

**DEATH PENALTY CASE,
EXECUTION SCHEDULED FOR
MARCH 11, 2004 at 1:00 a.m.
STAYED**

No. 04-5066

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**IN RE: OLEN E. HUTCHISON,
Movant.**

**RESPONSE IN OPPOSITION TO MOTION TO HOLD
PROCEEDINGS IN ABEYANCE**

Ricky Bell, Warden of Riverbend Maximum Security Institution,¹ respectfully moves this Court to deny the Motion to Hold Proceedings in Abeyance filed by petitioner.

Following the denial of his petition for writ of certiorari by the United States Supreme Court, movant attempted to relitigate the claims asserted in his petition for writ of habeas corpus by filing a motion for relief from judgment pursuant to Rule 60(b), F.R.A.P. The district court correctly determined that Hutchison's motion should be treated as a second or successive habeas petition and transferred the matter to this Court. Hutchison then filed a notice of appeal with the district court seeking to appeal the order transferring the case. That matter is docketed as Case No. 04-5081 in this Court.

¹Warden Bell is the respondent/appellee in the related matter of *Olen E. Hutchison v. Ricky Bell*, Case No. 04-5081 also pending before this Court.

As a part of its transfer order, the district court also entered a stay of execution. Warden Bell has filed a motion to vacate the stay in Case No. 04-5081, which is presently pending.

Hutchison now asks this Court to hold proceedings in Case No. 04-5066 in abeyance pending this Court's decision in *Abdur'Rahman v. Bell*, Nos. 02-6457 and 02-6458. That case was orally argued in December 2003 on the question of whether a motion for relief from judgment pursuant to Rule 60(b), F.R.A.P., should be considered as a second or successive petition for habeas relief when it arises from a change in the state court rules relating to exhaustion. For the reasons set forth in the motion to vacate the stay filed in Case No. 04-5081, a copy of which is attached to this motion, Warden Bell submits that the holding in *Abdur'Rahman* will have no impact upon this case, and therefore there is no need to hold proceedings in abeyance. Because Hutchison cannot prevail under either a theory of a second or successive habeas petition or under Rule 60(b), there is no need to delay in ruling on this matter or to allow the stay of execution to stand.

CONCLUSION

For the foregoing reasons, Hutchison's motion to hold proceedings in abeyance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

_____I hereby certify that a true and exact copy of the foregoing document filing has been forwarded by facsimile transmission and first class mail, postage prepaid to: Dana C. Hansen Chavis, Federal Defender Services, 530 S. Gay Street, Suite 900, Knoxville, Tennessee 37902, (865) 637-7999, on this the ___ day of March, 2004.

ALICE B. LUSTRE
Assistant Attorney General