IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CECIL C. JOHNSON, JR.,	)	
	)	
Plaintiff-Appellant,	)	**CAPITAL CASE**
	)	
v.	)	
	)	**No. 09-6416**
PHIL BREDESEN, Governor of the State of Tennessee; GEORGE M. LITTLE, Commissioner of the Tennessee Department of Correction; and RICKY BELL, Warden, Riverbend Maximum Security Institution, in their official capacities only,	)	
	)	
Defendants-Appellees.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR A STAY OF EXECUTION

The District Court has transferred this case to this Court under 28 U.S.C. § 1631 so that it can consider whether this action can go forward as a second or successive habeas corpus application under 28 U.S.C. § 2244(b)(3).[1] Cecil Johnson seeks a stay of his imminent execution so that this Court can give due consideration to the critical threshold issue of whether this case really is a "second or successive habeas corpus application" within the meaning of section 2244(b)(2). Mr. Johnson contends that it does not.

[1] Out of an abundance of caution, however, Mr. Johnson has also filed a Notice of Appeal in the District Court.

This case raises novel and important questions as to how, if at all, a condemned inmate can raise the issue of whether his execution after an extraordinarily lengthy confinement on Death Row can constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment, even when he has expeditiously pursued his available remedies, and most of the delay is attributable to the State.

Justices Stevens and Breyer, at least, believe that the issue of whether long confinement on Death Row before an inmate's actual execution can constitute an Eighth Amendment violation deserves study in the lower courts before the Supreme Court ultimately resolves it some day. *See, e.g., Lackey v. Texas,* 514 U.S. 1045, 1045-47 (1995) (Stevens, J., respecting denial of certiorari, with Breyer, J., concurring). The District Court's ruling erects procedural barriers to such review that are, as a practical matter, insuperable.

Rather than reach the merits of Cecil Johnson's Motions for Temporary Restraining Order and Preliminary Injunction, the District Court accepted the State of Tennessee's invitation to characterize Mr. Johnson's claim as a "second or successive habeas corpus application" within the meaning of 28 U.S.C. § 2244(b)(2), which left it without jurisdiction to consider Mr. Johnson's motion for injunctive relief. Accordingly, it transferred the case to this Court under 28 U.S.C. § 1631.

Mr. Johnson faces death by lethal injection behind the walls of the Riverbend Maximum Security Institution in Nashville at 1:00 a.m. CST on December 2, 2009. Mr. Johnson has been confined on Tennessee's Death Row for almost twenty-nine years, due in large part to the State of Tennessee's manipulations and misconduct, even though his state post-conviction and federal habeas counsel consistently pursued a strategy to *expedite* his case as much as possible in the interest of reaching the federal court of appeals sooner rather than later. Mr. Johnson contends that after being subjected to the psychological torture of being forced to live in a state of constant apprehension of imminent death for nearly three decades, carrying out his death sentence this far removed from the imposition of his sentence would violate the Eighth and Fourteenth Amendments.

The District Court held that Mr. Johnson should have applied to file his action as a "second or successive application" under 28 U.S.C. § 2244(b)(3) rather than a claim under 42 U.S.C. § 1983. This means that Mr. Johnson necessarily loses, because his claim does not come close to meeting either of the criteria under section 2244(b)(2).

With all due respect, this ruling is dependent upon an improper characterization of Mr. Johnson's action as a challenge to the validity of his sentence, rather than as the challenge to the conditions of his confinement – the psychological torture of living in death's shadow for a generation – that it actually

presents. Ignoring the substance of Mr. Johnson's claim, the lower court found that this characterization was appropriate because of the remedy Mr. Johnson seeks. This reliance on the remedy sought by Mr. Johnson to determine the type of action that must be filed is unsupported by Supreme Court law.

However, even if the District Court was correct in finding that the action should have been filed under 28 U.S.C. § 2254, the appropriate response would have been to recharacterize Mr. Johnson's complaint as an action for habeas corpus relief and allow it to proceed under that law. Under the Supreme Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), such a petition, while a "second petition" in the ordinary sense of the term, is definitely not a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b)(2) (which is the meaning that matters).

A. Mr. Johnson's *Lackey* Claim Is A Proper Subject For A § 1983 Action

The Supreme Court has recognized the intersection and overlap between habeas corpus claims and § 1983 claims for many years.[2] *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Wilkinson v. Dotson*, 544 U.S. 74 (2005). It is generally understood that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus" while "[a]n

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[2] In fact, the Court in *Preiser* acknowledged that some claims might legitimately be filed both as habeas actions and as § 1983 claims. 411 U.S. at 499.

inmate's challenge to the circumstances of his confinement … may be brought under § 1983." *Hill v. McDonough*, 547 U.S. 573, 579 (2006). As suggested by this general principle, the determination of the proper vehicle for a particular challenge focuses on the substance of the claim raised, rather than on the remedy sought. *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Wilkinson, supra*, 544 U.S. at 81-82.

In *Heck*, the Supreme Court considered whether an inmate's claim for damages was cognizable under § 1983 when the lower courts had found that the claim challenged the legality of the inmate's conviction. 512 U.S. at 479-80. Even though damages are not an available remedy under habeas corpus, this was not determinative of the question of whether the inmate's claim could be pursued under § 1983. *Id*. at 481-83; *see also id*. at 497 (Souter, J., concurring) ("As the Court explains, nothing in *Preiser* nor in *Wolff v. McDonnell*, 481 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), is properly read as holding that the relief sought in a § 1983 action dictates whether a state prisoner can proceed immediately to federal court.").

The Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the

conviction or sentence has already been invalidated." *Id*. at 487. The Court further explained that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id*. (emphasis in original).

A decade later, the Court examined the line of cases defining the relationship between § 1983 and federal habeas statutes, and succinctly explained the focus of the inquiry as follows:

> These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (emphasis in original).

In the instant case, Mr. Johnson has alleged that because he has already suffered for so long as a result of the decades of confinement under conditions that Justices Stevens and Breyer have declared to be precisely the type of "gratuitous infliction of suffering" the Eighth Amendment was intended to prevent, executing him at this point would simply be "patently excessive," cruel, and unusual. *See Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari); *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring). This claim does not challenge the

validity of Mr. Johnson's conviction, or assert that the sentence in itself is invalid, but is properly characterized as a challenge to the conditions of his confinement.

Stated another way, Mr. Johnson contends that the *condition* of having been confined under a death sentence for so long has reached a point where the death penalty ceases to further its legitimate societal purposes of retribution and deterrence and "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, *supra,*408 U.S. at 312 (White, J., concurring in judgment) (quoted in *Lackey, supra*, 514 U.S. at 1047).

Mr. Johnson's claim is analogous to the recent challenges inmates have raised concerning lethal injection, which the Supreme Court has held to be proper subjects under § 1983. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 547 U.S. 573 (2006). The Court in *Nelson* noted that civil rights suits seeking to enjoin the use of a particular method of execution do not clearly fall within the description of challenges to "conditions" or to the "fact or duration" of a conviction or sentence. 541 U.S. at 643-44. The Court was not required to reach the question of how to categorize method-of-execution claims generally, however, since the state conceded that the same claim raised by the inmate would

be proper under § 1983 if it challenged the procedure in the context of general medical treatment.[3] *Id*. at 644-45.

Two years after the limited decision in *Nelson*, *Hill* presented the Supreme Court with an inmate's broader challenge to the drug cocktail used in Florida's lethal injection procedure. *Hill*, 547 U.S. at 576-78. The Court again found that the challenge was permissible as a § 1983 action. *Id*. at 576. In reaching this decision, the Court was not swayed by the state's argument that the suggestion that there were alternative constitutional procedures available was more theoretical than real and that if the inmate were successful in his challenge, he could frustrate the execution as a practical matter. *Id*. at 581-83. Although this *could,* in effect, permit the inmate to obtain a permanent injunction preventing his execution, the Court found that the challenge was proper under § 1983. *Id*. at 576.

Neither *Nelson* nor *Hill* addressed, much less answered, the question of whether a constitutional challenge seeking to permanently enjoin an execution would amount to a challenge to the fact of the sentence itself (and therefore should be filed as a habeas corpus claim rather than a § 1983 action). *See Hill*, 547 U.S. at 579-80. As discussed above, since the Supreme Court has both demonstrated and explained that it is not the remedy sought that dictates whether the action is cognizable under § 1983, if and when it finally determines this question, the Court

[3] The inmate in *Nelson* was challenging the use of a particular procedure to obtain venous access. *Id*. at 641-42.

will undoubtedly continue to evaluate the substance of the claim rather than consider the request for a permanent injunction to be determinative. As such, the mere fact that Mr. Johnson seeks a permanent injunction cannot lead to the conclusion that his *Lackey* claim may only be filed as a petition for writ of habeas corpus.

B. Even If Mr. Johnson's Claim Should Have Been Treated As A Habeas Petition, It Was Not A "Second Or Successive" Petition Within The Meaning of 28 U.S.C. § 2244(b)(2)

The analysis that the District Court undertook regarding the proper characterization of Mr. Johnson's claim should not have been the end of the court's inquiry. While the Supreme Court in *Hill* expressly did not answer the question of whether an action seeking to foreclose execution completely could be filed under § 1983, the Court suggested that it might be proper to recharacterize such a complaint as an action for habeas corpus. *Id*. at 582. The District Court erred when it failed to recharacterize the complaint in this way and reach the merits of Mr. Johnson's action under 28 U.S.C. § 2254.

If Mr. Johnson's claim is more properly considered as a habeas petition, this Court should find that it is not subject to the strict limitations on successive habeas petitions found in 28 U.S.C. § 2244. The Supreme Court recently held in the context of a *Ford v. Wainwright* claim that a petitioner could file a second habeas petition without being subject to the statutory bar on "second or successive"

applications if the *Ford* claim was filed only when it became ripe. *See Panetti v. Quarterman*, 551 U.S. 930 (2007).

Although acknowledging that *Ford*-based incompetency claims are generally not ripe until after the time has run to file a first habeas petition (because of the one-year AEDPA statute of limitation), in *Panetti* the State of Texas asserted that the petitioner was required to raise the unripe claim in his initial petition to preserve it for future consideration. *Id*. at 943. The Court rejected this argument, describing it as "counterintuitive" and an approach that would "add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id*.

The Court explained that the phrase "second or successive" as used in 28 U.S.C. § 2244 does not refer to all § 2254 applications filed second or successively in time. *Id*. at 943-44. It found that it was appropriate to look at the "implications for habeas practice" when interpreting § 2244. *Id*. at 945. Considering the purposes of AEDPA, the Court found that an "empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies." *Id*. at 946. "Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Id*.

The underlying action giving rise to this appeal did not become ripe until Governor Phil Bredesen denied Plaintiff's Petition for Executive Clemency on November 25, 2009. Before then, the full measure of Cecil Johnson's confinement on Death Row before his scheduled execution was unknown (because the Governor could have commuted his sentence). Plaintiff had originally submitted his petition to the Governor's Office on August 27, after the Tennessee Supreme Court had set his execution date and at a point when he was not pursuing any judicial remedies.

Much like the State of Texas in *Panetti*, the State of Tennessee has suggested that Mr. Johnson should have filed his unripened *Lackey* claim at some earlier stage of the proceedings, such as the time of filing his second federal habeas petition in 1999, in order to preserve this issue. Requiring such a pointless filing (which, although the State does not concede this, would in reality mean that an inmate would be obliged to file the claim even earlier in his prior state post-conviction proceedings to comply with exhaustion requirements) would be an "empty formality" that would operate to frustrate the purposes of AEDPA and impose further burdens on the courts. If characterized as a habeas action, Mr. Johnson's claim must be considered timely filed and not subject to the bars of § 2244.

The State and the District Court made much of the fact that Mr. Johnson had already been on Death Row for some eighteen years when he filed his second habeas petition in 1999, longer than the seventeen years at issue in *Lackey.* But the logic of the State's position demands the conclusion that each and every condemned habeas petitioner would have to include a *Lackey* claim in his initial petition in order to preserve it, and that is precisely the sort of conclusion that the *Panetti* court rejected.

Moreover, in terms of diminishing the force of retribution and deterrence – the two social purposes that continue to make the death penalty constitutionally permissible, *see Lackey, supra*, 514 U.S. at 1045 – there is a quantum difference between eighteen years and twenty-nine years. And the less Mr. Johnson's execution would serve to further those purposes as more time passes, the more likely it is that his execution "would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.* at 1046 (quoting Justice White's concurrence in *Furman v. Georgia, supra*). Mr. Johnson's claim was not ripe until now (or at least not until very recently).[4]

[4] As noted in the District Court's decision, Mr. Johnson did raise a *Lackey*-based challenge to his execution in his Response to the State's Motion to Set Execution Date this past June, which the Tennessee Supreme Court summarily rejected. Mr. Johnson was foreclosed from pursuing any sort of litigation while his clemency petition was thereafter pending in the Governor's Office.

Any other ruling would effectively result in leaving Mr. Johnson with a constitutional right without a remedy. If Mr. Johnson is correct and there is an Eighth Amendment right at stake here, under the ruling of the District Court, he could neither pursue this constitutional violation in his initial habeas petition (as it would have been not only unripe, but theoretical, in that it would have required both the parties and the courts to predict that such an inordinate delay would occur in this case) nor when it finally became ripe when the Governor denied his request for clemency. The law will not countenance a right without a remedy. This Court must find that Mr. Johnson is entitled to pursue his claim – whether as a § 1983 action or as a viable habeas petition. Under the rationale of *Panetti*, it is simply not a "second or successive petition" within the meaning of 28 U.S.C. § 2254(b)(2).

C. This Court Should Grant A Stay Of Execution Because Cecil Johnson Has A Significant Possibility Of Success On The Merits Of His Underlying Claim And The Other Factors Weigh In His Favor

Since this case is not a "second or successive" habeas petition, regardless of whether this Court determines that Plaintiff's case should be permitted to proceed as a § 1983 action or as a habeas corpus petition, the Court should grant a stay of execution so that full and fair consideration may be given to the important constitutional issue raised in Mr. Johnson's petition. A stay of execution is an equitable remedy and is analyzed under the following test:

> 1) whether there is a likelihood [Mr. Johnson] will succeed on the merits of the appeal; 2) whether there is a likelihood he will suffer irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and 4) whether the injunction would serve the public interest.

Hill v. McDonough, 547 U.S. 573, 584 (2006); *Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007). To satisfy the first factor, Mr. Johnson must show a "significant possibility of success on the merits." *Hill*, 547 U.S. at 584.

Although Justice Stevens's memorandum opinion in *Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (Stevens, J., respecting denial of certiorari), has led to the description of claims such as that presented by Mr. Johnson as "*Lackey* claims," members of the Supreme Court have recognized for over a century that lengthy incarceration under a sentence of death inevitably causes an extreme psychological toll upon condemned inmates. *See, e.g.*, *In re Medley*, 134 U.S. 160, 172 (1890); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 287-88 (1972) (Brennan, J., concurring). For this reason, long delays between sentencing and execution constitute "cruel and unusual punishment," and executing defendants after such delays is "unacceptably cruel." *Lackey*, *supra*, 514 U.S. at 1045-47 (Stevens, J., respecting denial of certiorari); *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari).

Although the Supreme Court has not yet granted certiorari to address this issue, courts of other nations have found that delays of fifteen years *or less* – i.e., half the time endured by Mr. Johnson – can render capital punishment "degrading, shocking, or cruel." *See Foster v. Florida*, 537 U.S. 990, 991-93 (2002) (Breyer, J., respecting denial of certiorari) (citing *Pratt v. Attorney General for Jamaica*, [1994] 2 A.C. 1, 29, 33, 4 All E.R. 769, 783, 786 (P.C. 1993) (en banc) (U.K. Privy Council); *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, P111 (1989) (European Court of Human Rights)). The "instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years" is widely accepted in other Western countries. *See Pratt v. Attorney General for Jamaica*, *supra*; *Foster*, 537 U.S. at 991-93. Two members of the current Supreme Court have agreed, noting that long confinement under such conditions is precisely the type of "gratuitous infliction of suffering" the Eighth Amendment was intended to prevent. *See Thompson*, *supra*, 129 S. Ct. at 1299-1300, 1303-04 (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari); *Lackey*, 514 U.S. at 1047.

Mr. Johnson's case presents an ideal opportunity for the Supreme Court to address the viability of a "*Lackey* claim." Mr. Johnson's case is seemingly unique in terms of his and his counsel's rejection of what many perceive as the "typical" death penalty defense strategy of delay in favor of an affirmative effort to expedite

proceedings. Despite this concerted effort to move his case forward as expeditiously as possible, the State's misconduct has caused Mr. Johnson's case to continue for nearly thirty years. The State withheld exculpatory evidence despite explicit requests to which the materials at issue were indisputably responsive for more than ten years, then, when it perceived such a motion would operate to its benefit, the State moved to dismiss without prejudice Mr. Johnson's first federal habeas proceeding after it had been pending for nearly seven years. Mr. Johnson has been forced to languish on Death Row for at least eighteen avoidable years solely because of the State's misconduct and subsequent evasive maneuvers.[5]

Being forced to persist in a state of constant apprehension of imminent death for nearly three decades amounts to psychological torture. After already imposing such punishment on Mr. Johnson, it would now be "unacceptably cruel" for the State of Tennessee to also take his life. *See Thompson*, *supra*, 129 S. Ct. at 1300 (Stevens, J., respecting denial of certiorari). Mr. Johnson has satisfied his burden of demonstrating that he has a "significant possibility" of succeeding on the merits of this case.

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[5] To be clear, Mr. Johnson is not complaining about not having been executed eighteen years ago; for reasons not relevant for present purposes, he contends that a more expeditious disposition of his case would have resulted in relief, in part because it would not have been subject to the strict standards of review that the Anti-Terrorism and Effective Death Penalty Act of 1996 imposed in his second federal habeas proceeding.

Not only has Mr. Johnson demonstrated in the discussion above and in the District Court filings that this Court should grant a stay because there is a significant possibility that he will succeed on the merits, the remaining factors also weigh in favor of granting a stay of execution. First, there is no question that Mr. Johnson would suffer irreparable injury without the injunction if he is executed in violation of the Eighth Amendment (i.e., death, the most irreparable injury of all). It is just as clear that issuing a temporary stay of execution pending resolution of the important questions raised in this action would not cause substantial harm to others.

As for the final factor, while the State of Tennessee has an undeniable interest in enforcing its judgments, that interest is outweighed by the fact that it would not be in the public interest to conduct an execution that would be in violation of the Constitution. *Cf. Hartman v. Bobby*, 319 Fed. Appx. 370, 371 (6th Cir. 2009) (discussing the consideration of the public interest factor in the context of an inmate's claim of innocence). Moreover, allowing such an unconstitutional execution to proceed would undermine the public's confidence in Tennessee's criminal justice system. *See id*.

In the proceedings before the District Court, the State raised objections to the timing of Mr. Johnson's motion for injunctive relief. The Supreme Court has observed that with respect to the effect that timing may have on a motion to stay,

the relevant inquiry on this issue is "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).[6] As has been true throughout the entire pendency of his case, Mr. Johnson acted with the utmost diligence and expediency in filing this action and motion for stay. Mr. Johnson filed his complaint and motions for injunctive relief in the District Court on November 25, the very same day the Governor of Tennessee denied his petition for clemency. The timing of his filing cannot be criticized in this case.

In *Lackey*, *supra*, Justice Stevens suggested that it would be useful for the lower courts to serve as "laboratories" in which the novel issue that *Lackey* presented could receive "further study" before the Supreme Court ultimately addresses it. 514 U.S. at 1047. That apparently has not happened to any significant degree in the intervening years, but Justice Stevens's suggestion is all the more reason for this Court to grant a stay of execution and remand it to the District Court for such review in the first instance.

<u>Conclusion</u>

For all of these reasons, and as more fully explicated in the attachments to Plaintiff-Appellant's Motion, the Court should grant a stay of execution and

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[6] In fact, in *Nelson*, the Supreme Court issued a stay of execution even though the inmate had waited until ***three days*** before his scheduled execution to file his civil rights action and application for stay. *Id*. at 639; *Nelson v. Campbell*, 540 U.S. 942 (2003) (granting application for stay).

transfer this case back to the District Court for the adjudication of Mr. Johnson's claim on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by email upon Jennifer L. Smith, Esq., Associate Deputy Attorney General, 425 Fifth Avenue North, Second Floor, Nashville, TN 37202, this the 30th of November, 2009.

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