

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE

v.

SEDLEY ALLEY

)
)
)
)
)

No. M1999-00019-SC-DPE-PD
Filed: May 30, 2006

MOTION TO STRIKE, OR, IN THE ALTERNATIVE
RESPONSE IN OPPOSITION TO MOTION TO RE-SET EXECUTION DATE

On May 18, just two days after Governor Phil Bredesen granted a 15-day reprieve to Sedley Alley to litigate DNA testing in the state courts, the Attorney General filed a Motion to Re-Set Execution Date for Sedley Alley. For a number of reasons, this Motion should be stricken or denied. In support of Mr. Alley's Motion and Response, Sedley Alley states the following:

1. Upon discovery of documents hidden by the State for almost twenty years which establish that Sedley Alley could not possibly have killed the victim, Mr. Alley immediately began asking for access to the physical evidence in this case for DNA testing. Since 2004, Mr. Alley has sought a new trial and pursued DNA testing in both state and federal court. The state has resisted Mr. Alley at every turn.

2. On March 29, 2006, this Court scheduled Sedley Alley's execution for May 17, 2006 at 1:00 a.m.

3. On May 15, 2006, after a hearing on the issue of DNA testing, the State Board of Probation and Parole voted 4-3 that Mr. Alley should be given a reprieve and access to the evidence in order to conduct testing.

4. On May 16, 2006, in response to the Board's recommendation, Governor Bredesen

granted Mr. Alley a fifteen-day reprieve so that he could return to state court and file a new petition under the state Post-Conviction DNA Act. It was the clear intent of the Governor that the motion be filed within that fifteen-day window. The clear assumption of the Governor was that once a petition was filed, a prompt and orderly adjudication would follow. In fact, the Governor made his intentions clear at a press conference shortly after he issued the reprieve.

5. Within days of the reprieve, on May 19, 2006, Sedley Alley promptly initiated state court proceedings seeking release of evidence for DNA testing.

6. The Attorney General is well aware that the adjudication contemplated by the Governor cannot occur by June 1, 2006. Indeed, the District Attorney's office has admitted in *The Tennessean* that state proceedings would require more than 15 days – something the Governor clearly understood, and something the Parole Board understood as well: Members of the Board voted for an even longer reprieve.

7. Nevertheless, on May 18, 2006, the Attorney General requested that this Court set Sedley Alley's execution date for June 1, 2006 – just one hour after the Governor's reprieve expires – and prior to the conclusion of any state court determination of the request for DNA testing ordered by the Governor.

8. In seeking a June 1 execution date, the Attorney General has specifically asked this Court to suspend its own rules, specifically Tennessee Supreme Court Rule 12.4(e).¹ This Court,

¹Rule 12.4(e) states: "Where the date set by the Court for execution has passed by reason of a stay or reprieve, this Court shall *sua sponte* set a new date of execution when the stay or reprieve is lifted or dissolved and the State shall not be required to file a new motion to set an execution date. Any new date of execution shall be no less than seven (7) days from the date of the order setting the new execution date." June 1, 2006 is the first day that this Court has authority, under its own Rules, to set an execution date for Sedley Alley, which must be at least 7 days past the June 1 date.

however, may not suspend its own rules simply because the Attorney General believes Sedley Alley should not be permitted to do DNA testing. In fact, Alley's state DNA petition and supporting documentation clearly establish his entitlement to such testing. Where, as here, there exists a rule of Court which specifically addresses the situation at hand, suspension of the rules would be arbitrary and inappropriate, and a violation of due process and equal protection under the Tennessee and United States Constitutions. For this reason alone, the State's Motion should be denied and stricken.

9. Moreover, as noted earlier, on May 19, 2006, Sedley Alley filed in the Shelby County Criminal Court a post-conviction DNA petition, as instructed by the Governor. On May 23, 2006, the Shelby County Criminal Court scheduled an evidentiary hearing on the petition for May 30, 2006. Along with his post-conviction DNA petition, Sedley Alley has a Motion for Discovery pending in the Shelby County Criminal Court.

10. It is completely unreasonable to expect that the litigation surrounding the issue of DNA testing could be completely and fully resolved by the state courts prior to June 1, 2006 at 1:00 a.m.

11. Rather, because Mr. Alley is proceeding without delay following Governor's Executive Order, this Court should not set an execution date for June 1, 2006, or any time prior to the resolution of the issue of DNA testing in the state courts. See e.g., Workman v. State, No. M1999-01334-SC-DPE-PD (Tenn. Feb. 7, 2002)(denying state's motion to reset execution date during pendency of *coram nobis* proceedings).²

²In addition to the state court DNA proceedings, Sedley Alley has also filed three separate petitions for Writ of Certiorari in the United States Supreme Court. The first petition, Alley v. Key, U.S.No. 05-10958, Mr. Alley asks the Supreme Court to recognize his rights under the federal constitution to access to evidence for DNA testing. In the second petition, Alley v. Little, U.S.No. (continued...)

CONCLUSION

WHEREFORE, Sedley Alley's Motion to Strike should be granted, or in the alternative, this Court should deny the State's motion to set an execution date for June 1, 2006.

Respectfully Submitted,

Paul R. Bottei (#17036)
Kelley J. Henry (#21113)
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

²(...continued)

05-10959, Mr. Alley asks the Supreme Court to reinstate United States District Judge Aleta Trauger's order regarding Mr. Alley's civil rights lawsuit challenging Tennessee's unconstitutional lethal injection protocol. In the third petition, Alley v. Bell, U.S.No. 05-10960, Mr. Alley asks the Supreme Court to order Mr. Alley's federal habeas proceedings be reopened so that the federal courts can adjudicate his claim that the State unlawfully withheld exculpatory time of death evidence. This is an allegation which the State has never denied. The State Attorney General is counsel for Respondent in two of these cases, Alley v. Bell and Alley v. Little, and counsel for intervenor in Alley v. Key. The State Attorney General has yet to respond to any of these petitions. Indeed, their responses aren't due until June 15, 2006.

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 May, 2006.