No. 09-A-521

IN THE

Supreme Court of the United States

CECIL C. JOHNSON, JR.,

Petitioner,

v.

PHIL BREDESEN, GOVERNOR, GEORGE M. LITTLE, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF CORRECTION, AND RICKY BELL, WARDEN,

Respondents.

APPLICATION FOR STAY OF EXECUTION

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December 1, 2009

THIS IS A DEATH PENALTY CASE WITH AN EXECUTION SCHEDULED FOR DECEMBER 2, 2009 AT 1:00 A.M. CST.

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REQUEST FOR STAY OF EXECUTION

Petitioner, Cecil C. Johnson, Jr., applies to this Court under 28 U.S.C. § 2101(f) for a stay of his execution, **currently scheduled to take place at 1:00 a.m. CST on December 2, 2009.** The Sixth Circuit decision affirming the district court order declaring Mr. Johnson's complaint to be an improper "second or successive petition" barred by 28 U.S.C. § 2244(b)(2) is styled *Johnson v. Bredesen*, Nos. 09-6416, 09-6418 (6th Cir. Dec. 1, 2009), and is attached hereto as Appendix A. The decision of the United States District Court for the Middle District of Tennessee in *Johnson v. Bredesen*, No. 3:09-cv-01133 (M.D. Tenn. Nov. 30, 2009) is attached hereto as Appendix B.

Mr. Johnson's Petition for a Writ of Certiorari presents the following questions:

> 1. Whether a condemned inmate's Eighth and Fourteenth Amendment challenge to the extraordinary duration of his confinement on death row prior to execution may be brought under 42 U.S.C. § 1983, or whether it is cognizable only in a habeas corpus proceeding.
>
> 2. If such a challenge is cognizable only in habeas corpus, whether it is barred by 28 U.S.C. § 2244(b)(2) as a "second or successive petition" unless raised in an initial habeas petition, regardless of how premature it would have been at the time.

These issues will become moot if Mr. Johnson is put to death tonight. *E.g. Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

Argument

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 delays, even though Mr. Johnson's 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. From a broader perspective, he also contends that his execution after almost thirty years would no longer further the State's interests in retribution and deterrence, which this Court has identified as the two social purposes that continue to sustain the constitutionality of the death penalty in this country.

On November 25, 2009, hours after the Governor of Tennessee denied his petition for executive clemency, Mr. Johnson filed an action under 42 U.S.C. § 1983 seeking relief from this violation of his constitutional rights. Instead of reaching its merits, the lower courts disposed of the action by procedurally recasting it as a "second or successive habeas corpus application" under 28 U.S.C. § 2244(b)(2), which meant that Mr. Johnson was out of court, there being no way that his action could meet the narrow criteria

for a viable "second or successive" petition that the statute lays down.

Moreover, and more importantly, if left undisturbed, the import of the lower court decisions is that *every* condemned inmate must raise a "*Lackey* claim" at the first available opportunity in order to preserve it, regardless of how premature and speculative it might be, and certainly no later than his or her initial federal habeas petition. And in view of the "exhaustion" requirement of federal habeas law, even that might be too late. This is an absurd and unworkable result.

Mr. 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 presented a "second or successive habeas corpus application" within the meaning of section 2244(b)(2). Mr. Johnson contends that it does not. More importantly, however, this case provides a vehicle for this Court to say exactly how a condemned inmate seeking to challenge the sheer duration of his or her confinement on death row as a possible violation of the Eighth Amendment is to go about it, in keeping with Justice Stevens's suggestion in *Lackey v. Texas,* 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting the denial of certiorari), that the issue deserves study in the lower courts before this Court ultimately addresses it. (And Justice Breyer agreed with Justice Stevens that the issue "is an important undecided one." *Id.*)

Mr. Johnson requests that this Court grant a stay of execution, grant his petition for writ of certiorari, rule that his action was not a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b)(2), and remand this case for further inquiry into, and resolution of, the merits of Mr. Johnson's claims.

The rulings of the courts below that this action is an improper "second or successive" petition rests on an incorrect 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 courts below found that this characterization was appropriate solely 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 this Court's precedents.

The appropriate focus when determining the proper vehicle for a particular challenge is on the substance of the claim raised, rather than on the remedy sought. *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Heck v. Humphrey*, 512 U.S. 477, 481-83 (1994) (finding that although the petitioner inmate sought damages as his remedy, this was not determinative of the question of whether his claim could properly be brought under § 1983). 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 inmate's challenge to the circumstances of his confinement ... may be brought under § 1983." *Hill v. McDonough*, 547 U.S. 573, 579 (2006).

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 be

"patently excessive," cruel, and unusual. *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari); *see also Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring). Like the recent challenges inmates have raised concerning lethal injection, which this Court has held to be proper subjects under § 1983, Mr. Johnson's claim does not challenge the validity of his conviction, or assert that the sentence in itself is invalid, but rather is properly characterized as a challenge to the conditions of his confinement. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 547 U.S. 573 (2006).

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 thus that "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 1046).

However, even if the lower courts were 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 as such. *See Hill, supra*, 547 U.S. at 582. Under this 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).

In *Panetti*, this Court 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 as soon as it became ripe. *Id.* at 945, 947. This Court rejected the very argument that the State of Tennessee implicitly makes in the instant case – that the inmate should have filed his unripened claim in his initial habeas petition solely to preserve it for later review in the event it ever became ripe – describing this 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.* at 943. Looking to the purposes of AEDPA, the Court found that such a rule would simply be an "empty formality" that should not be required under habeas law. *Id.* at 946.

The underlying action giving rise to this appeal did not become ripe until Governor Phil Bredesen denied Mr. Johnson's Petition for Executive Clemency on November 25, 2009. Until then, the full measure of Mr. Johnson's confinement on Death Row before his scheduled execution was unknown and unknowable, as the Governor could have commuted his sentence. Mr. Johnson 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.[1]

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[1] To the extent it might be said that Mr. Johnson's claim became ripe when the Tennessee Supreme Court set his December 2

Since this case is not a "second or successive" habeas petition, and regardless of whether the Court determines that Mr. Johnson'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 not only to consider the procedural question presented here, but also so that the lower courts can ultimately give full and fair consideration to the important Eighth Amendment claim that Mr. Johnson raised below. 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, supra, 547 U.S. at 584; *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.

As is evident from the discussion above, Mr. Johnson has shown not just a significant possibility of success, but a high likelihood of success on the merits of the procedural issue he raises here. But a brief discussion of the merits of his underlying

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execution date on July 21, Mr. Johnson was precluded from pursuing it in court because the Governor's Office will not consider an executive clemency petition if there is pending litigation in the matter. That is why Mr. Johnson could not file anything before the Governor issued his decision.

constitutional claim as part of this analysis is also warranted.

Although Justice Stevens's 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," this Court and members thereof 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).

While this Court has not yet addressed this issue on the merits, 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 current members of this Court have indicated their agreement, 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.

The time has come for this Court to address once and for all the viability of a "*Lackey* claim," and Mr. Johnson's case, if allowed to proceed on its merits in the lower courts, will present an ideal opportunity for addressing the issue. Mr. Johnson and his counsel from the outset rejected what many perceive as the "typical" death penalty defense strategy of delay in favor of an affirmative effort to expedite proceedings. The record (summarized in the Verified Complaint, which is included in the Appendix to the Petition for a Writ of Certiorari) is undeniable on that point, nor has the State even attempted to dispute it. But despite this concerted effort to move his case forward as expeditiously as possible, the State's delays have caused Mr. Johnson's case to continue for nearly thirty years. The State withheld exculpatory evidence for more than ten years despite explicit requests to which the materials at issue were indisputably responsive, 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

suppression of evidence and subsequent evasive maneuvers.[2]

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 his underlying case, if (but only if) the Court will stay his pending execution.

Not only has Mr. Johnson demonstrated above and in his certiorari petition 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. 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. Given the excessive delay the State of Tennessee has caused thus far, it could not plausibly maintain that it would suffer prejudice if Mr. Johnson's execution were stayed.

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[2] 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.

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 violate 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 *Lackey*, 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 this 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 this case for such review in the first instance.

WHEREFORE, for the foregoing reasons and the reasons detailed in Mr. Johnson's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Petitioner respectfully requests that this Court stay Cecil Johnson's scheduled execution.

Respectfully submitted,

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December 1, 2009

CERTIFICATE OF SERVICE

No. 09-

Cecil C. Johnson, Jr.,

Petitioner,

v.

Phil Bredesen, Governor, George M. Little, Commissioner of the Tennessee Department of Correction, and Ricky Bell, Warden

Respondents.

I, James G. Thomas, do hereby certify that, on this 1st day of December, 2009, I caused three copies of the Application for Stay of Execution in the foregoing case to be served by email and first class mail, postage prepaid, on the following parties:

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December 1, 2009

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-6418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CECIL C. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
PHIL BREDESEN, Governor of the State of Tennessee; GEORGE M. LITTLE, Commissioner of the Tennessee Department of Corrections; and RICKY BELL, Warden Riverbend Maximum Security Institution, in their official capacities,	)	
	)	
Defendants.	)	

Before: BATCHELDER, Chief Judge; COLE and GIBBONS, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Cecil C. Johnson, Jr., a Tennessee inmate under sentence of death, seeks a stay of his execution, which is scheduled to occur at 1:00 a.m. CST on Wednesday, December 2, 2009. This case is before this Court pursuant to a transfer under 28 U.S.C. § 1631 by the district court, which held Johnson's action under 42 U.S.C. § 1983 to be the functional equivalent of a second or successive *habeas corpus* petition for which prior appellate approval for filing is required. We hold that the district court was correct in transferring Johnson's § 1983 claim, but we deny approval to file a second or successive petition, and deny Johnson's motion for a stay of execution.

Johnson's Verified Complaint and request for injunctive relief under 42 U.S.C. § 1983, filed November 25, 2009, asserts that because the unique facts and circumstances of his case caused him to spend almost twenty-nine years on death row, his execution at this time would amount to cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution, and Article I, § 16 of the Tennessee Constitution. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of *certiorari*) ("*Lackey* claim"). Johnson argued, therefore, that his execution should be permanently enjoined.

The district court set forth the procedural history of Johnson's case and analyzed Johnson's § 1983 claim under the Supreme Court's decisions in *Nelson v. Campbell*, 541 U.S. 637 (2007), and *Hill v. McDonough*, 547 U.S. 573 (2006), which defined when a § 1983 should be treated as a *habeas corpus* claim. The Court has held that "where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence . . . such claims fall within the 'core' of habeas corpus and are thus not cognizable when brought pursuant to § 1983." *Nelson*, 541 U.S. at 643. However, "constitutional claims that merely challenge the conditions of a prisoner's confinement . . . fall outside of that core and may be brought pursuant to § 1983 in the first instance." *Id.* Because the § 1983 challenges in both *Nelson* and *Hill* centered around the procedure of the petitioners' pending executions, and Johnson conversely is challenging the "'fact and validity' of his sentence by claiming that his death sentence is unconstitutional due to the passage of time," the district court found that his claim amounted to a *habeas* action. The district court held that because Johnson already had a *habeas* petition adjudicated, his current claim was "second or successive," and therefore barred under 28 U.S.C. § 2244(b)(2). A second or successive *habeas* claim can only

be filed in the district court with the approval of this Court of Appeals, so the district court transferred the action to this Court pursuant to 28 U.S.C. § 1631.

Both parties have submitted filings to this court. Johnson now (1) challenges the district court's characterization of his § 1983 claim as *a habeas* claim; (2) argues that even if it is a *habeas* claim, it should not be considered "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2); and (3) moves for a stay of execution on the grounds that he has a significant possibility of success on the merits of the *Lackey* claim.

For the reasons stated by the district court, we agree that Johnson's claim is accurately characterized as a *habeas* claim. Moreover, the claim does not meet the criteria of 28 U.S.C. § 2244(b)(2) and thus cannot proceed as a second or successive habeas petition.

Even if Johnson's claims were either properly cognizable under 42 U.S.C. § 1983 or should not be considered "second or successive" *habeas* claims, Johnson has not shown sufficient likelihood of success on the merits to entitle him to a stay of execution.

The request to proceed with a second or successive *habeas* petition and the request for stay are **DENIED.**

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CECIL C. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:09-1133**
	)	**Judge Echols**
PHIL BREDESEN, Governor of the State of Tennessee; GEORGE M. LITTLE, Commissioner of the Tennessee Department of Corrections and RICKY BELL, Warden Riverbend Maximum Security Institution, in their official capacities,	)	
	)	
Defendants.	)	

ORDER

This is an action brought under 42 U.S.C. § 1983 by Plaintiff Cecil M. Johnson, an inmate at the Riverbend Maximum Security Institution in Nashville, Tennessee, who is scheduled to be executed by the State of Tennessee at 1:00 a.m. CST on Wednesday, December 2, 2009. The Governor of Tennessee, the Honorable Phil Bredesen, denied Plaintiff's petition for executive clemency on November 25, 2009.

Plaintiff filed a Verified Complaint, an Application to *Proceed In Forma Pauperis* (Docket Entry No. 2),[1] and a combined Motion for Temporary Restraining Order and Preliminary Injunction (Docket Entry No. 3) in this Court on the evening of November 25, 2009. The State has filed a

[1]Plaintiff's Application to proceed *in forma pauperis* was granted by Order dated November 30, 2009 (Docket Entry No. 13).

response in opposition to the Motion (Docket Entry No. 7), and Plaintiff has filed a reply (Docket Entry No. 10). The Court conducted a hearing on Plaintiff's Motion on November 30, 2009.

In his Verified Complaint, Plaintiff seeks only injunctive relief. Specifically, he claims that his execution under the unique facts and circumstances of this case would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 16, of the Tennessee Constitution.

Plaintiff was sentenced to death on three counts of first degree murder on January 20, 1981. The sentence was imposed after his convictions in criminal court in Davidson County, Tennessee for a robbery and triple murder at Bob Bell's Market in Nashville, Tennessee on July 5, 1980. On May 3, 1982, the convictions and sentence were upheld by the Tennessee Supreme Court on direct appeal, and the United States Supreme Court denied certiorari on October 4, 1982. State v. Johnson, 632 S.W.2d 542 (Tenn.), cert. denied, 459 U.S. 882 (1982).

Plaintiff filed his first petition for post-conviction relief on February 9, 1983. After a five day evidentiary hearing in the trial court which resulted in an order denying his petition, Plaintiff appealed to the Tennessee Court of Criminal Appeals and was successful on a claim that the prosecution attempted to minimize the jurors' responsibility in imposing the death penalty, but the Tennessee Supreme Court reversed the appeals' court decision and reinstated the judgment of the trial court on September 14, 1990, Johnson v. State, 797 S.W.2d 578 (Tenn. 1990), and denied a second petition to rehear.

Plaintiff filed a second petition for post-conviction relief in state court on February 28, 1995 after his first federal petition for habeas corpus relief in this Court was dismissed without prejudice for failure to exhaust state remedies. This second petition for post-conviction relief was denied by

the state Court of Criminal Appeals in State v. Johnson, 1997 WL 738586 (Tenn. Crim. App. 1997), and the Tennessee Supreme Court denied Plaintiff's application to appeal on October 5, 1998.

On January 18, 1999, Plaintiff filed his second federal habeas petition under 28 U.S.C. § 2254 in this Court. The Court granted the State's Motion for Summary Judgment, and the action was dismissed on September 30, 2002. Plaintiff's motion to alter or amend the Court's Order of dismissal was granted, but this Court reaffirmed dismissal of the action in 2004.

On April 29, 2008, the Sixth Circuit affirmed this Court's dismissal of Plaintiff's federal habeas petition, and the Supreme Court denied Plaintiff's certiorari petition on March 30, 2009. Johnson v. Bell, 525 F.3d 466 (6th Cir. 2008), cert. denied, 129 S.Ct. 1668 (2009).

On July 29, 2009, the Tennessee Supreme Court entered an order directing that Plaintiff's execution take place on December 2, 2009. In doing so, the court rejected Plaintiff's contention that the State's Motion to Set Execution Date should be denied "because the excessive delay in carrying out the capital sentence and the arbitrariness and capriciousness of the sentence" violates both the United States and the Tennessee Constitutions. State v. Johnson, M1981-00121-SC-DPE-DD (Tenn. July 21, 2009).

On November 25, 2009, seven days before the scheduled execution and on the evening before the Thanksgiving holiday, Plaintiff filed the presently pending Verified Complaint and request for injunctive relief in this Court under 42 U.S.C. § 1983. Plaintiff asserts in his Verified Complaint that he has spent almost twenty-nine years on death row and that, because of the unique facts and circumstances of this case, his execution at this time (or any time hereafter) would amount to cruel and unusual punishment under the constitutional provisions mentioned above, and, therefore, his execution should be permanently enjoined.

In response, the State argues that Plaintiff's present request for a temporary restraining order and preliminary injunction, although brought under the guise of a Section 1983 action, is the functional equivalent of a second or successive habeas petition and therefore, this Court lacks jurisdiction to entertain the motion under 28 U.S.C. § 2244(b). This Court agrees with the State's position.

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains certain gatekeeping provisions that restrict a prisoner's ability to bring new and repetitive claims in "second or successive" habeas corpus actions.[2] Specifically, 28 U.S.C. § 2244 provides in relevant part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless–
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no

[2]Plaintiff initially filed a federal habeas petition in 1991, before the enactment of AEDPA. However, that action was dismissed on procedural grounds for failure to exhaust state remedies and his constitutional claims were not properly before this Court until the filing of his 1999 habeas corpus petition, long after the enactment of AEDPA. Thus, the gatekeeping requirements of AEDPA apply to this case. See, Slack v. McDaniel, 529 U.S. 473, 486-488 (2000).

> reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b).

Plaintiff styles his claim as seeking redress for the alleged violation of a constitutional right under Section 1983, and it is properly characterized as such. "[H]owever, § 1983 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" because "[s]uch claims fall within the 'core' of habeas corpus and are thus not cognizable when brought pursuant to § 1983." Nelson v. Campbell, 541 U.S. 637, 643 (2004)(citations omitted). "By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance." Id.

In Nelson, a unanimous Supreme Court held that a prisoner could bring a Section 1983 action in which he claimed that the procedure to be used in his execution[3] violated the Eighth Amendment, without running afoul of the gate-keeping provisions of 28 U.S.C. § 2244. The challenge there was not to the constitutionality of the sentence itself (death by lethal injection), but rather the particular manner in which the sentence (execution) would be carried out. "A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity'

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[3]The prisoner in Nelson was informed that, because he had collapsed veins due to prolonged drug usage, the execution team was intending to use a "cut-down procedure" which required the cutting of muscle and fat so as to provide access to a vein.

of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence." Id. 644.

Subsequently in Hill v. McDonough, 126 S.Ct. 2096 (2006), the Supreme Court, in another unanimous decision, held that the district court wrongfully treated a prisoner's Section 1983 action as the functional equivalent of a second or successive habeas petition where the prisoner challenged the constitutionality of a three-drug sequence that Florida officials planned to use in his execution. In doing so, the Court found the action to be "controlled by the holding in Nelson" because in the case before it, as in Nelson, plaintiff's "action if successful would not necessarily prevent the State from executing him by lethal injection" and "a grant of injunctive relief could not be seen as barring the execution of Hill's sentence." Id. at 2102.

This case is markedly different from both Nelson and Hill. Plaintiff is not challenging the conditions of his confinement as claimed by the Plaintiff, or the method or manner of carrying out his punishment (execution). Instead, Plaintiff is challenging the "fact and validity" of his sentence by claiming that his death sentence is unconstitutional due to the passage of time.[4] In other words, because it has taken so long to maneuver through the legal appeals process, and Plaintiff has been forced to endure the physical and psychological hardships of living on death row during this ordinate delay, much of which was allegedly caused by the state, the Plaintiff has suffered cruel and unusual punishment and is entitled to an injunction prohibiting his execution.

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[4]A constitutional challenge to the carrying out of a death sentence on the grounds that years on death row make the ultimate punishment cruel and unusual is commonly called a "Lackey claim," given that such a claim is generally based upon Justice Stevens' Memorandum respecting the denial of certiorari in Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari).

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

In Allen v. Ornoski, 435 F.3d 946 (9th Cir. 2006), the Ninth Circuit was presented with a habeas petition and motion for stay of execution filed on the eve of execution in which the petitioner claimed that his continued confinement on death row for twenty-three years under "horrific" conditions violated the Eighth Amendment. The Ninth Circuit found that the filings were an "abuse of the writ" and a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244 such that the district court was required to dismiss the claim. In reaching its conclusion, the Ninth Circuit wrote:

> Allen brings his Lackey claim for the first time in this second habeas petition. A petition for review of a new claim that could have been raised earlier may be treated as the functional equivalent of a second or successive petition for a writ of habeas corpus. . . .
>
> Allen could have brought his Lackey claim in his first habeas petition in 1988, when he had already been on death row for six years, in his first amended habeas petition, when he had been on death row for nine years, or at some other point during the course of the proceedings on his first habeas petition in federal court from 1993 to 2005.

Id. at 957-958 (citation omitted). The Ninth Circuit also rejected petitioner's argument that his Lackey claim could not have been brought earlier because it was not ripe, writing:

> [A] Lackey claim does not become ripe only after a certain number of years or as the final hour of execution nears. There is no fluctuation or rapid change at the heart of a Lackey claim, but rather just the steady and predictable passage of time. As the district court noted, that the passage of time makes his Lackey claim stronger is irrelevant to ripeness, because the passage of time strengthens any Lackey claim. Allen's initial execution date was in 1988, and by the time habeas proceedings resumed in federal court in 1993, he already had been suffering the psychological distress of death row and impending execution for eleven years. Those proceedings

> did not end until 2005. Allen could have sought to amend his petition to state a Lackey claim at any time during their pendency. Allen fails to show adequate cause as to why he delayed raising his Lackey claim.

Id. at 958.

During oral argument, Plaintiff's counsel in this case cited Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) for the proposition that his present claim was not ripe until the Governor denied clemency. However, Stewart is inapposite. There, the Supreme Court ruled that a habeas petition which raised a Ford v. Wainright, 477 U.S. 399 (1986) claim of mental incompetency was not a second or successive petition where it had previously been dismissed by the district court as premature. Indeed, the above-quoted language in Allen was in direct response to the prisoner's argument based on Stewart that his Lackey claim was not ripe until the eve of his execution.

Moreover, as the Sixth Circuit noted in Alley v. Little, 186 Fed. Appx. 604 (6th Cir. 2006), the Supreme Court's ruling in Stewart dealt with a situation where the claim had previously been dismissed without prejudice and the "lower courts had specifically left open the possibility that the defendant's Ford claim could proceed in a future filing." Id. at 607. This simply is not the situation here. Additionally, and as also observed in Alley, a claim of mental incompetency is subject to variance over a period of time due to the inmate's mental health. Id. Again, that is not the situation here.

In this case, Plaintiff could have presented his Lackey claim in his 1999 federal habeas petition when he had already been under the death sentence for over eighteen years,[5] or amended his petition at some point during the years that it was pending, but he did not do so. Instead, he chose to wait until

[5]At that point, Plaintiff would have had the benefit of Lackey in which Justice Stevens set forth his position that a delay of seventeen years in carrying out a death sentence could arguably constitute cruel and unusual punishment.

the eve of his execution to file a Section 1983 action in federal court, a filing which this Court finds to be a second or successive habeas petition because it challenges the very existence and validity of his death sentence.

A district court may not consider a second or successive petition on its merits without prior approval of the appellate court because authorization is a jurisdictional prerequisite to merit review. Dress v. Palmer, 484 F.3d 844, 852 (6th Cir. 2007) (citing, Burton v. Stewart, 127 S.Ct. 793 (2007)). Instead, the Sixth Circuit has instructed that "when a second or successive petition for 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." In re Sims, 111 F.3d 45, 47 (6th Cir. 1997).

Based upon the foregoing, the Court determines that Plaintiff's request for injunctive relief is the functional equivalent of a second or successive habeas petition for which prior appellate approval for filing is required. Accordingly, the Court finds that it LACKS JURISDICTION over this action and the Clerk of the Court is hereby directed to FORTHWITH TRANSFER the filings in this case to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE