 (6th Cir. 2004); and (3) Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *cert. denied* 542 U.S. ____ (2004). The holdings of each of these cases confirms Donnie Johnson's entitlement to equitable relief from judgment:

- (1) Banks v. Dretke, 540 U.S. ____ (2004) establishes that, contrary to this Court's

initial denial of relief on Johnson’s due process challenge to McCoy’s false testimony and the withholding of exculpatory evidence, Johnson’s constitutional claim is not procedurally defaulted. Rather, *Banks* establishes that when, as here the state withholds evidence and misleads a petitioner about the existence of facts supporting ultimately meritorious false testimony/exculpatory evidence claims, a petitioner has ample “cause” and prejudice entitling him to federal review of such claims.

Banks thus undoes this Court’s prior erroneous conclusion that Donnie Johnson’s due process claim is procedurally defaulted, and, as a result, there is a likelihood that Johnson can secure relief in this Court. Indeed, where an intervening appellate decision establishes that a District Court erroneously imposed a procedural bar, relief from judgment is available. See Abdur’Rahman v. Bell, 537 U.S. 88, 90, 123 S.Ct. 594, 595 (2002)(Stevens, J., dissenting).¹ Especially where the Sixth Circuit will be deciding this precise issue in *Abdur’Rahman*, a stay is warranted here.

(2) Donnie Johnson also establishes a likelihood of success on his request for equitable relief based on the Sixth Circuit’s intervening decision in Cone v. Bell, 359 F.3d 785 (6th Cir. 2004). *Cone* is significant in two ways

(a) First, *Cone* establishes that this Court erred when it concluded that Johnson’s vagueness challenge to the “heinous, atrocious, or cruel” aggravating circumstance (Petition, Claim 15) was procedurally defaulted. *Cone* clearly establishes that federal review is

¹ In fact, this was the very issue presented to the Supreme Court in *Abdur’Rahman*. See Abdur’Rahman v. Bell, 537 U.S. at 93 n.9, 123 S.Ct. at 596 n. 9 (Stevens, J., dissenting)(stay and certiorari granted on question whether failure to consider vital intervening legal event on motion for relief from judgment was abuse of discretion where failure to consider intervening event “precludes a habeas petitioner from ever receiving any adjudication of his claim on the merits.”)

required, especially where the Tennessee Supreme Court on direct appeal considered “the entire record” when deciding whether to affirm Johnson’s death sentence. See Motion For Equitable Relief, pp. 15-16.

(b) Second, *Cone* makes manifest that Johnson’s constitutional challenge to the “heinous, atrocious, or cruel” aggravating circumstance is meritorious and provides a clear basis for habeas relief. See Motion For Equitable Relief, pp. 16-18.

Consequently, Donnie Johnson has a likelihood of success in light of *Cone*. That likelihood of success on the merits is further confirmed by the fact that in *Alley* – a case involving a request for relief in light of *Cone* – the Sixth Circuit refused to vacate a stay entered by this Court, while requesting further briefing on *Cone*. See Exhibit 5 (*Alley* order). Similarly, in *Workman*, where *Workman* asserted that *Cone* entitled him to review of a constitutional claim previously thought to be barred, this Court granted a stay, which the Sixth Circuit refused to vacate. See Exhibit 3 (District Court stay in *Workman*); Exhibit 4 (Sixth Circuit order denying motion to vacate stay).

(3) In addition, Johnson’s claim under *Davis v. Mitchell* also provides a proper basis for a stay. Indeed, Judge Spiegel has granted relief from judgment on an identical claim. Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003). Judge Spiegel’s decision in *Henderson* conclusively demonstrates that Johnson has a clear likelihood of success on the merits. Especially with *Henderson* now pending on appeal in the Sixth Circuit,² a stay of execution is warranted pending the final decision in *Henderson*. Donnie Johnson ought not be executed if *Henderson* gets relief. See generally Motion For Equitable Relief, pp. 27-30.

In light of the intervening decisions in *Banks*, *Cone* and *Davis*, Donnie Johnson has shown

² Henderson v. Collins, 6th Cir. Nos. 03-3988, 03-4054, 03-4080.

a likelihood of success on his motion. As in *Henderson, Abdur'Rahman, Alley, and Workman*, Donnie Johnson is entitled to a stay of execution because his claims may likely succeed on the merits.³ This Court should therefore grant a stay of execution.

CONCLUSION

This Court should enter an order staying execution pending *Abdur'Rahman*, pending further proceedings on the motion, and pending final disposition of the motion.

Respectfully Submitted,

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³ While granting a stay is consistent with the courts' treatment of motions for relief from judgment, granting a stay is also fully consistent with other cases in which stays have been granted to petitioners who have sought relief under 28 U.S.C. §2244. A petitioner seeking to file a second or successive petition is entitled to a stay if he or she has made a *prima facie* showing of entitlement to relief – which is “not a particularly high standard.” *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002). Numerous such stays have thus been granted to petitioners filing “second or successive” habeas petitions where there has been a showing of possible merit to their applications. See e.g., *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004)(en banc); *In Re Holladay*, 331 F.3d 1169 (11th Cir. 2003); *In Re Morris*, 328 F.3d 739 (5th Cir. 2003)(granting stay); *Id.* at 741 (Higginbotham, J., concurring)(concurring in stay of execution where claim showed “enough merit to warrant further exploration”); *In Re Johnson*, 322 F.3d 881 (5th Cir. 2003)(granting stay of execution where petitioner made *prima facie* showing of actual innocence to satisfy 28 U.S.C. §2244). *A fortiori*, where Johnson is in a more favorable posture – only seeking relief from judgment on his first habeas petition and not seeking to file a second petition – he, too, is entitled to a stay, because he has made a *prima facie* showing that he is entitled to the relief he seeks.

Certificate of Service

I certify that on October 13, 2004, a copy of the foregoing was hand delivered to Paul Summers, Attorney General, Criminal Justice Division, 500 Charlotte Avenue, Nashville, Tennessee 37243-0493.

C. Mark Pickrell

EXHIBIT 1:

Order Granting Stay Of Execution
Abdur'Rahman v. Bell, Nos. 02-6547, 02-6548
(6th Cir. June 6, 2003)(en banc)

EXHIBIT 2:

Order Granting Stay Of Execution
Alley v. Bell, W.D.Tenn. No. 97-3159
(May 19, 2004)

EXHIBIT 3:

Order Granting Stay Of Execution
Workman v. Bell, W.D.Tenn. No. 94-2577
(Sept. 1, 2004)

EXHIBIT 4:

Order Denying Motion To Vacate Stay Of Execution
Workman v. Bell, 6th Cir. Nos. 04-6037, 04-6038
(Sept. 20, 2004)

EXHIBIT 5:

Order Denying Motion To Vacate Stay Of Execution
Alley v. Bell, 6th Cir. No. 04-5096
(May 28, 2004)

EXHIBIT 6:

Order Denying Motion To Vacate Stay Of Execution
Hutchison v. Bell, 6th Cir. No. 04-5081
(May 24, 2004)