IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CECIL C. JOHNSON, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 09-6416**
	)	**CAPITAL CASE**
PHIL BREDESEN, Governor of the State of Tennessee, *et al*,	)	
	)	
	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO
MOTION FOR STAY OF EXECUTION

Cecil C. Johnson, Jr., a Tennessee inmate under sentence of death pursuant to a state court judgment, has filed a motion seeking a stay of his December 2, 2009, execution date pending a determination of whether the district court properly transferred to this Court for consideration as a second or successive habeas corpus petition his recent filing seeking to "forever prohibit[]" his execution on grounds that it "would constitute a violation of the Eighth and Fourteenth Amendments to the United States Constitution." (R. 1: Verified Complaint).

On November 25, 2009, seven days before the scheduled execution of the State's 29-year-old judgment of conviction and death sentence, and after availing himself of direct review of the judgment by the Tennessee Supreme Court, two complete rounds of review

under the Tennessee's Post-Conviction Procedure Act, and one complete federal habeas corpus review, Johnson sought to permanently enjoin the State from carrying out his execution on grounds that the review process in his case had taken too long. Citing Justice Stevens' memorandum in dissent from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), Johnson argued that the length of time that had passed in the course of his collateral challenges rendered the execution of his death sentence cruel and unusual under the Eighth Amendment, thereby justifying an injunction "forever prohibiting [his] execution." (R. 1: Verified Complaint, p. 13). Although Johnson styled his pleading as a Verified Complaint for relief under 42 U.S.C. § 1983, the district court determined that the filing was the functional equivalent of a second or successive habeas corpus application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements and over which it lacked jurisdiction absent authorization by this Court under § 2244(b)(3)(A). The district court thus transferred the matter to this Court under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631 for consideration in the first instance.

Now, with just under 30 hours from his scheduled execution, Johnson asks this Court to enter a stay so it can consider "in an orderly fashion" whether the district court erred in its determination. He contends that the case raises "novel and important questions" about how a condemned inmate can raise a so-called *Lackey* claim challenging as unconstitutional the length of his confinement on death row. But he is mistaken. Federal appeals courts have long recognized that, "while Justice Stevens' memorandum in *Lackey* has given prominence to the argument that delay in carrying out a death sentence constitutes cruel and unusual

punishment, the legal theory underlying the claim is not new." *See, e.g., McKenzie v. Day*, 57 F.3d 1461, 1465 (9th Cir. 1995); *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995). Johnson identifies *no* precedent for his contention that such a claim may be pressed in a § 1983 action as a conditions-of-confinement challenge; rather, courts addressing the claim have uniformly recognized it for what it is — a constitutional challenge to the validity of a sentence, the core of habeas corpus. Nor can Johnson point to *any* instance in which a state has been enjoined from executing a lawful death sentence on this basis. *See also Thompson v. McNeil*, 129 S.Ct. 1299 (2009) (Thomas, J., concurring in denial of certiorari) ("I remain 'unaware of any support in the American constitutional tradition or this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain that his execution has been delayed.'"); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) (observing that courts considering such claim after Justice Stevens' invitation for further study in *Lackey* have "resoundingly rejected the claim as meritless"); *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995) (pre-AEPDA case dismissing *Lackey* claim in successive application as abusive) (Luttig, Cir. J., concurring) ("Petitioner's [*Lackey*] claim should be recognized for the frivolous claim that it is, and his delay in raising it, for the manipulation that it is.").

More importantly, Johnson presents no legitimate justification for the eleventh-hour timing of his filing. Indeed, guided by the 17-year delay referenced by the dissenting opinion in *Lackey*, Johnson could easily have pressed his claim in his 1999 federal habeas corpus

proceeding when he had already been incarcerated on death row for 19 years.[1] Instead, as the district court observed, Johnson waited until the eve of his execution to press his claim. The balance of equities in any analysis for injunctive relief thus weighs strongly, if not entirely, in the State's favor.

The district court's decision to transfer this case was correct in all respects, and Johnson is not entitled to a stay of execution.

ARGUMENT

A. THE DISTRICT COURT CORRECTLY TRANSFERRED THIS ACTION FOR CONSIDERATION AS A SECOND OR SUCCESSIVE HABEAS APPLICATION UNDER 28 U.S.C. § 2244(b)(3)(A).

Johnson's present complaint seeks to permanently enjoin the State of Tennessee from carrying out his death sentence due to the extended passage of time since entry of the judgment. His claim thus challenges the very "fact" or "validity" of his death sentence and thus falls within the core of habeas corpus under 28 U.S.C. § 2254. *See Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004). Because the district court has already rejected a previous challenge to the constitutionality of Johnson's state-court judgment, his present complaint is the equivalent of a second or successive application for writ of habeas corpus under 28 U.S.C. § 2254 for which he has not yet obtained authorization from this Court under 28 U.S.C. § 2244(b)(3)(A). As such, the district court correctly determined that it lacked jurisdiction to entertain Johnson's complaint and properly transferred the action to this Court

[1] During oral argument before the district court, Johnson's counsel conceded that he sustained injury from prolonged confinement on death row at least as early as 1992.

under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631.

In *Nelson*, the United States Supreme Court made clear that, even where the general provisions of 42 U.S.C. § 1983 appear "literally applicab[le]" to a prisoner's action, those provisions "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *Nelson*, 541 U.S. at 643 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). A state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus. *Preiser*, 411 U.S. at 489. By contrast, a suit seeking to enjoin a particular means of effectuating a death sentence does not directly call into question the fact or validity of the sentence itself for, as the Supreme Court has recognized, by simply altering its method, the State may go forward with its sentence. *Nelson*, 541 U.S. at 644. Here, Johnson seeks to declare his sentence unconstitutional in and of itself, an attack that lies at the very core of habeas corpus. However, he may not evade the procedural requirements of § 2254 simply by applying a different label to his pleading. *See, e.g., Allen v. Ornoski*, 435 F.3d 946 (9th Cir.), *cert. denied*, 546 U.S. 1136 (2006) (*Lackey* claim raised for the first time in a second habeas petition subject to requirements of 28 U.S.C. § 2244); *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir.), *cert. denied*, 522 U.S. 1085 (1998) (*Lackey* issue subject to AEDPA's limitations on successive habeas applications). Where, as here, a grant of relief would necessarily bar the State from carrying out an execution, thus effectively rendering the sentence invalid, the action must be brought under the habeas statute. *Hill v. McDonough*, 547 U.S. 573, 583

(2006). As the district court correctly observed:

> No matter how it is couched, [Johnson's] claim lies at the very core of habeas corpus because, if successful, [Johnson] will evade what the trial court and various appellate courts have determined to be a lawfully imposed sentence of death. In essence, [Johnson] is seeking to strike down the death sentence and change the sentence drastically to something much less.

(R. 17: Order, p. 7).

Citing *Panetti v. Quaterman*, 551 U.S. 930 (2007), Johnson further argues that the district court could have properly re-characterized his petition as a habeas petition, but without the statutory limitations under 28 U.S.C. § 2244, because his claim was not ripe until the Governor of Tennessee denied his request for executive clemency.[2] However, Johnson misplaces his reliance on *Panetti*, which dealt with a competence-for-execution claim. Unlike mental competency, which may fluctuate over time and thus does not ripen until execution is imminent, a *Lackey* claim turns on the "steady and predictable passage of time." *Ornoski*, 435 F.3d at 958. "[T]hat the passage of time makes [a] *Lackey* claim stronger is irrelevant to ripeness." *Id*. Here, Johnson has conceded that he was harmed by his time of death row as early as 1992. The district court further found that Johnson could have raised a *Lackey* claim in his 1999 federal habeas petition "when he had already been under a death sentence for over eighteen years." (R. 17: Order, p. 8). Because Johnson could have brought his *Lackey* claim earlier, it is a second or successive habeas application and is governed by § 2244.

[2] Johnson made no request for such a re-characterization in the district court, but rather raises this contention for the first time in this Court.

Johnson has already had one fully-litigated petition for writ of habeas corpus challenging his Tennessee first-degree murder conviction and death sentence. *Johnson v. Bell*, 525 F.3d 466 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 1668 (2009). He has neither sought nor received authorization from this Court to proceed on a successive application. *See Felker v. Turpin*, 518 U.S. 651, 662 (1996) (federal habeas relief to state prisoners challenging the legality of their confinement pursuant to the judgment of a State court is necessarily limited by the requirements of AEDPA).

Under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), "when a second or successive petition for writ of habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631." The district court's action in this case was proper, and Johnson is not entitled to retransfer to the district court.

B. JOHNSON IS NOT ENTITLED TO A STAY OF EXECUTION.

Section 1651(a) of the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages of the law." The Act empowers a federal court to enter such orders as are necessary to aid it in the exercise of its subject-matter jurisdiction. In this case, however, Johnson cannot satisfy the traditional four-factor analysis for preliminary injunctions, which focuses on: (1) the movant's likelihood of success on the merits; (2) the possibility of irreparable harm to the movant in the absence of an injunction; (3) public interest considerations; and (4) potential harm to third parties. *See Lexmark Int'l,*

Inc. v. Static Control Components, Inc., 387 F.3d 522, 532 (6th Cir. 2004).

Here, Johnson has *no* likelihood of success, much less a substantial one. First, Johnson's request for equitable relief should be denied for the inexcusable delay in filing, if for no other reason. *See Hicks v. Taft*, 431 F.3d 916, 917 (6th Cir. 2005) (citing *Nelson v. Campbell*, 541 U.S. 637 (2004)) (holding that "a court may consider the last minute nature of an application to stay execution in deciding whether the grant equitable relief.")). Even on the underlying merits of his complaint, Johnson utterly fails to support his contention that he has a "significant possibility" of succeeding on the merits of his claim, citing not a single case in which a state prisoner has obtained relief on grounds that the course of state and federal collateral review has taken too long. Indeed, as Justice Thomas observed in his concurring opinion in *Knight*, "[i]f there were any [ ] support [for a *Lackey* claim] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, and the Privy Council [of Jamaica]." 528 U.S. at 990. This is particularly so where, as here, the delay has been caused by the fact that Johnson has availed himself of procedures the law provides to ensure that executions are carried out only in appropriate circumstances[3] and where both the state and federal courts — including this one — have upheld Johnson's death sentence. Especially in light of the fact Johnson's *Lackey* claim is devoid of merit, its filing and, consequently, his efforts to stay his execution on the basis of its filing, can only be seen as an obvious

[3] In fact, a cursory review of the chronology submitted as an attachment to Johnson's Verified Complaint reveals that Johnson's case was under advisement by various courts for at

"attempt[] at manipulation" of the judicial process." *Hill*, 547 U.S. at 584. Federal courts can and should protect States from such tactics. *Id*.

And while it is obvious that Johnson stands to lose his life when his sentence is executed, it is only as lawful punishment for his own brutal conduct — the triple murders of three innocent bystanders during the course of an armed robbery of a local Nashville market. Indeed, the harm from any further delay in the execution of Johnson's sentence falls substantially on the State. At this juncture, with Johnson having long since completed state and federal review of his convictions and sentence, the State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). The State must be allowed to "execute its moral judgment in [this] case" and allow "the victims of crime [to] move forward knowing the moral judgment will be carried out." Id., 523 U.S. at 556.

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least 12 years since his conviction became final.

WHEREFORE, Johnson's request for a stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 1, 2009, the foregoing response was electronically filed with the Clerk of Court using the CM/ECF system, which will send by email a Notice of Electronic Filing to: James Thomas, James Sanders, and Elizabeth Tipping, Neal & Harwell, PLC, 150 Fourth Avenue North, Suite 2000, Nashville, TN 37219. A copy is also being forwarded directly to the aforementioned counsel by email at: jsanders@nealharwell.com; jthomas@nealharwell.com; and etipping@nealharwell.com.

/s/ Jennifer L. Smith
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