Nos. 08A667

IN THE
SUPREME COURT OF THE UNITED STATES

STEVE HENLEY,
Petitioner,

v.

GEORGE LITTLE, et al.,
Respondents.

STEVE HENLEY,
Petitioner,

v.

RICKY BELL,
Respondent.

ON APPLICATION FOR STAY OF EXECUTION

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN*
Associate Solicitor General
Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED BY PETITIONER[1]

1. Whether petitioner is entitled under18 U.S.C. § 3599(e) to authorization for his principal counsel to participate in his state clemency proceedings.

2. When is a challenge under 42 U.S.C. § 1983 to a method of execution properly dismissed as untimely or a stay of execution denied on the ground that the plaintiff was unduly dilatory in filing suit?

TABLE OF CONTENTS

[1]Petitioner has filed only an application for stay of execution. He "suggests" that this Court treat that filing as a petition for writ of certiorari. Respondent suggests instead that no petition for writ of certiorari has properly been filed, *see* U.S.Sup.Ct.R. 12.4, but assumes for present purposes that it has. In any event, there is no basis for granting the application for a stay.

OPINIONS BELOW

The February 2, 2009, decision of the Sixth Circuit Court of Appeals affirming the district court's dismissal of petitioner's complaint challenging Tennessee's lethal injection protocol is unreported. (App. G) The January 26, 2009, memorandum opinion of the district court dismissing petitioner's complaint is unreported. (App. F) The November 18, 2008, memorandum opinion of the

district court holding in abeyance petitioner's motion to authorize federally-appointed counsel to participate in state clemency proceedings is unreported. (App. B)

JURISDICTION

Petitioner presumably invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

In 1989, the Tennessee Supreme Court affirmed the convictions and death sentences of petitioner, Steve Henley, who had been convicted of two counts of first degree murder and one count of aggravated arson. *State v. Henley*, 774 S.W.2d 908 (1989). Post-conviction relief was sought in 1990 and denied in state court. *See Henley v. State*, 960 S.W.2d 572 (Tenn. 1997), *cert. denied*, 525 U.S. 830 (1998). One of petitioner's current counsel, Paul S. Davidson, was one of the two attorneys representing petitioner throughout his post-conviction proceedings, *see, e.g., Henley*, 960 S.W.2d at 573.[2]

Petitioner filed a petition for federal habeas corpus relief, which was denied, and the Sixth Circuit affirmed. *Henley v. Bell*, 487 F.3d 379 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 2962 (June 23, 2008). Mr. Davidson continued to represent petitioner throughout his federal habeas proceedings. *See, e.g., Henley*, 487 F.3d at 382 (noting that the case was argued by Paul S. Davidson)[3]; *see also Henley v. Bell*, No. 98-0672, (R. 15) (M.D. Tenn.) (December 8, 1998, Order appointing Paul S. Davidson as co-counsel). On October 20, 2008, the Tennessee Supreme Court ordered that petitioner's sentence be executed on February 4, 2009.

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[2] *See Henley v. State*, No. 3445 (Jackson Cty., Tenn., Crim. Ct.)

[3] When the habeas case was argued in November 2006, Mr. Davidson was a member of the firm Waller, Lansden, Dortch and Davis, PLLC – one of the largest law firms in the State of Tennessee, with 221 lawyers. http://www.wallerlaw.com/firm

Lethal injection became the established method of executing death sentences in Tennessee in 2000. *See* Tenn.Code Ann. § 40-23-114; 2000 Tenn.Pub.Acts, ch. 614, § 1.[4] The state's lethal injection protocol was utilized in executing the sentence of another Tennessee inmate, Robert Glen Coe, in April 2000. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 301 (Tenn. 2005). In July 2002, yet another Tennessee inmate, Abu-Ali Abdur'Rahman, challenged the state's lethal injection protocol, and in June 2003, a state trial court issued a ruling in that case that set forth the details of the state's lethal injection protocol. *See Abdur'Rahman*, 181 S.W.3d at 300-304. On March 2, 2007, the Sixth Circuit decided *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), *cert. denied, Biros v. Strickland*, 128 S.Ct. 2047 (April 21, 2008), in which the Sixth Circuit held that "method-of-execution" challenges under § 1983 accrue either upon the conclusion of direct review of the conviction in state court (or the expiration of time for seeking such review) or on the date the state adopts the execution method being challenged, whichever is later. 479 F.3d at 422.

On October 21, 2008, petitioner filed in his federal habeas case a motion to authorize his federally-appointed habeas counsel to participate in state clemency proceedings, along with a motion for a stay of execution. On November 18, 2008, the district court held the motion for authorization in abeyance, pending a decision by this Court in *Harbison v. Bell*, No. 07-8521 (U.S.), but denied the motion to stay petitioner's execution. The district court noted, among other things: "Petitioner has not provided the Court with any information from which the Court can determine that Petitioner will likely succeed on a state clemency application. Moreover, Petitioner has not shown irreparable harm because he is not being denied an opportunity to present a state clemency application." (App.

[4]Lethal injection had been an available method of execution in Tennessee, and the established method for certain prisoners, since 1998. *See* 1998 Tenn.Pub.Acts, ch. 982, §§ 1-3.

B, p. 5) On December 22, 2008, and again on January 9, 2009, the Sixth Circuit denied a similar motion for a stay of execution. (App. C, D) On November 26, 2008, more than eight years after lethal injection became the presumptive method of execution in Tennessee, and a mere seventy days days prior to the scheduled execution of his sentence, petitioner filed a complaint under § 1983 challenging Tennessee's lethal injection protocol. On January 26, 2009, the district court granted the state's motion to dismiss, ruling that petitioner's complaint was barred by the applicable one-year statute of limitations (App. F, p. 8), and that petitioner had been dilatory in filing his complaint a mere seventy days prior to the scheduled execution date. (App. F, p. 10) Petitioner filed a notice of appeal and a motion for stay of execution in the Sixth Circuit. On February 2, 2009, the Sixth Circuit affirmed on the basis of the statute of limitations and "decline[d] to stay [petitioner's] execution." (App. G, p. 1) Petitioner now seeks review and a stay of execution from this Court.

REASONS FOR DENYING A STAY AND FOR DENYING REVIEW

I. PETITIONER IS NOT ENTITLED TO A STAY OF EXECUTION ON THE BASIS OF HIS MOTION TO AUTHORIZE COUNSEL TO PARTICIPATE IN STATE CLEMENCY PROCEEDINGS.

Petitioner argues that this Court should grant a stay of execution under 28 U.S.C. § 2101(f), pending its decision in *Harbison v. Bell*, No. 07-8521 (U.S.). Both the district court and the Sixth Circuit (twice) properly denied similar motions, and there remains no justification for the issuance of a stay on this basis. As the district court concluded, "[n]othing prevents current counsel, who have represented Petitioner for ten years, from pursuing an executive clemency application on behalf of Petitioner in advance of the scheduled execution date." (App. B, p. 3)

Petitioner's claim that it is "critical" that his "principal counsel" be appointed under 18 U.S.C. § 3599 in order for him to be able to pursue state clemency, because that counsel is a Federal

Public Defender who cannot represent him in state clemency proceedings absent such an appointment, is disingenuous.[5] As discussed in more detail in the Statement set forth above, petitioner has been ably represented by the same *private* attorney, Paul S. Davidson, since 1990 – throughout both his state and federal post-conviction proceedings – a fact that petitioner deftly avoids mentioning. And nothing prevents *that* attorney from preparing and submitting a clemency application on petitioner's behalf.[6] Petitioner's protestations that he must have the representation of his "principal counsel" because "[t]hat counsel has represented petitioner for more than a decade" (Application, p. 7), are muted by the fact that his private counsel has represented petitioner for nearly *two* decades. *See, e.g., Henley v. State*, 960 S.W.2d 572, 573 (Tenn. 1997) (noting petitioner's representation in state post-conviction proceedings by Jack E. Seaman and Paul S. Davidson). Petitioner's attempt, therefore, to distinguish those cases in which this Court has denied similar stay applications on the basis that, in those cases, the prisoner had private counsel who were not precluded from representing him in state clemency proceedings (Application, pp. 11-12) falls flat. As the district court recognized, "Petitioner has not shown irreparable harm because he is not being denied an opportunity to present a state clemency application." (App. B, p. 5)

Both the district court and the Sixth Circuit were also right to deny a stay on the grounds that, absent express authorization by a federal statute or an exception to the Anti-Injunction Act, a federal court is without jurisdiction to stay a state court judgment. No federal statute expressly authorizes a stay pending resolution of a motion under § 3599, and such a motion is not an exception to the

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[5]Equally disingenuous is petitioner's assertion that the balance of equities for a stay strongly favor him because "this delay is not at all of petitioner's making." (Application, p. 9) Although assailing the district court for holding his § 3599 motion in abeyance (Application, p. 2), it was petitioner who asked that the motion be held in abeyance (R. 134, Memorandum, p. 2), as the district court points out. (App. B, p. 2)

[6]As of this writing – 14 hours before the scheduled execution – no clemency application has been filed.

Anti-Injunction Act. A stay is not warranted under 28 U.S.C. § 2101(f) (neither the final judgment on petitioner's conviction and sentence, nor the October 20, 2008, order setting an execution date is presently "subject to review by [this Court] on writ of certiorari." A stay of execution is not "necessary or appropriate in aid of [the federal court's] jurisdiction" under 28 U.S.C. § 1651, as the district court observed, and a stay is not authorized by 28 U.S.C. § 2251 because, while the motion was filed in the federal habeas case, the motion itself is not "a habeas corpus proceeding."

II. PETITIONER IS NOT ENTITLED TO A STAY OF EXECUTION BECAUSE HE HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL.

In *Hill v. McDonough*, 547 U.S. 573 (2006), this Court reiterated that "a stay of execution is an equitable remedy." *Id.*, 547 U.S. at 584. Accordingly, "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Inmates like petitioner, who seek time to challenge the manner in which the State plans to execute their sentences, must make a showing "of a significant possibility of success on the merits." *Id.* In *Baze v. Kentucky*, 128 S.Ct. 1520 (2008), this Court instructed that "[a] stay of execution may not be granted unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives." 128 S.Ct. at 1537. Petitioner says that he has met this standard.

But petitioner completely ignores this Court's further instruction in *Baze* that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." 128 S.Ct. at 1537. Tennessee's is just such a protocol. *See* App. F, p. 2 ("Kentucky's three-drug lethal injection protocol . . . is the same as that used in Tennessee.") Petitioner does not even contend, much less show, otherwise. And he cannot. Tennessee's lethal injection protocol includes *all four* of the safeguards for proper administration of sodium pentothal upon which the Supreme Court relied in upholding the Kentucky protocol in *Baze*. *Id.* 128 S.Ct. at 1533-1544 (*i.e.*, IV catheters inserted by qualified medical personnel; regular practice sessions for entire execution team; establishment of back-up IV lines and drugs; and presence of prison personnel in execution chamber) *See Henley v. Little*, No. 08-1148 (M.D.Tenn.) (R. 9, Exhibit: Tennessee Execution Procedures for Lethal Injection, pp. 32, 33, 38, 41, 42, 50, 64, 65)). *Cf., Emmett v. Johnson*, 2008 WL 2078624 (U.S. May 19, 2008) (Stevens, J., dissenting from order vacating stay of execution) ("The parties' filings with this Court highlight the existence of factual disputes concerning . . . whether [Virginia's lethal injection protocol] is substantially similar to the Kentucky protocol we declined to strike down in *Baze*."). While it is petitioner's burden at this juncture to demonstrate that Tennessee's protocol is *not* substantially similar to Kentucky's, the conclusion that it *is* substantially similar, and thus does not violate the Eighth Amendment, is inescapable.

III. PETITIONER IS NOT ENTITLED TO A STAY OF EXECUTION BECAUSE HE DELAYED UNNECESSARILY IN BRINGING HIS CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL.

In addition to the need for a prisoner to demonstrate a likelihood of success on the merits, this Court stated in *Hill* that a court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to

allow consideration of the merits without requiring entry of a stay." 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650)). *See Nelson,* 541 U.S. at 649 ("last-minute nature of an application" or "attempts to manipulate the judicial process" may be grounds for denial of a stay). Petitioner contends, hours before the scheduled execution of his now twenty-year-old sentence, that this Court should review the "exceptional[ly] importan[t]"question whether his challenge to Tennessee's lethal injection protocol was timely. But despite his protestations to the contrary, petitioner has only himself to blame for the fact that he finds himself seeking this Court's review of this question on the eve of his execution. The Sixth Circuit decided *Cooey v. Strickland* on March 2, 2007. Consequently, not only had petitioner long known at that time about the grounds for his challenge to the state's lethal injection protocol, but he also knew at that time how the Sixth Circuit was likely to decide the question of its timeliness. If his *true* interest were in obtaining this Court's review of that question -- rather than merely in securing a delay of the execution of his sentence -- he would have filed his complaint in March 2007. But he did not. Instead, he waited another year and a half, until seventy days before the execution of his sentence, to do so. As the district court observed, this delay was "inexcusable and cannot be justified." (App. F, p. 10). It is yet another reason for denying petitioner's application to stay the execution of his sentence. *See Hill*, 547 U.S. at 585 ("The federal courts can and should protect States from dilatory or speculative suits . . . . . ").

Moreover, and as discussed above, the timeliness question petitioner now poses to this Court is effectively rendered irrelevant by the fact that, in the end, and even if petitioner were to be afforded the opportunity to litigate his complaint, he *cannot* win. Not only would the state's

legitimate interest in executing its lawful judgment be frustrated by staying the execution on this basis, but petitioner's contention that this Court should issue a stay in order to consider whether petitioner's complaint was properly dismissed as untimely makes no logical sense, when his complaint is ultimately doomed to fail in any event.

IV. THE QUESTION PETITIONER PRESENTS REGARDING THE DISMISSAL OF HIS LETHAL INJECTION CHALLENGE DOES NOT WARRANT THIS COURT'S REVIEW.

Not only has petitioner failed to satisfy the standard for granting a stay of execution, but the question he presents regarding his challenge to Tennessee's lethal injection protocol would not warrant this Court's review even if it were presented in the usual course – and not on the eve of an execution. The inter-circuit conflict alleged by petitioner is illusory; it certainly is not so mature or entrenched as to warrant this Court's intervention. And it is petitioner's notion of when a method-of-execution challenge becomes ripe for adjudication that defies logic – not the holding of the Sixth Circuit.

As petitioner concedes, the holding of the Sixth Circuit in *Cooey*, applied by the lower courts here, regarding when a method-of-execution challenge accrues, comports with the rule in the Fifth, Eighth, and Eleventh Circuits. *See Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008); *Nooner v. Norris*, 491 F.3d 804 (8th Cir. 2007); *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008). Petitioner claims, though, that the holding of the Sixth Circuit conflicts with the decision of the Ninth Circuit in *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005). But *Beardslee* involved only a dilatoriness issue, and while the Ninth Circuit ruled in that case that the prisoner's lethal injection challenge, filed "[o]nce an execution was imminent," was not dilatory, the court pointedly declined to resolve the ripeness question. *See* 395 F.3d 1069 n.6 ("[B]ecause the execution protocol is subject to change,

Beardslee argues that his challenge to the protocol . . . did not become ripe until his execution was imminent as described in *Martinez-Villareal.* We need not, and do not resolve this question.").

Petitioner also alleges a conflict between the decision of the Sixth Circuit and rulings of the Texas Court of Criminal Appeals. But none of the state cases cited by petitioner involved § 1983 actions; they involved method-of-execution challenges raised in state proceedings. *See Carter v. State*, 2009 WL 81328 (Tex.Crim.App. 2009) (on direct review); *Segundo v. State*, 270 S.W.3d 79 (Tex.Crim.App. 2008) (same); *Gallo v. State*, 239 S.W.3d 757 (Tex.Crim.App. 2007) (same); *Ex Parte O'Brien*, 190 S.W.3d 677 (Tex.Crim.App. 2006) (in state habeas application); *see id.*, 190 S.W.3d at 678 (Cochran, J., concurring) (noting that pendency of United States Supreme Court case addressing "only a procedural issue under the federal Civil Rights Act" provides no reason for state court to stay execution).

On the merits, petitioner argues that the accrual rule fashioned by the Sixth circuit in *Cooey* is illogical. But it is instead petitioner's corresponding contention that is unsound. Indeed, under petitioner's view that it is only the establishment of an execution date that provides him standing to challenge the protocol, the issuance of a stay of execution – something to which petitioner insists he would then be entitled in order to pursue that litigation – would instantly strip him of that standing.[7] Acceptance of petitioner's position would thus create a Catch-22 that would serve only to ensure that the execution of his sentence would never transpire.

[7]In Tennessee, at least, once a stay of execution is issued, a new date must be set by the Tennessee Supreme Court once the stay is dissolved. See Tenn.S.Ct.R. 12(E).

CONCLUSION

The motion for stay of execution and petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered electronically to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 3rd day of February, 2009.

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
Associate Solicitor General