App. No. 08A667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

STEVE HENLEY,
Petitioner,

v.

GEORGE LITTLE et al.,
Respondents.

STEVE HENLEY,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

PETITIONER'S REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE
MR. HENLEY IS SCHEDULED TO BE EXECUTED ON FEBRUARY 4, 2009 at 1:00 a.m. (C.S.T.)

Thomas C. Goldstein
Counsel of Record
Troy D. Cahill
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Paul S. Davidson
WALLER, LANSDEN, DORTCH, & DAVIS, LLP
511 Union St., Suite 2700
Nashville, Tennessee 37219

Paul R. Bottei
OFFICE OF THE FEDERAL PUBLIC
DEFENDER
810 Broadway, Suite 200
Nashville, Tennessee 37203

PETITIONER'S REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

Petitioner respectfully submits this Reply in support of his Application for a Stay of Execution (Application).

I. A Stay Pending *Harbison* Is Warranted

Petitioner's Application demonstrated (at 6-13) that this case will be controlled by the outcome of this Court's decision in No. 07-8521, *Harbison v. Bell* (argued Jan. 12, 2009). Petitioner merely seeks a short stay – until *Harbison* is decided later this Term – so that he can fairly present his substantial case for clemency to the Governor of Tennessee. As the Application explained, this case differs from those in which the Court has previously been presented with requests for stays in light of *Harbison* because here (as in *Harbison* itself), the application of Section 3599 determines whether petitioner's principal counsel may participate in the clemency process *at all*, and because petitioner applied for the appointment of counsel immediately (indeed, *the day*) after the State set an execution date.

The State's response to petitioner's showing that he is entitled to a stay in these circumstances is unpersuasive.

First, the State's suggestion that this Court lacks jurisdiction is meritless. This case is pending before the district court, which has refused to adjudicate it pending this Court's decision in *Harbison*. The court of appeals denied a stay. There is obviously no merit to the contention that this Court must allow petitioner to die as a consequence of the violation of federal law because it is powerless to issue a stay in order to preserve its eventual jurisdiction over the case.

In fact, this Court's jurisdiction to review petitioner's application for a stay is clear. In

addition to 28 U.S.C. § 2101(f), the All Writs Act also authorizes this Court (as well as the lower federal courts) to "issue all writs necessary or appropriate in aid of their respective jurisdictions." At issue in this proceeding is whether petitioner is entitled to have his federally funded Section 2254 counsel participate in state clemency proceedings – an issue that, as *Harbison* confirms, this Court unquestionably would have jurisdiction to review.

The State's contrary position rests on its assertion that this Court lacks jurisdiction because petitioner merely seeks financing for his existing counsel, which remain free (no matter what this Court's ruling in *Harbison*) to participate in the clemency process. Even assuming that petitioner were merely seeking financing, the State offers no support for its view that this Court lacks jurisdiction as a consequence. But even more important, petitioner's Section 3599 Motion does not merely present a question of funding. Petitioner's principal counsel is statutorily prohibited from participating in clemency proceedings unless and until this Court overrules the Sixth Circuit's decision in *Harbison*. If a stay is not issued, petitioner will be executed, and – as a result – this Court will lack jurisdiction to review his request for the appointment of clemency counsel.

Woodard v. Hutchins, 464 U.S. 377 (1984) (per curiam), is instructive here. In that case, this Court specifically held that it had jurisdiction to consider the State's application to vacate a stay of execution because the Fourth Circuit judge who issued the stay had jurisdiction under 28 U.S.C. § 1651 to order the stay, *id.* at 377, to preserve the district court's jurisdiction over a pending habeas application, *id.* at 381 (Brennan, J., dissenting).

Second, contrary to the State's submission, petitioner has satisfied the criteria necessary for this Court to stay his execution. As the stay application outlines in detail, petitioner will suffer irreparable harm if he is executed before this Court issues its decision in *Harbison*. As the affidavit

submitted by Paul S. Davidson (who was also appointed to represent petitioner in his federal habeas proceedings) explains, petitioner's principal counsel is currently prohibited from participating in any clemency proceedings. *See* Affidavit of Paul S. Davidson ¶ 4, attached hereto as Exhibit I. The State's assertion that petitioner's reliance on the role of the Federal Public Defender is "disingenuous" (BIO 6) is inexplicable. As the Application explains and Mr. Davidson's sworn affidavit reinforces, "The inability of the Federal Public Defender's Office, and Mr. Bottei in particular, to participate in a clemency petition very seriously impedes Mr. Henley's ability to present a case for clemency" given Mr. Bottei's long relationship with petitioner, his familiarity with petitioner's case and the clemency process, and the resources of the Office of the Federal Public Defender. *Id.* ¶¶ 5-7. By contrast, Mr. Davidson's practice focuses on civil litigation, and he has "never before handled any clemency petition, much less one involving a death row inmate." *Id.* ¶ 1.

Such prejudice is hardly trivial: although the State suggests that clemency is somehow not important because it is not part of the adjudicatory process and is instead merely a shot at a windfall, this Court has expressly recognized clemency's historic role as the "fail safe" of the criminal justice system. *Herrera v. Collins*, 506 U.S. 390, 415 (1993); *see also id.* at 411-12 ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."). And Section 3599 (like its predecessor provision, Section 848(q)) reflects Congress's judgment that clemency proceedings are important, as it specifically provides that capital proceedings – including clemency proceedings – are "unique and complex," requiring well-qualified attorneys who must meet stringent criteria. *Cf. McFarland v. Scott*, 512 U.S. 849, 855 (1994).

Nor can the harm be alleviated by having some other person – such as petitioner's spiritual

advisor, a family member, or a friend – pursue clemency proceedings. To the contrary, in an *amicus* brief filed in this Court in *Harbison*, a group of current and former governors recognized that "[a]n attorney's role in the capital clemency process is critical even when the request for clemency is ultimately denied." Br. *Amicus Curiae* of Current and Former Governors 6-7, *Harbison v. Bell* (No. 07-8521).

Finally, the State's suggestion that a stay is not warranted because there is no right to have court-appointed counsel in executive clemency proceedings simply begs the question presented in *Harbison*. As the petitioner argues in that case, and as the Tenth Circuit has squarely held, a capital defendant in petitioner's position has the right to the appointment of counsel under Section 3599. Accordingly, a stay of execution is warranted.

II. Certiorari Should Be Granted to Review the Sixth Circuit's Decision Barring Petitioner's Section 1983 Suit

Petitioner's Application demonstrated that a stay of execution is warranted with respect to the Sixth Circuit's holding that petitioner's suit under 42 U.S.C. § 1983 was not timely filed. Further, this Court should treat the Application as a petition for certiorari and grant certiorari. As explained in the Application (at 13-22), the Sixth Circuit's holding cannot be reconciled with this Court's precedents or decisions of the Ninth Circuit and Texas Court of Criminal Appeals. Because the other elements of the stay inquiry support petitioner, a stay is warranted.

The State does not contest the recurring importance of this question of federal law. *See* App. 22. Instead, it principally contends that petitioner unduly delayed instituting this suit and now seeks a stay "hours before [his] scheduled execution." BIO 9. That argument lacks merit for three reasons.

First, the State ignores the Sixth Circuit's actual holding. The court of appeals held that petitioner's suit was barred by the statute of limitations; it did not endorse the State's submission that petitioner otherwise filed his claim too late. Notably, the State offers no principled defense of the Sixth Circuit's holding that petitioner was required to file suit in 1990 or 2000. As the Application demonstrates, nothing about the conclusion of direct review or the State's decision to make lethal injection the default method of execution rendered it "imminent" that petitioner would be subject to the protocol he challenges in this case, nine or nineteen years later. Requiring capital defendants to file at that time would implicate the burdens, costs, and risks associated with premature (and potentially unnecessary) litigation that the Court recently re-affirmed Article III is meant to guard against. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2853-55 (2007).

The State specifically ignores details of Tennessee's execution practices that inform the question of ripeness. The State has a standing practice that contemplates ongoing changes to its execution protocol. *See* Appendix J, *infra*. The inmate moreover must elect the method of execution to which he will be subject – lethal injection or electrocution – but the *State* has elected not to provide that choice until thirty days before the execution.

Indeed, the State does not seriously defend the Sixth Circuit's holding. It instead attempts to shift to the position that petitioner should have filed suit in 2007 (BIO 9), rather than 1990 or 2000, the indefensible dates that are required under the court of appeals' controlling ruling in *Cooey*. But as the Application explains (at 20), the Sixth Circuit has held that the only relevant event in 2007 was the State's adoption of a protocol *more favorable* to defendants, which accordingly does not trigger a new statute of limitations period. And as noted, even in 2007, when federal habeas proceedings were still ongoing, petitioner's claim would not have been ripe.

Second, the State's submission begs the question presented here. As the Application demonstrates, petitioner's claim was not ripe and thus could not have been filed until, at the very earliest, the State moved to set an execution date. Before that day, it was far too uncertain not only what execution protocol would be applied in his case, but also whether petitioner would be executed at all. The State's contention that petitioner should have filed suit earlier rests on the contested (and erroneous) premise that petitioner was entitled to sue under Section 1983 at an earlier date.

Third, the record belies the assertion that petitioner's conduct disentitles him to an adjudication of his claim. As explained in the Application, petitioner filed this suit more than two months prior to his scheduled execution. The merits of his claim were fully briefed and ready for resolution roughly two weeks before the execution date. The only reason that his claim was not resolved on the merits was that the district court refused to do so. In short, there was no delay, strategic or otherwise, in the litigation of petitioner's 1983 claim.

Respondent has no persuasive answer to the Application's showing (at 20-21) that the Sixth Circuit's holding conflicts with the precedent of the Ninth Circuit, as well as controlling decisions of the Texas Court of Criminal Appeals that give rise to an intra-jurisdictional conflict with the Fifth Circuit. Although the Ninth Circuit did not purport to lay down a firm rule regarding the statute of limitations in Section 1983 matters, it did squarely hold that an even later-filed suit was timely. Under that ruling, petitioner's suit manifestly could not have been dismissed on timeliness grounds. *Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir.), *cert. denied*, 543 U.S. 1096 (2005) (concluding that 1983 action was timely even though only filed thirty days before scheduled execution). Though the State contends that these cases involved "state proceedings" (BIO 11), the relevant point is that, as the Application explains, Texas holds that indistinguishable claims cannot

be presented until after an execution date is set, a holding that controls Section 1983 suits filed in the Texas courts. App. 21.

Nor does the supposed "Catch-22" that the State purports to identify (BIO 11) have any force. An order staying an execution does not vacate the Order directing that an execution proceed and thus does not obviate the defendant's immediate interest in an adjudication of his challenge to the method of his planned execution, particularly when direct and collateral review of his conviction and sentence have concluded.

Finally, respondent errs in asserting that petitioner is equitably disentitled to a stay because there are similarities between the execution protocol challenged in this case and that upheld in *Baze v. Rees*, 128 S. Ct. 1520 (2007). *Baze* expressly contemplated that additional challenges to other states' protocols would proceed. A federal district court has already invalidated Tennessee's protocol in another case, in a ruling that is currently pending before the Sixth Circuit. *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007). As the Application illustrates, the record shows that this case presents a substantially stronger case than *Baze* in light of demonstrated errors that have occurred in Tennessee executions, as well as evidence regarding blood samples of executed inmates. Respondent simply assumes (BIO 8) that a State that nominally adopts the same safeguards as did Kentucky in *Baze* falls within an absolute safe harbor from litigating the constitutionality of its execution protocol. But that assumption is unsupported by *Baze* itself, which looks to the "risk" in the State's method of execution. 128 S. Ct. at 1537. The uncontested evidence presented by petitioner is that, whatever nominal safeguards the State has adopted, *in practice* there is a substantial risk of wholly unnecessary injury.

CONCLUSION

The Court should grant a stay of execution, deem petitioner's Application to be a petition for certiorari, and grant certiorari on the terms set forth in the Application.

Respectfully submitted,

February 3, 2009

By: /s/ Thomas C. Goldstein

Paul R. Bottei
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway, Suite 200
Nashville, Tennessee 37203

Paul S. Davidson
WALLER, LANSDEN, DORTCH, & DAVIS PLLC
511 Union St., Suite 2700
Nashville, Tennessee 37219

Thomas C. Goldstein
Counsel of Record
Troy D. Cahill
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

APPENDIX I

State of Tennessee)
)
County of Davidson)

AFFIDAVIT OF PAUL S. DAVIDSON

I, Paul S. Davidson, being of lawful age, swear as follows:

1. I am an attorney licensed to practice in the State of Tennessee.

2. I represent Steve Henley in state and federal court in Tennessee along with the Tennessee Federal Public Defender's Office. An attorney in that office, Paul R. Bottei, was appointed as Mr. Henley's lead attorney in 1998. Although I represented Mr. Henley in state post conviction proceedings, my experience is in civil litigation, not criminal law. Before the federal habeas proceedings were filed, I partnered up with a former state prosecutor and member of the Tennessee State Attorneys General's staff to represent Mr. Henley. I have never before handled any clemency petition, much less one involving a death row inmate.

3. At the time Mr. Bottei was appointed lead counsel in this case, he was the sole attorney employed in the Nashville Federal Public Defender's Capital Habeas Unit. The Federal Public Defender now employs 6 attorneys and five investigators.

4. The Federal Public Defender's Office has advised me that Mr. Bottei is forbidden by law from participating in clemency proceedings absent authorization from the federal courts.

5. In my continued representation of Mr. Henley, I have relied a great deal on Mr. Bottei's expertise and experience as well as the resources of his office. The inability of the Federal Public Defender's Office, and Mr. Bottei in particular, to participate in a clemency petition very seriously impedes Mr. Henley's ability to present a case for clemency. Mr. Bottei has tremendous familiarity, built up over more than a decade as Mr. Henley's lead counsel, with

this case.

6. In addition, the Federal Public Defender's Office and Mr. Bottei have highly relevant experience in capital litigation generally that I simply do not have. Mr. Bottei first began working on death penalty cases when he was in law school at Yale University. After graduating law school, Mr. Bottei gained valuable experience as law clerk to Sixth Circuit Chief Judge Albert Engle. Upon completion of his clerkship, Mr. Bottei began representing death sentenced inmates in Texas. Since that time, he has represented capital defendants at trial, appeal, post-conviction, and in habeas. He has drawn on his vast experience, including seventeen years as a Tennessee practitioner, in representing Mr. Henley.

5. Beyond Mr. Bottei's extensive legal experience, the Office of the Federal Public Defender also has financial resources available to it that would be of crucial importance in presenting a case for clemency. As an example, one issue of clemency involves Mr. Henley's mental illness and depression. To effectively advocate for clemency, expert witnesses must be presented to the Governor. The Federal Public Defender has the resources to compensate those witnesses, but only if authorized to do so.

Further affiant saith not.

Paul S. Davidson

Subscribed to and sworn before me this
3rd day of February, 2009.

Notary Public

My commission expires: 5-8-2012

C. DENISE GUYE
STATE OF TENNESSEE
NOTARY PUBLIC
DAVIDSON COUNTY, TENN.
My Commission Expires MAY 8, 2012

APPENDIX J

ADMINISTRATIVE POLICIES AND PROCEDURES State of Tennessee Department of Correction	Index #: 506.16.3	Page 1 of 1
	Effective Date: April 20, 2007	
	Distribution: LD	
	Supersedes: N/A	
Approved by:		
Subject: EXECUTIONS: CHANGES TO EXECUTION PROTOCOLS		

I. AUTHORITY: TCA 4-3-603, TCA 4-3-606, TCA 39-13-206, and TCA 40-23-114 through TCA 40-23-117.

II. PURPOSE: To establish guidelines for changing execution protocols.

III. APPLICATION: The Warden of Riverbend Maximum Security Institution (RMSI) and the Commissioner of the Tennessee Department of Correction.

IV. DEFINITIONS: Execution Manuals: Manuals containing the detailed description of policies and procedures that describe the carrying out of executions in Tennessee by lethal injection and electrocution.

V. POLICY: Any changes to the execution protocols as outlined within the *Execution Manuals* shall be documented and approved by the Commissioner of Correction.

VI. PROCEDURES:

1. Any changes to the execution protocols shall be recommended by the Warden of RMSI and approved by the Commissioner of Correction.

2. The pages of the Execution Manuals shall be numbered and dated. Any change shall be numbered with the new date and inserted into the manual. The old page shall be removed and maintained by the Warden as an historical record.

VII. ACA STANDARDS: None.

VIII. EXPIRATION DATE: April 20, 2010.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct electronic version of the above and foregoing Petitioner's Reply in Support of Application for Stay of Execution was served on opposing counsel on February 3, 2009, via email to:

Mark Hudson
Assistant Attorney General
Office of the Attorney General
425 Fifth Avenue, North
Nashville, TN 37243-0493
(615) 741-3491
Mark.Hudson@ag.tn.gov

Elizabeth Ryan
Assistant Attorney General
Office of the Attorney General
425 Fifth Avenue, North
Nashville, TN 37243-0493
(615) 741-3491
elizabeth.ryan@ag.tn.gov

/s/ Troy D. Cahill
Troy D. Cahill
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
tcahill@akingump.com

February 3, 2009