IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	No. 3:06-340
v	)	Judge Trauger
	)	
GEORGE LITTLE, et al.,	)	
	)	
Defendants.	)	

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to 42 U.S.C. §1983, Plaintiff has filed a complaint seeking injunctive relief prohibiting Defendants from executing him on May 17, 2006 employing their proposed lethal injection protocol. R.1:Complaint. On May 2, 2006, noting that Hill v. McDonough, U.S. No. 05-8794 will address whether Plaintiff's complaint may proceed under 42 U.S.C. §1983 or should be considered a habeas corpus petition, this Court has issued a memorandum and order holding this case in abeyance pending disposition of *Hill*. R. 21, 22. Under the circumstances, it is now appropriate for this Court to issue a preliminary injunction prohibiting Defendants from executing Plaintiff using the protocol described in the complaint. This Court should grant a preliminary injunction for the following reasons:

1. The Supreme Court itself granted a stay of execution in *Hill* to permit resolution of the exact jurisdictional question presented in this case: Whether Hill's challenge to a particular lethal injection protocol may proceed under §1983 or must proceed in habeas. See Hill v. Crosby, 546 U.S. ___, 126 S.Ct. 1189 (Jan. 25, 2006)(granting stay of execution and petition for writ of certiorari);[1]

[1] While the plaintiff in *Hill* sought an injunction under 42 U.S.C. §1983, the Supreme Court order granted a stay of execution.

See also Rutherford v. Crosby, 546 U.S. ___, 126 S.Ct. 1191 (2006)(granting stay of execution).[2]

2. The Supreme Court is not alone in granting a preliminary injunction or stay under such circumstances. Thus, in Roane v. United States, No. 05-2337, given the pendency of *Hill*, the United States District Court for the District of Columbia issued a preliminary injunction barring the United States from executing the plaintiffs using a lethal injection protocol essentially identical to the one at issue here. See Exhibit 1 (order granting preliminary injunction pending *Hill*). See also Taylor v. Crawford, No. 06-1379 (8th Cir. Feb. 1, 2006)(en banc)(granting stay of execution on plaintiff's challenge to lethal injection protocol involving thiopental, pancuronium bromide, and potassium chloride)(Exhibit 2).

3. The stay or preliminary injunction orders in *Hill*, *Rutherford*, and *Roane* are not unlike various orders issued by courts which recently confronted a similar jurisdictional question, *viz*. a district court's jurisdiction to hear a habeas petitioner's motion for relief from judgment under Fed.R.Civ.P. 60(b):

a. For example, in In Re Abdur'Rahman, 6th Cir. Nos. 02-6547, 02-6548, the Sixth Circuit granted a stay of execution to allow it to consider the continued vitality of McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1997), which held that a district court lacked jurisdiction to consider such motions filed under Rule 60(b). See Exhibit 3 (*Abdur'Rahman* order granting stay of execution).

b. Afterwards, pending the decision in *Abdur'Rahman*, district courts granted stays of execution pending *Abdur'Rahman*, and each stay was upheld as not being an abuse of

[2] In Abdur'Rahman v. Bredesen, U.S.No. 05-1036, the Supreme Court has pending before it the constitutionality of the same lethal injection protocol described in the complaint.

discretion. See e.g., Johnson v. Bell, W.D.Tenn.No. 97-3052, Nov. 9, 2004, R. 109 (granting stay pending *Abdur'Rahman*)(Exhibit 4) and Johnson v. Bell, No. 04-6361 (6th Cir. Nov. 15, 2004)(denying motion to vacate stay without prejudice to renewal following decision in *Abdur'Rahman*)(Boggs, C.J., Norris, Clay, JJ.)(Exhibit 5);[3] Workman v. Bell, W.D.Tenn.No. 94-2577, Sept. 1, 2004, R. 162 (granting stay pending *Abdur'Rahman*)(Exhibit 6) and Workman v. Bell, Nos. 04-6037, 6038 (6th Cir. Sept. 20, 2004)(denying motion to vacate stay without prejudice to renewal following *Abdur'Rahman*)(Siler, Cole, Sutton, JJ.)(Exhibit 7); Alley v. Bell, W.D.Tenn.No. 97-3159, May 19, 2004, R. 131 (granting stay pending *Abdur'Rahman*)(Exhibit 8) and Alley v. Bell, No. 04-5596 (6th Cir. May 28, 2004)(denying motion to vacate stay)(Boggs, C.J., Batchelder, Ryan, JJ.)(Exhibit 9).[4]

4. The situation here is essentially identical: Confronted with a question of jurisdiction, this Court may properly grant a preliminary injunction pending the Supreme Court's resolution of the jurisdictional issue.

5. The appropriateness of a preliminary injunction is also confirmed by the traditional four-part test governing injunctive relief:

a. Under that test, a court is required to assess: (a) the movant's likelihood of

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[3] As this Court has recognized, In Re Sapp, 118 F.3d 460 (6th Cir. 1997) appears to indicate that this Court lacks jurisdiction. *Sapp's* vitality is called into question by *Hill*, however, and it is clear that *Sapp* may indeed be overturned, much like *McQueen* was by *Abdur'Rahman*. If *Hill* determines that §1983 is a proper jurisdictional vehicle for Plaintiff's challenge, then this Court would be required to address Plaintiff's complaint in the first instance. Compare Alley v. Bell, 405 F.3d 371 (6th Cir. 2005)(en banc)(where district court had yet to decide merits of Rule 60(b) motion, case remanded for district court to address petition in first instance).

[4] After upholding the stay, the panel issued its opinion after *Abdur'Rahman* was decided. Alley v. Bell, 392 F.3d 822 (6th Cir. 2004), vacated 405 F.3d 371 (6th Cir. 2005)(en banc).

success on the merits; (b) irreparable harm to the movant absent a stay; (c) the prospect that others will be harmed; and (d) the public interest. See e.g., Nader v. Blackwell, 230 F.3d 833, 834 (6th Cir. 2000)(granting stay pending appeal); Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

b. These four factors "are factors to be balanced, not prerequisites that must be met." Nader, 230 F.3d at 834; Michigan Coalition of Radioactive Material Users, Inc., 945 F.2d at 153; In Re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985).

c. "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." Michigan Coalition of Radioactive Material Users, Inc., 945 F.2d at 153; In Re Delorean Motor Co., 755 F.2d at 1229.

d. Thus, it has long been the law of this Circuit that a stay is appropriate where the movant "*at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.*" Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982) (emphasis supplied). See also Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission, 388 F.3d 224, 227 (6th Cir. 2004).

e. Here, these four considerations require a preliminary injunction.

1) Plaintiff's complaint (R. 1) is far from frivolous, and there is clear evidence that, in violation of the Eighth and Fourteenth Amendments, the only person executed by the State of Tennessee was, indeed, conscious and suffering terror and excruciating pain during the

execution process.[5] Plaintiff's claims are properly before this Court,[6] and he will likely prevail on the merits.

2) It is also apparent that Plaintiff would suffer irreparable injury absent

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[5] See e.g., R. 11, Ex A, ¶20 (Affidavit of David Lubarsky, M.D.: "Mr. Coe was probably awake, suffocating in silence, and felt the searing pain of injection of intravenous potassium chloride.").

[6] See e.g., R. 19, Plaintiff's Response To Motion To Dismiss, pp. 2-11 (incorporated in full by reference). Ultimately, Defendants misapprehend the scope of Article III, which requires a justiciable and ripe controversy with the threat of imminent harm. Sedley Alley has not faced the imminent harm which is the subject of his complaint until: (1) On March 29, 2006 the Tennessee Supreme Court set a May 17, 2006 execution date; (2) Commissioner Little overruled Plaintiff's objections to the protocol on April 13, 2006; and (3) Lethal injection was established as the method of execution on April 19, 2006.

Significantly, on January 6, 2005, the Tennessee Supreme Court refused to set an execution date given the pendency of Plaintiff's federal Rule 60(b) proceedings (Exhibit 10: Order refusing to set execution date), and later held the state's November 2005 motion to reset execution "in abeyance pending disposition of the Rule 59(e) motion" (Exhibit 11) which Plaintiff had pending before the District Court (That case is now on appeal). The Tennessee Supreme Court's actions make clear that from January 2005 through March 2006, Plaintiff faced no prospect of imminent harm from the Defendants, because Plaintiff would not face execution at all, at least until the 60(b) proceedings had been decided by the District Court, and a Rule 59 motion denied. And indeed, had the Rule 60 motion or the Rule 59 motion been granted, there would be no justiciable controversy at all, and Sedley Alley simply would not be facing the imminent harm he now faces. His claims have only recently ripened. The fact that he may have previously faced a threat which since dissipated makes no difference. Anderson v. Green, 513 U.S. 557 (1995). The question here is the imminent harm which is the subject of the complaint now before this Court.

It is also significant that Defendant Bell has discretion to change the protocol at any time. See R. 19, p. 7 & Ex. C: Bell deposition excerpts. It was not until Defendant Little responded to Plaintiff's objections to the apparent protocol that it became clear that, notwithstanding Plaintiff's objections and new research from Dr. Koniaris, et al., Defendants intended, in May 2006, to use what apparently is the same protocol used previously (although absent discovery, even that is not completely clear). Defendant Little could have upheld Plaintiff's objections and stated that he would not use the protocol, and the present Article III controversy would not exist. Little, however, overruled the objections, which has created the case and controversy now pending before this Court. Again, this establishes that Plaintiff's claims did not ripen until April 13, 2006, at the earliest, when Little finally responded to Plaintiff's objections. As Plaintiff has noted, in reality, his suit did not fully ripen until April 19, 2006, when Defendant Bell sought to have Plaintiff choose a method of execution, Plaintiff refused, and this refusal conclusively established lethal injection as the method.

the requested relief: He would face the loss of life under cruel and torturous circumstances.[7] This is especially true where Defendants' counsel has stated to Plaintiff's counsel that, absent an injunction, Defendants would proceed with the execution as planned.

3) In addition, there is little potential harm to the Defendants, who would merely be required to temporarily refrain from engaging in cruel and inhumane actions, pending a decision in *Hill* which will be decided in weeks.

4) Finally, the public manifestly has no interest in allowing state agents to willfully inflict a most gruesome death on one of its citizens. The public interest lies with a proper and deliberate examination of the complaint.

5) In the balance of these factors, therefore, a preliminary injunction is appropriate.

6. As in *Hill*, *Rutherford*, and *Roane*, and much like the stays entered and upheld pending *Abdur'Rahman*, this Court acts well within its powers to issue a preliminary injunction to await the decision in *Hill*, especially given Plaintiff's likelihood of success on the merits, the irreparable harm he faces, and the public's interest in avoiding wanton cruelty.

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[7] This disturbing reality strikes home after Ohio's recent 90-minute botched execution of Joseph L. Clark, who raised his head from the gurney following the initial administration of the drugs and announced: "It don't work." See "Execution of Joseph Lewis Clark Fails To Go Smoothly," Copley News Service, May 2, 2006. Clark then "could be heard 'moaning, crying out and making guttural noises' after technicians closed a curtain so that" no one could "observe them trying to set up a new IV line." "Ohio Execution Briefly Delayed Over Problems With Lethal Injection," Agence France Presse, May 3, 2006. Even after the execution resumed after nearly ninety minutes, "Clark raised his head more than a dozen times as the three-drug fatal cocktail was pumped into a vein." Copley News Service, *supra*. *It thus clearly appears, exactly as Sedley Alley has maintained in his complaint, that Clark was not immediately or adequately anesthetized during either attempt to kill him*. Compare Complaint, R. 1, ¶¶1, 43-48, 91-99. According to the New York Times, after this debacle, Ohio officials intend "to review our policies and our protocol." See "Trouble Finding Inmate's Vein Slows Lethal Injection In Ohio," New York Times, May 3, 2006.

CONCLUSION

This Court should grant a preliminary injunction prohibiting Defendants from executing Plaintiff under Defendants' protocol, pending resolution of *Hill v. McDonough*, U.S.No. 05-8794 and pending final disposition of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 this 4th day of May, 2006.

/s/ *Paul R. Bottei*