

Nos. 08A-674
08-8464

IN THE
SUPREME COURT OF THE UNITED STATES

STEVE HENLEY,
Petitioner,

v.

RICKY BELL,
Respondent.

ON APPLICATION FOR STAY OF EXECUTION AND ON PETITION
FOR CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
Attorney General & Reporter

MICHAEL E. MOORE
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OPINIONS BELOW

The February 2, 2009, decision of the Sixth Circuit Court of Appeals denying a certificate of appealability is unreported. (App. A1-A2) The January 29, 2009, order of the district court denying a certificate of appealability is unreported. (App. A9-A11) The January 27, 2008, order of the district court denying petitioner's motion for relief from judgment is unreported. (App. A3-A8)

JURISDICTION

Petitioner 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).

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). On October 20, 2008, the Tennessee Supreme Court ordered that petitioner's sentence be executed on February 4, 2009.

On November 25, 2008 – thirty-six days after the Tennessee Supreme Court had set the execution date, and seven days after the district court had denied a motion to stay that execution (on the basis of petitioner's motion to authorize appointment of

counsel for state clemency proceedings) – petitioner filed a motion for relief from the district court judgment denying him habeas relief. (R. 144, Motion). On January 27, 2009, the district court denied petitioner’s motion, and on January 29, 2009, denied a certificate of appealability. (R. 154, 157, Orders) Petitioner appealed, and on February 2, 2009, the Sixth Circuit denied a certificate of appealability. It also dismissed as moot the motion for stay. (App. A9-A11) Petitioner now applies to this Court for a certificate of appealability and for a stay of execution.

REASONS FOR DENYING A STAY AND DENYING REVIEW

A BALANCING OF THE EQUITIES WAYS STRONGLY IN FAVOR OF DENYING A STAY OF EXECUTION.

A. Petitioner Cannot Demonstrate Any Likelihood of Success on the Merits

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 engage in further litigation beyond the standard three-tier appeals process must make a showing “of a significant possibility of success on the merits.” Where, as here, the federal habeas process has concluded, the state’s interest in executing its lawful judgments is “all but paramount.” *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). Here, petitioner cannot demonstrate any likelihood of success; indeed, this point is emphasized here by the very basis upon which petitioner seeks this Court’s review: the denial, by both the district court and Sixth Circuit, of a certificate of appealability, i.e., a

determination by each of these courts that petitioner's appeal from the denial of his motion for relief from judgment does not "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (2000)). As was the case with petitioner's related effort to secure a stay of execution on the basis of his petition for certiorari from the Sixth Circuit judgment denying his lethal injection challenge as untimely, his contention that this Court should stay the execution of his sentence in order to consider whether a certificate of appealability is required in order to pursue his appeal makes no logical sense, when, in the end, that appeal would ultimately be doomed to fail.

And that is the case here. Even if petitioner were allowed to proceed on appeal from the denial of his motion for relief from judgment, petitioner *cannot* win, for two principal reasons. First, the denial of a motion for relief from judgment under Fed.R.Civ.P. 60 is reviewed only for abuse of discretion. *Workman v. Bell*, 484 F.3d 837, 840 (6th Cir. 2007). Second, petitioner's motion sought relief on the basis of an alleged fraud on the court, and his allegations simply did not satisfy the requisite elements for establishing a fraud on the court, namely, conduct (1) on the part of an officer of the court; (2) that is directed to the "judicial machinery"; (3) that is intentionally false, wilfully blind to the truth, or in reckless disregard for the truth; (4) that is a positive averment or concealment when one is under a duty to disclose; and (5) that deceives the court. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993)).¹

¹As the district court noted, to the extent petitioner's fraud claim relied on

Petitioner's motion sought to reopen his claims that the prosecution presented false and misleading testimony at trial from his accomplice, Terry Flatt, regarding the details of his agreement to testify against the petitioner, and that the prosecution withheld evidence with regard to this agreement. His assertion of fraud on the court was based on the State's habeas attorneys' denial of these claims in their answer to his habeas petition. But as the district court found, nothing presented in support of petitioner's motion even alleged, much less showed, that the State's habeas attorneys knew anything about any agreement between the trial prosecutors and Flatt. *See* R. 154, p. 4 ("There is no allegation in the declaration that Respondent's counsel in this habeas case knew of the prosecution's deal with Flatt, if there was one, and kept silent about it during this federal habeas proceeding."); *see also Workman*, 484 F.3d at 840 ("In making this serious allegation against the Attorney General, . . . Workman offers nothing serious to show that the Attorney General sponsored this false testimony or knew about it during the federal habeas proceeding.") Consequently, petitioner's motion fails to show what is the essence of a fraud on the court claim: a positive "concealment" by "an officer of the court."

Moreover, petitioner's motion fails to show, and cannot show, a deception of the court. The claims petitioner sought to reopen were denied by the district court as procedurally defaulted, the Sixth Circuit affirmed that judgment, and this Court denied certiorari. (R. 154, p. 3) *See Henley v. Bell*, 487 F.3d 379, 389 (6th Cir. 2007), *cert. denied*,

Fed.R.Civ.P. 60(b)(3), it was untimely. (R. 154, p. 5)

128 S.Ct. 2962 (2008). The allegations of petitioner's motion – the “rank hearsay” that Flatt told an investigator that he was “almost positive” that the prosecution had agreed not to oppose his parole as part of the agreement (R. 154, p. 4) – go to the underlying merits of his claim; they do nothing to call the procedural default judgment into question. And it is precisely because his motion purportedly challenged the correctness of the procedural default judgment that he was entitled to file a Rule 60(b) motion in the first place. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 & n.5 (2005) (60(b) motion is proper when it challenges some “defect in the integrity of the federal habeas proceedings,” such as when the motion asserts a fraud on the court). Accordingly, petitioner's protestations before this Court that the district court should have held an evidentiary hearing are largely, if not entirely, beside the point.

B. The Timing of Petitioner's Motion for Relief from Judgment Suggests an Intent to Seek Delay.

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). Here, petitioner filed his motion for relief from judgment thirty-six days after the execution of his sentence had been set, seven days after the district court had denied a motion for a stay on a different basis,

and seventy-one days before the scheduled execution date. Especially in light of the fact that his motion is devoid of merit, its filing and, consequently, petitioner's efforts to stay that execution on the basis of its filing, can only be seen as an obvious "attempt[] to manipulate the judicial process." This Court's denial of petitioner's stay application is particularly warranted under these circumstances. For the same reasons that the application for a stay fails to demonstrate a likelihood of success on the merits, this case does not provide an appropriate vehicle for resolving the question presented by petitioner in his certiorari petition, and it too should be denied.

CONCLUSION

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

Respectfully submitted,

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/s/ Joseph F. Whalen

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by way of the Court's electronic filing system on Paul R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, and Paul S. Davidson, Waller, Lansden, Dortch, & Davis PLLC, 511 Union Street, Suite 2700, Nashville, Tennessee 37219, on this the 3rd day of February, 2009.

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
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