No. 09-7839

IN THE
SUPREME COURT OF THE UNITED STATES

CECIL C. JOHNSON, JR. – PETITIONER
(Your Name)

VS.

PHIL BREDESEN, GEORGE
M. LITTLE, and RICKY BELL – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

SIXTH CIRCUIT – per 18 U.S.C. § 3006,

U.S. DISTRICT COURT, M.D.TENN. – per 18 U.S.C. § 3006

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

No. 09-7839

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.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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December 1, 2009


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

## CAPITAL CASE

## QUESTIONS PRESENTED

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.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cecil C. Johnson, Jr., is under sentence of death at Riverbend Maximum Security Institution in Nashville, Tennessee. **Mr. Johnson's execution is scheduled to take place 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, this despite the fact that his post-conviction counsel made a judgment twenty-seven years ago (with his consent) to *expedite* his case as much as possible in the interest of reaching the court of appeals sooner rather than later, a strategy that they consistently pursued. The delay in this case was caused in large part by the State's failure to turn over admittedly exculpatory evidence until Mr. Johnson's federal habeas proceedings commenced and its subsequent strategic gamesmanship in procuring the dismissal of that pre-AEDPA petition to obtain the benefit of the more stringent AEDPA standard of review.

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. *See Lackey v. Texas*, 514 U.S. 1045 (1995). Rather than reach the merits of Mr. Johnson's claim, the District Court found that the claim was the "functional equivalent of a second or successive habeas petition" and transferred the case to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1631.[1] The Sixth Circuit

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[1] Out of an abundance of caution, in addition to filing an emergency motion for stay in the Sixth Circuit and a motion to

affirmed the District Court's order regarding the characterization of Mr. Johnson's claim and dismissed his action on the grounds that it was an improper "second or successive" petition.

Mr. Johnson urges this Court to grant plenary review and hold that a condemned inmate may bring a "*Lackey* claim" without having raised such an as-yet premature, speculative issue in his initial federal habeas petition. 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 presents a "second or successive habeas corpus application" within the meaning of section 2244(b)(2).

## OPINIONS BELOW

The United States District Court for the Middle District of Tennessee declared Mr. Johnson's action to be a second or successive habeas petition and transferred the case to the United States Court of Appeals for the Sixth Circuit on November 30, 2009. *Johnson v. Bredesen*, No. 09-cv-01133 (M.D. Tenn. Nov. 30, 2009). App. 04-12. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court on December 1, 2009. *Johnson v. Bredesen*, Nos. 09-6416, 09-6418 (6th Cir. Dec. 1, 2009). App. 01-03.

## JURISDICTION

Pursuant to 42 U.S.C. § 1983, Petitioner sought relief in the United States District Court on his claim that his excessive incarceration on death row violated his rights under the Eighth and Fourteenth

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transfer the case back to the District Court, Mr. Johnson filed a Notice of Appeal in the District Court.

Amendments. On November 30, 2009, the United States District Court concluded that Petitioner's section 1983 complaint was a second or successive habeas corpus petition and transferred the complaint to the United States Court of Appeals for the Sixth Circuit.

Petitioner filed a timely notice of appeal, and the Sixth Circuit docketed that appeal as Johnson v. Bredesen, 6th Cir. No. 09-6416. The Sixth Circuit also considered the District Court's transfer order an application for a second or successive petition for writ of habeas corpus, which was docketed as In Re Johnson, 6th Cir. No. 09-6418. Mr. Johnson sought a stay of execution, and also filed a motion to retransfer the transferred case to the District Court for a merits ruling.

The Court of Appeals denied all of Petitioner's requests for relief and entered judgment on December 1, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1). Because Mr. Johnson is appealing the very characterization of his claim as a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b)(2) rather than the denial of an application to file a second or successive petition, the restrictions of 28 U.S.C. § 2244(b)(3)(E) do not bar this Court from considering the important questions raised herein. *See, e.g., Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-42 (1998); *Castro v. United States*, 540 U.S. 375, 379-81 (2003).

When a petitioner disputes a court of appeals' recharacterization of his 42 U.S.C. § 1983 as a second or successive habeas corpus petition, this Court has jurisdiction to review the correctness of the court of appeals' determination under 28 U.S.C. § 1254. See e..g., *Hill v. McDonough*, 547 U.S. 573, 578 (2005) (granting certiorari under 28 U.S.C. § 1254 to review

lower court's conclusion petitioner's 1983 action was actually a second or successive habeas petition).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2244 of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides, in pertinent part:

§ 2244. Finality of determination

* * *

(b)(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 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.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244.

## INTRODUCTION

This case raises important questions as to how, if at all, a condemned inmate can bring a *Lackey* claim when he has expeditiously pursued his available

remedies and the extraordinary delay is attributable to the State.

Despite an affirmative defense strategy to expedite proceedings in his case as much as possible in the interest of reaching the court of appeals as soon as possible, nearly thirty years have passed since Cecil Johnson was sentenced to death in January 1981.[2] Through no fault of Mr. Johnson's, his case has been unnecessarily delayed for many years because of the State's failure to disclose exculpatory evidence for over ten years and subsequent strategic gamesmanship in the engineering of the dismissal of Mr. Johnson's first federal habeas petition on exhaustion grounds five years later (after the petition had been pending for six years, and nearly three years after the exhaustion issue had become apparent). Because of the unavoidable "second layer" of litigation that ensued after the 1992 discovery of the State's failure to disclose exculpatory materials, this ultimately gave rise to a delay of almost eighteen years just by itself.

Mr. Johnson has spent this time in mortal suspense, constantly waiting for that uncertain day on which he will be strapped to a chair or a gurney and killed – a day that could have arrived next month, next year, but also maybe never (although it

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[2] Although not determinative of the issues presented in this petition, it bears noting that no physical evidence linked the crimes to Mr. Johnson, and he has consistently maintained his innocence since his arrest on July 6, 1980 (the day after the crimes with which he was charged occurred). He was convicted after the State manipulated his trial by suppressing crucial exculpatory evidence that would have fatally undermined the testimony of the State's three eyewitnesses, and by improperly coercing Mr. Johnson's alibi witness off the stand on the eve of trial.

is now scheduled for tonight). 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 v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari).

Although the circumstances of this case presents an ideal opportunity for the Court to resolve the important question raised in *Lackey v. Texas*, 514 U.S. 1045 (1995), concerning the constitutionality of conducting executions in cases involving extremely lengthy delays following sentencing, the courts below erroneously held that review on the merits is barred because it is a "second or successive" petition under 28 U.S.C. § 2244(b)(2). The lower courts' rulings erect procedural barriers to review of such claims that are, as a practical matter, insuperable.

## STATEMENT OF THE CASE

Cecil Johnson filed this action in the United States District Court for the Middle District of Tennessee (Echols, J.) on November 25, 2009, seeking injunctive relief under 42 U.S.C. § 1983. The basis for federal jurisdiction over his claim is 28 U.S.C. § 1343(a)(3) because this is an action to address the deprivation, under color of state law, of Mr. Johnson's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

A detailed chronology of the proceedings following Mr. Johnson's convictions and sentencing in 1981 is set forth in the Verified Complaint contained in the Appendix. App. 13-35. Without getting into the details of the factual basis for Mr. Johnson's claim,

suffice it to say that the chronology demonstrates Mr. Johnson's spotless record of having attempted to prosecute his case with vigor at every turn and the State of Tennessee's corresponding dilatory conduct. All told, the State's dilatory conduct, including the State's failure to disclose exculpatory materials and its procurement of the dismissal of Mr. Johnson's federal habeas petition for the sole purpose of benefitting from the more stringent AEDPA standard, delayed timely resolution of this case by roughly two decades.

After nearly thirty years, the judicial proceedings related to Mr. Johnson's federal habeas corpus petition came to a close when this Court denied Mr. Johnson's certiorari petition on March 30, 2009 and petition for rehearing on May 18, 2009. The Tennessee Supreme Court set the December 2 execution date by order entered July 21. Mr. Johnson then submitted a Petition for Executive Clemency to Governor Phil Bredesen on August 27. The Governor denied it on November 25, 2009, nearly three months later. Mr. Johnson filed his § 1983 action hours later.

While the State continued its delays, Mr. Johnson was confined on Death Row, suffering from the psychological torture that inevitably results from living for nearly thirty years in constant mortal jeopardy. Whether this extraordinary delay, causing extreme psychological punishment and dramatically diminishing the death penalty's legitimate societal purposes of retribution and deterrence, leads to the conclusion that the actual infliction of Mr. Johnson's death sentence would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments has never been considered, however, because of the procedural barriers that the lower courts have erected.

On November 30, 2009, the District Court entered an order finding that Mr. Johnson's complaint was the "functional equivalent of a second or successive habeas petition" and that it lacked jurisdiction over the action. The District Court then transferred the case to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1631.

Mr. Johnson filed an Emergency Motion for a Stay of Execution in the Sixth Circuit and asked the Court of Appeals to determine that he had not filed a "second or successive" petition. Mr. Johnson filed a motion on December 1, 2009 asking the Sixth Circuit to transfer the case back to the District Court.[3] On December 1, 2009, the Sixth Circuit entered an order denying Mr. Johnson's motions.

## REASONS FOR GRANTING THE PETITION

The lower courts' rulings are dependent upon their incorrect characterizations 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 because of the remedy Mr. Johnson seeks. This reliance on the remedy sought by Mr. Johnson to hold that his claim must proceed in habeas rather than under § 1983 is contrary to this Court's precedents.

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[3] Mr. Johnson had included this request in his initial Motion for a Stay of Execution filed on November 30, 2009 in Case No. 09-6416. However, on December 1, 2009, the Sixth Circuit opened a companion case with a separate case number (09-6418) due to the District Court's transfer order, and Mr. Johnson filed a Motion to Retransfer in this consolidated companion case.

Even if the courts below correctly held 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. Under *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.

This Court has recognized the intersection and overlap between habeas corpus actions and § 1983 claims for many years. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Wilkinson v. Dotson*, 544 U.S. 74 (2005).[4] "Challenges 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). 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*, this Court considered whether an inmate's claim for damages was cognizable under § 1983 when the lower courts had found that the claim challenged

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[4] 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.

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. *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari). 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 such 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*, 408 U.S. 238, 312 (1972) (White, J.,

concurring in judgment) (quoted in *Lackey, supra*, 514 U.S. at 1046).

Mr. Johnson's claim is analogous to the recent challenges inmates have raised concerning lethal injection, which this Court has held to be proper subjects of § 1983 actions. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 547 U.S. 573 (2006). The Court in *Nelson* observed 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, because 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.[5] *Id.* at 644-45.

Two years after *Nelson*, which this Court characterized as "extremely limited," *Hill* presented this Court with an inmate's broader challenge to the drug cocktail used in Florida's lethal injection procedure. *Nelson*, 541 U.S. at 649; *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 argument that the inmate's 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

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

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 this Court's precedents provide that it is the substance of the claim, not the remedy sought, that dictates whether the action is cognizable under § 1983, the request for a permanent injunction cannot be held to be determinative of this issue.

Consequently, the fact that Mr. Johnson seeks a permanent injunction, by itself, cannot lead to the conclusion that his *Lackey* claim may only be filed as a petition for writ of habeas corpus. Indeed, to allow this determination to turn on the relief Mr. Johnson seeks would lead to the absurd result that his claim would be cognizable under § 1983 if he requested damages for the violations of his constitutional rights, or if he suggested a theoretical possibility of future execution if the State could find a way to conduct the execution in a manner that avoids the concerns raised in his claim (which would, in all likelihood, have the practical effect of permanently frustrating the execution), but would not be cognizable if he sought the remedy of a permanent injunction. That is not and could not be the law.

### B. Even If Mr. Johnson's Claim Should Have Been Presented 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 courts below undertook regarding the proper characterization of Mr. Johnson's claim should not have been the end of the inquiry. While this 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 courts below erred when they 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(b)(2). This 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 first became ripe. *See Panetti v. Quarterman*, 551 U.S. 930 (2007).[6]

Although acknowledging that *Ford*-based incompetency claims are generally not ripe until after the time has run to file an inmate's 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

[6] Following the hearing on November 30, 2009, Mr. Johnson referred the District Court to *Panetti* as supplemental authority.

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. The Court 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 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 submitted his petition to the Governor's Office on August 27, 2009, shortly after the Tennessee Supreme Court had set his execution date and at a point when he was not pursuing any judicial remedies, which was a prerequisite to the Governor's consideration of an executive clemency request.

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 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 therefore should 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 Court rejected in *Panetti*.

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 remains a significant 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).[7]

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 and the Sixth Circuit, 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, particularly in this context. This Court should 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. The Merits Of Mr. Johnson's *Lackey* Claim Should Be Considered By The District Court.

Mr. Johnson has raised a legitimate and meritorious *Lackey* claim. The actual infliction of Mr. Johnson's death sentence under the extreme

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[7] 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.

circumstances of this case would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. For nearly thirty years, Mr. Johnson has remained confined on Death Row awaiting the resolution of appellate and post-conviction review of his convictions and capital sentence. During this extraordinarily lengthy incarceration, he has been subjected to extreme psychological punishment through the ever-present prospect of his execution. Taking Mr. Johnson's life after he has suffered so much for so long – when he has actually endeavored in good faith to *expedite* the proceedings in his case would violate the United States Constitution.

Current members of this Court have recognized the adverse psychological impact inevitably caused by an extraordinarily lengthy incarceration on Death Row. *See, e.g., Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (Stevens, J., respecting denial of certiorari). But long before Justice Stevens issued his opinion in *Lackey* acknowledging the merit of a claim such as Mr. Johnson's, other Justices of this Court and scholars alike had recognized that inordinate and unreasonable delays between sentencing and execution exact a profound and "frightful" psychological toll upon death row inmates. *Furman v. Georgia*, 408 U.S. 238, 287-88 (1972) (Brennan, J., concurring); *see* Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychol. Rev. 141, 142 (1979). In fact, more than a century ago, this Court observed that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the

uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890).

Inmates on death row endure constant and unremitting fear for their lives. Whether he or she will live for another week, another month, another year, another decade, or eventually be granted mercy is unknown and unknowable. *See* Johnson, *supra*, at 142. Otherwise mentally competent individuals in such circumstances invariably suffer extreme mental anguish, and, after years of delay, often experience "the onset of insanity." *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting). This amounts to a form of "psychological torture." Michael P. Connolly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 New Eng. J. on Crim. & Civ. Confinement 101, 119 (1997).[8]

For this reason, long delays in execution constitute "cruel and unusual punishment," and executing defendants after such delays is "unacceptably cruel." *Lackey v. Texas, 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). The Privy Council of the United Kingdom has unequivocally held that forcing inmates to remain on death row for extended

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[8] *See also People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."), *cited in Lackey*, 514 U.S. at 1046 n.* (Stevens, J., respecting denial of certiorari).

periods contravenes section 10 of the Bill of Rights of 1689, the progenitor of our own Eighth Amendment. *See, e.g.*, *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), *cited in Foster v. Florida*, 537 U.S. 990, 991-93 (2002) (Breyer, J., respecting denial of certiorari); *see also Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (Stewart, J.) (observing that Eighth Amendment has been interpreted in a "flexible and dynamic manner"); *Furman*, 408 U.S. at 314-20 (Marshall, J., concurring) (discussing history of Eighth Amendment's prohibition against "cruel and unusual" punishments).

In fact, 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*, 537 U.S. at 992-93 (citing *Pratt v. Attorney General for Jamaica, supra*); *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, P111 (1989) (European Court of Human Rights). Two current members of the 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 v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari); *Lackey, supra,* 514 U.S. at 1047.

Moreover, the execution of an individual who already has endured such agony does not, and cannot, serve any legitimate societal or penological purpose. Neither the goals of deterrence nor retribution continue to demand the ultimate sanction under such circumstances. *Lackey, supra,* 514 U.S. at

1045-46. "[T]he pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman, supra,* 408 U.S. at 312 (White, J., concurring); *see also Foster, supra,* 537 U.S. at 993 (Breyer, J., respecting denial of certiorari) ("If executed [after a twenty-seven year delay, the defendant] will have been punished both by death and also by more than a generation spent in death row's twilight."); *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens and Breyer, JJ., respecting denial of certiorari) ("Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment . . . [and] can become so excessive as to constitute cruel and unusual punishment prohibited by the Eighth Amendment.").

There should be no doubt that Cecil Johnson's years of confinement under such circumstances constitute the sort of psychological torture that prohibits the further imposition of death. Mr. Johnson was sentenced on January 20, 1981. He thereafter timely filed a direct appeal (automatic under Tennessee law at the time), two petitions for state post-conviction relief – the second filed only because the prosecution suppressed exculpatory evidence for over ten years, which Mr. Johnson did not discover until 1992, after federal habeas proceedings had commenced – two petitions for federal habeas relief (the second filed for the same reason), and a petition for executive clemency. Those proceedings were not concluded until November 25, 2009, almost *twenty-nine years* after Mr. Johnson was sentenced to death. For the entirety of that period,

Mr. Johnson has been confined on Death Row, the sword of Damocles hanging over his head.

As Justice Stevens observed in *Lackey* (regarding a confinement of seventeen years), "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." *Lackey,* 514 U.S. at 1045. A confinement of twenty-nine years, viewed against the backdrop of the unique record in this case, has surely satisfied "the acceptable state interest in retribution."

It bears particular emphasis that this decades-long delay is not attributable to Mr. Johnson, and none have suggested otherwise. To the contrary, he and his counsel have tried to press his case at all turns. All of the appeals and petitions that Mr. Johnson has filed have been timely. None have been found to be anything other than legitimate challenges to his convictions and sentences. Indeed, over the course of the last twenty-eight years, several jurists have recognized that Mr. Johnson's claims of constitutional error were meritorious, warranting relief from the sentences or the convictions themselves. *See, e.g., Johnson v. State,* No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29 (Jan. 20, 1988), *rev'd in relevant part,* 797 S.W.2d 578 (Tenn. 1990); *Johnson v. Bell,* 525 F.3d 466, 490-97 (6th Cir. 2008) (Cole, J., dissenting on *Brady* issue). The State's conduct has, in contrast, been marked by unjustified intransigence and delay. More significantly, the prosecution's suppression of evidence until 1992, and subsequent procurement of a dismissal of Mr. Johnson's first habeas petition for the purpose of benefitting from the more stringent AEDPA standard, added years of delay entirely and exclusively attributable to the State.

Mr. Johnson and his counsel have acted appropriately and efficiently to move his case forward as expeditiously as possible, only to have delays presented at every turn. Mr. Johnson has been forced to languish on Death Row for almost eighteen unnecessary years solely because of the State's failure to disclose admittedly exculpatory material and subsequent evasive maneuvers.[9] After nearly thirty years spent in Death Row's twilight, taking Mr. Johnson's life this far removed from his original sentencing would be simply inhumane.

The imminent execution of Mr. Johnson would violate the Eighth Amendment. However, the procedural barriers that the lower courts have erected have prevented consideration of this meritorious claim. This Court should grant a stay of execution, grant Mr. Johnson's petition for writ of certiorari, declare 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.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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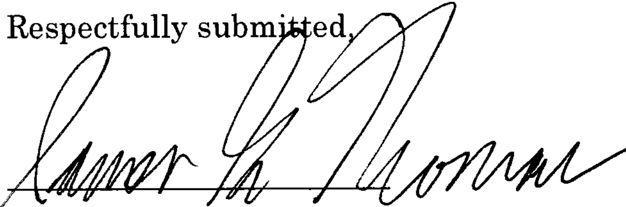
[9] To be clear, Mr. Johnson is most definitely *not* complaining that he was not executed eighteen years ago; instead, we believe that a speedier resolution of his case would have almost certainly yielded a different outcome, primarily but not exclusively because it would not have been subject to the AEDPA standards of review in federal court.

Respectfully submitted,



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*Counsel for Petitioner*

December 1, 2009

* Counsel of Record

## RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 09-

Cecil C. Johnson, Jr.,

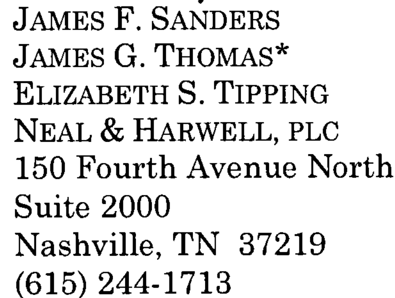
Petitioner,

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 the Petition for a Writ of Certiorari in the foregoing case has 6498 words, in compliance with Rules 33.1(d) and (g) of this Court.



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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 Petition for a Writ of Certiorari in the foregoing case to be served by email and first class mail, postage prepaid, on the following parties:

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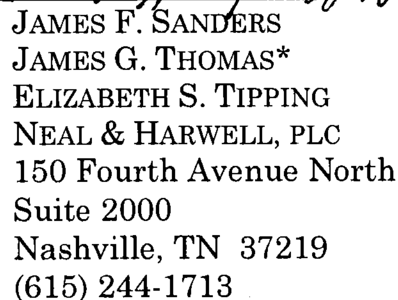

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December 1, 2009

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

**No. 09-6418**

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

FILED
DEC - 1 2009
LEONARD GREEN, Clerk

| | | |
|---|---|---|
| **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.

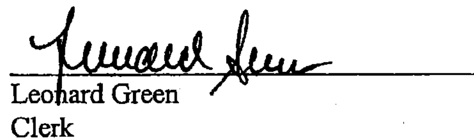
Both parties have submitted filings to this court. Johnson now (1) challenges the district court's characterization of his § 1983 claim as *a habeas* claim; (2) argues that even if it is a *habeas* claim, it should not be considered "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2); 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

**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

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[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

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

| | | |
|---|---|---|
| **CECIL C. JOHNSON, JR.,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. ____________** |
| | ) | |
| **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.** | ) | |

**VERIFIED COMPLAINT**

This is an action for injunctive relief only under 42 U.S.C. § 1983. Plaintiff is scheduled to be put to death on Wednesday, December 2, 2009, at 1:00 a.m. CST in the execution chamber at Riverbend Maximum Security Institution. He contends that the execution of his death sentence in light of the facts and circumstances detailed below would constitute a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 16, of the Tennessee Constitution that this Court should permanently enjoin.

**Overview**

1. Cecil Johnson has been confined on Tennessee's Death Row for almost twenty-nine years, constantly under a sentence of death. Apart from the fact that he initiated legitimate legal proceedings in an effort to vindicate his constitutional rights (many of which proceedings were compelled by the "exhaustion of state remedies" requirement of federal habeas law), *no* material part of the delay in this case is attributable to him. In fact, almost eighteen years of

delay is *directly* attributable to the fact that the Davidson County District Attorney's Office suppressed concededly exculpatory evidence until 1992, which necessitated a second post-conviction proceeding in the state courts.

2. By contrast, Cecil Johnson and his counsel have done everything within their power to move the case forward, believing that the merits of his case would ultimately result in a new trial. That obviously did not happen, but he now contends that his execution after a period of twenty-nine years *for which he is blameless* would constitute cruel and unusual punishment. This case appears to be unique in that respect.

**Parties, Jurisdiction, and Venue**

3. Plaintiff, Cecil C. Johnson, Jr., is a condemned inmate at the Riverbend Maximum Security Institution located in Nashville, Davidson County, Tennessee. By Order of the Tennessee Supreme Court dated July 21, 2009, as implemented by Defendant George Little, Plaintiff is scheduled to be put to death by lethal injection at 1:00 a.m. CST on Wednesday, December 2, 2009, within the execution chamber at Riverbend Maximum Security Institution. Defendant Phil Bredesen, in his official capacity as the Governor of the State of Tennessee, denied Plaintiff's petition for executive clemency on November 25, 2009.

4. Defendant Phil Bredesen is the duly-elected Governor of the State of Tennessee and is vested with its "supreme executive power" under Article III, § 1, of the Tennessee Constitution. Under Article III, § 6, of the Constitution, he has the unfettered power to grant reprieves and pardons, except in cases of impeachment. Finally, under Article III, § 10, he has the duty to faithfully execute the laws of the State.

5. Defendant George Little is the duly-appointed Commissioner of the Department of Correction. As such, he oversees the execution of condemned inmates, among his other duties.

6. Defendant Ricky Bell is the Warden of Riverbend Maximum Security Institution. As such, he is directly responsible for the actual implementation of all judicial executions in this State, and the Tennessee Supreme Court's Order of July 21 specifically directs him or his designee to carry out Plaintiff's execution.

7. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1343(a)(3) because this is an action to address the deprivation, under color of state law, of Plaintiff's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. The Court has supplemental jurisdiction over Plaintiff's state law claim (Count Two) under 28 U.S.C. § 1367(a).

8. Venue lies in this District under 28 U.S.C. § 1391(b)(1)&(2) because Defendants all reside in this District and a substantial part (indeed, all) of the events giving rise to Plaintiff's claims occurred in this District.

**Factual Background**

9. On January 19, 1981, a Davidson County jury convicted Plaintiff (then twenty-four years old) on three counts of first-degree murder for three homicides that had occurred at the former Bob Bell's Market in Nashville on July 5, 1980. The Metropolitan Nashville Police Department arrested and charged Plaintiff with these offenses the next day (July 6, 1980). Plaintiff has continuously and consistently maintained his innocence of these crimes ever since.

10. On January 20, 1981, the same jury imposed three death sentences on Plaintiff. Plaintiff was immediately transported to Death Row (Unit 6) in the former Tennessee State

Penitentiary in Nashville. In June 1992, Plaintiff was transferred to Death Row (Unit 2) of the then newly-opened Riverbend Maximum Security Institution, where he has remained continuously confined ever since (except for a limited number of court appearances).

11. All told, Plaintiff has been in the custody of the State of Tennessee for over twenty-nine years, i.e., since July 6, 1980, and he has been awaiting execution for almost twenty-nine years, i.e., since January 20, 1981. Plaintiff is now fifty-three years old.

12. Plaintiff was the twentieth inmate to go on Tennessee's Death Row following the 1977 reinstatement of the death penalty. Of those twenty, only two (Donald Wayne Strouth and Michael Coleman) remain on Death Row with Plaintiff. Fourteen others have received relief from their death sentences, while three died of unstated causes other than execution. None of the twenty have been executed to date. In fact, from a broader perspective, of the 112 defendants sentenced to death in this State from 1977 through 1990, only thirty-nine (or just slightly over a third) remained on Death Row as of June 15, 2008 (the date of the source upon which Plaintiff is relying for these statistics).

13. The Tennessee Supreme Court affirmed Plaintiff's convictions and sentences on direct appeal on May 3, 1982, and the United States Supreme Court denied certiorari on October 4, 1982, less than two years after the trial.

14. In November 1982, the undersigned law firm committed to represent Plaintiff going forward in state post-conviction and, if necessary, federal habeas corpus proceedings (all on a pro bono basis). In that connection, and somewhat contrary to what some would view as "conventional wisdom" in the defense of death penalty cases, Plaintiff's counsel made a judgment (with Plaintiff's approval) to *expedite* the proceedings as much as possible. They believed that he had a strong case on the merits, but they also recognized that, in all likelihood,

the United States Court of Appeals for the Sixth Circuit would make the final adjudication on the merits (which turned out to be the case). The Sixth Circuit did not have a death penalty habeas corpus docket at the time, but experience in the other circuits that were deciding death penalty habeas corpus cases back then strongly suggested that it would be better to reach the Court of Appeals sooner rather than later.

15. In keeping with a deadline that the Tennessee Supreme Court had imposed, Plaintiff's counsel filed his first petition for post-conviction relief in the Davidson County Criminal Court on February 9, 1983. Then-Judge A.A. Birch (who had presided over the trial in January 1981) handled the matter expeditiously, and conducted an evidentiary hearing over the course of five days beginning on April 12 and concluding on May 31, 1983. On September 14, 1983, he entered an order denying the petition in all respects.

16. Plaintiff timely appealed to the Tennessee Court of Criminal Appeals ("CCA"). The case was argued in the CCA on December 18, 1984, but then, setting what became something of a recurring pattern, the case remained under advisement for over three years, until January 20, 1988. The CCA did, however, order a new sentencing hearing, but denied any relief as to the guilt phase of Plaintiff's trial. *Johnson v. State,* No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29.

17. By way of two orders dated August 29 and 30, 1988, respectively, the Tennessee Supreme Court granted each party's application for permission to appeal. On September 4, 1990, the court rendered a decision reversing the CCA on the sentencing phase relief it had ordered, but summarily affirming the lower court's decision in all other respects. *Johnson v. State,* 797 S.W.2d 578 (Tenn. 1990).

18. Having now fully exhausted Plaintiff's available state judicial remedies (as required by federal habeas law), Plaintiff bypassed the opportunity to file a certiorari petition in the U.S. Supreme Court (in keeping with the strategy described above), and proceeded directly to the filing of a habeas corpus petition in this Court. The case was assigned to the Honorable Thomas A. Wiseman, Jr., Case No. 3:91-0119.

19. There then ensued a development that would have a profound impact on the course of future proceedings. Specifically, in the spring of 1992, having been denied access on multiple occasions, Plaintiff's counsel finally obtained access to the Davidson County District Attorney General's file in this case based a new judicial interpretation of the Tennessee Open Records Act. Without getting into the merits of Plaintiff's *Brady* claim, suffice it to state that the file contained multiple police reports containing exculpatory material that the State should have produced before trial, as even the State itself stipulated in subsequent proceedings. Moreover, the materials were responsive to multiple specific requests that had been made at both the trial and post-conviction levels.

20. Based on the evidence discovered in the District Attorney General's file, Plaintiff's counsel filed a motion in this Court to add a *Brady* claim to Plaintiff's pending habeas petition, which Judge Wiseman granted on January 25, 1993.

21. On September 8, 1993, Glenn R. Pruden, the Assistant Attorney General then assigned to this case, sent a letter to one of Plaintiff's counsel on which he copied Judge Wiseman. In substance, the letter conveyed that there had been an extremely attenuated employment relationship between Judge Wiseman and Bob Bell (a critical witness in this case and the father of one of the homicide victims) when Judge Wiseman had been State Treasurer over twenty years before. In what can only be interpreted as a response to the letter, Judge

Wiseman entered a one-sentence Order recusing himself from the case on September 16, 1993 (although, in keeping with customary practice, the Order did not articulate any basis for the recusal).

22. The case was reassigned to Judge Robert Echols, which necessarily generated some additional delay. The case did, however, move forward, as evidenced by the fact that Judge Echols conducted a lengthy hearing on motions and cross-motions for partial summary judgment on November 4, 1994, which he took under advisement.

23. In the meantime, a convergence of then-recent Sixth Circuit and Tennessee appellate decisions left Plaintiff with no choice but to go back to state court on a second post-conviction proceeding to exhaust his *Brady* claim, at the risk of being precluded from pursuing it in federal court if he failed to do so. Without going into all the details, the combination of the cases made it clear that the otherwise applicable three-year statute of limitations in the Tennessee Post-Conviction Procedure Act at the time would not be a bar to the *Brady* claim under the circumstances, such that Plaintiff had to initiate a second state post-conviction proceeding to satisfy the exhaustion requirement of federal law. *See O'Guinn v. Dutton*, 88 F.3d 1409 (6th Cir. 1996) (en banc), and *Caldwell v. State*, No. 02C01-9405-CC-00099, 1994 Tenn. Crim. App. LEXIS 851 (Tenn. Crim. App. Dec. 28, 1994), *rev'd on other grounds*, 917 S.W.2d 662 (Tenn. 1996). (The en banc *O'Guinn* decision affirmed the earlier panel's holding that a Tennessee habeas petitioner in a position materially indistinguishable from Plaintiff's had to return to state court to exhaust a newly-discovered *Brady* claim, despite his blamelessness for not raising it in his first state post-conviction proceeding and despite the additional delay that was likely to ensue. It was the convergence of the *O'Guinn* panel decision and the CCA's *Caldwell* decision

in December 1994 that prompted the reluctant decision of Plaintiff's counsel to file a second state post-conviction proceeding on February 28, 1995, a few weeks later.)

24. Plaintiff and his counsel prosecuted the second post-conviction proceeding vigorously, as evidenced by the fact that the trial court (Randall Wyatt, J.) conducted an evidentiary hearing on stipulated facts on October 23, 1995. (By this time, Justice Birch was now serving on the Tennessee Supreme Court.)

25. On April 24, 1996, the United States Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which established new and extremely deferential standards of review in federal habeas corpus cases, at least when the state courts had ruled on the merits of a given issue. At the time, it was unclear whether the statute would be applied retroactively, or prospectively only. (Under prior law, the standard of review was de novo, except as to state court findings of historical fact.)

26. On May 6, 1996, the post-conviction court entered its order denying relief on Plaintiff's *Brady* claim, which he timely appealed to the CCA. (As, once again, the federal exhaustion requirement demanded.)

27. On June 23, 1997, the United States Supreme Court rendered its decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that the AEDPA standards of review were inapplicable to habeas cases pending in federal court on the date of the statute's enactment (as was Plaintiff's first petition).

28. On November 3, 1997, and despite the fact that Plaintiff's federal habeas case had remained on this Court's docket since February 28, 1995 (the filing date of his second state post-conviction petition), Assistant Attorney General Pruden filed a motion seeking the dismissal of Plaintiff's federal case without prejudice. In subsequent filings opposing the motion and

presenting the viable alternative of simply holding the federal petition in abeyance pending the exhaustion of state remedies, Plaintiff's counsel repeatedly pointed out that the sole purpose of the State's motion under the circumstances was to make the stricter AEDPA standards applicable to a subsequent federal habeas petition. The State never denied the point, which was not susceptible of any other explanation in any event. The Court, however, ultimately put Plaintiff to the choice of dropping the *Brady* claim or allowing the dismissal of the petition without prejudice. Because dropping the *Brady* claim would have almost certainly meant being precluded from further pursuing it in federal court, as it would have been considered an improper "successive" petition, Plaintiff "elected" the Hobson's choice of dismissal without prejudice.

29. On November 25, 1997, the CCA rendered its decision affirming the post-conviction court. Still compelled to do so by the federal exhaustion requirement, Plaintiff filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on October 5, 1998.

30. The suppressed exculpatory evidence referred to above should have been produced before trial, as the State itself subsequently stipulated. Because it was not produced from January 20, 1981 (the date of Plaintiff's death sentences) until the spring of 1992, and because the second state post-conviction proceeding that it necessitated did not conclude until the Tennessee Supreme Court denied review on October 5, 1998, the concealment of the evidence, by itself, had the effect of delaying the proceedings in this case for almost eighteen years.

31. Once again bypassing the opportunity to petition the U.S. Supreme Court for a writ of certiorari, Plaintiff promptly filed his second habeas corpus petition in this Court on January 18, 1999, Case No. 3:99-0047. In August of that year, both sides filed motions for

summary judgment, which Judge Echols held under advisement until September 30, 2002 (over three years later). At that time, he granted the State's motion, denied Plaintiff's, and dismissed the petition with prejudice. As had been anticipated, the Court applied the deferential AEDPA standard of review to almost all of Plaintiff's claims (including the *Brady* claim), rejecting his argument to the effect that the State's gamesmanship made this fundamentally unfair, particularly in view of the fact that it actually allowed the State to benefit from its own chicanery in not disclosing the exculpatory material (despite numerous requests for it) until 1992. The State was, in effect, rewarded for deceit in a matter of life and death.

32. On October 15, 2002, for the purpose of clarifying the record and ensuring the proper preservation of certain issues for appeal, Plaintiff's counsel filed a motion to alter or amend the Court's September 30 decision. On February 25, 2004 (over sixteen months later), the Court granted the motion in part and denied it in part.

33. Under AEDPA, Plaintiff could not appeal this Court's ruling as a matter of right, but had to obtain a "Certificate of Appealability" ("COA") from either this Court or the Court of Appeals itself. On March 25, 2004, Judge Echols sua sponte entered an Order denying a COA as to any issue, which would have precluded Plaintiff from appealing anything, absent relief from the Court of Appeals.

34. Accordingly, on May 10, 2004, and although there was no particular deadline for doing so, Plaintiff's counsel promptly filed an application for a COA in the Sixth Circuit.

35. On February 16, 2006 (almost two years later), a Sixth Circuit panel entered an Order granting a COA on six issues. The case was then argued on March 15, 2007, and on April 29, 2008, the Sixth Circuit panel issued a bitterly-divided two-to-one decision affirming this Court (having kept the case under advisement for over a year). Like this Court, the Court of

Appeals applied the deferential AEDPA standard of review to almost all of Plaintiff's claims (except for a few that the state courts had indisputably failed to reach on the merits).

36. Plaintiff filed a petition for rehearing and a suggestion for rehearing en banc, which the Court of Appeals denied on July 17, 2008. Thereafter, a group of U.S. Supreme Court practitioners in the firm of Sidley Austin LLP volunteered to take on Plaintiff's case in the Supreme Court as a pro bono matter, based on their conclusion that justice had not been served in this case.

37. The Sidley lawyers and undersigned counsel timely filed a certiorari petition in the U.S. Supreme Court on November 5, 2008, which the Court denied on March 30 this year. A subsequent petition for rehearing was denied on May 18.

38. In keeping with Rule 12.4 of the Tennessee Supreme Court, the State then filed a Motion to Set Execution Date on May 27. Plaintiff filed a response raising substantive objections to his execution on June 8, but the Tennessee Supreme Court granted the State's Motion on July 21, setting Plaintiff's execution date for December 2. It summarily rejected Plaintiff's arguments in a one-page order.

39. Plaintiff's counsel then submitted a Petition for Executive Clemency to the Office of the Governor on August 27, which they supplemented on September 30. Governor Bredesen denied the Petition on November 25, thereby leaving Plaintiff with very little time to pursue any judicial remedies that might still be available.

40. A "Chronology of Proceedings in Cecil Johnson Case" is attached as Exhibit A hereto. Among other things, it also reflects (in color-coding) the motions for extensions filed by both sides over the course of the proceedings (excluding requested extensions of a week or less). It plainly reflects that the State's requests (all granted) far outweighed Plaintiff's.

41. Plaintiff has consistently maintained his mental competence and does not claim to be suffering from any form of mental illness. In fact, he has been a model inmate for over twenty years and a productive member of the Unit 2 community, most recently having served as the Unit's chief cook for a number of years. Nevertheless, he has suffered the mental anguish of living under a death sentence for almost twenty-nine years.

**Count One**
**(Violation of the Eighth and Fourteenth Amendments)**

42. The allegations contained in paragraphs 1-41 are hereby incorporated by reference in full.

43. The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." The relevant clause of that Amendment has been made applicable to the States through its "incorporation" into the due process clause of the Fourteenth Amendment.

44. In view of the unique set of facts and circumstances detailed above, the carrying out of Plaintiff's death sentence at this late date would constitute cruel and unusual punishment. In the absence of any fault fairly attributable to Plaintiff, the delays engendered by the State and the courts have created a situation in which Plaintiff's execution now would be wanton and freakish, and would not serve any legitimate societal interest. To borrow a familiar phrase, it would be cruel and unusual in the same way that being struck by lightning is cruel and unusual.

**Count Two**
**(Violation of Article I, § 16 of the Tennessee Constitution)**

45. The allegations contained in paragraphs 1-44 are hereby incorporated by reference in full.

46. Article I, § 16 of the Tennessee Constitution likewise prohibits cruel and unusual punishments. However, the Tennessee Supreme Court has applied the State constitutional

provision more broadly than its federal counterpart. Accordingly, even if the Court were to find that Plaintiff's execution would not violate the Eighth Amendment, it could predict that as a matter of State law, the Tennessee courts would hold that the facts and circumstances of this case give rise to a violation of section 16 of Article I. (It should be noted, however, that Plaintiff raised this issue, among others, in his Response to the State's Motion to Set Execution Date in the Tennessee Supreme Court. In its one-page Order granting the State's Motion, the court summarily stated that Plaintiff had presented "no legal basis" for denying the State's Motion. It is at best unclear whether this constituted an actual adjudication on the merits.)

## Prayer for Relief

WHEREFORE, Cecil C. Johnson, Jr., requests relief as follows:

1. That the Court immediately issue a Temporary Restraining Order staying his scheduled execution;

2. That, upon a hearing, the Court issue a preliminary and permanent injunction forever prohibiting Plaintiff's execution; and

3. That the Court grant Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

**NEAL & HARWELL, PLC**

By: s/James G. Thomas
James F. Sanders
James G. Thomas
Elizabeth S. Tipping

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**VERIFICATION**

**STATE OF TENNESSEE** )<br>
)<br>
**COUNTY OF DAVIDSON** )

I, Cecil C. Johnson, Jr., after having been duly sworn according to law, hereby depose and state that the facts and statements contained in the foregoing Complaint are true and correct to the best of my information, knowledge and belief.

______________________________
**CECIL C. JOHNSON, JR.**

Sworn to and subscribed before me this the _______ day of __________________, 2009.

______________________________
Notary Public

My Commission Expires: ______________________

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served by email and hand-delivery upon Jennifer L. Smith, Esq., Associate Deputy Attorney General, 425 Fifth Avenue North, Second Floor, Nashville, TN 37202, this the 25th day of November, 2009.

s/James G. Thomas

**AS OF JUNE 8, 2009**

## CHRONOLOGY OF PROCEEDINGS IN CECIL JOHNSON CASE

State's requests for extensions in red; Cecil Johnson's in blue. Does not include extensions of a week or less.

| Date | Event |
|---|---|
| 7/5/80 | Bob Bell's Market robbery and murders. |
| 7/6/80 | Cecil Johnson arrested. |
| 7/8/80 | Initial interview of Victor Davis by investigators for Public Defender's Office (then representing Cecil Johnson). Davis exculpates Johnson. |
| 7/17/80 | Victor Davis gives tape-recorded statement (27 pages) to State investigators, which likewise exculpates Cecil Johnson. |
| 8/6/80 | Cecil Johnson indicted by Davidson County grand jury. |
| 1/10/81 | Victor Davis changes story under questioning by Assistant Attorney General Sterling Gray, who threatens Davis with his own capital prosecution for the Bob Bell's Market crimes if he testifies for Cecil Johnson. By Gray's own admission (never disputed), his intent was to eliminate Davis as a defense witness. |
| 1/13/81 | Trial begins. (N.B. First capital murder trial in Davidson County following 1977 reinstatement of the death penalty in Tennessee.) |
| 1/20/81 | Trial concludes. Cecil Johnson becomes twentieth inmate on Tennessee's death row. |
| 5/3/82 | Tennessee Supreme Court affirms on direct appeal. *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982) (Cooper, J.). |
| 10/4/82 | U.S. Supreme Court denies certiorari. |
| 11/82 | Neal & Harwell ("N&H") commits to represent Cecil Johnson going forward in post-conviction proceedings on pro bono basis. |
| 2/9/83 | N&H files petition for post-conviction relief in state trial court. |
| 4/12/83, 4/27/83, 5/6/83, 5/12/83, 5/31/83 | Trial court conducts evidentiary hearing over the course of these five days. |
| 9/14/83 | Trial court enters order denying post-conviction petition. |

**EXHIBIT A**

| | |
|---|---|
| 10/11/83 | Notice of Appeal filed. |
| 10/15/84 | State files motion for 45-day extension of time to file brief (granted). |
| 12/18/84 | Case argued in Court of Criminal Appeals. |
| 1/20/88 | Court of Criminal Appeals renders decision granting relief on sentencing phase, but denying any relief as to guilt phase. *Johnson v. State*, No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29. (N.B. Case was under advisement for over three years.) |
| 2/8/88 | Johnson moves for a 30-day extension to file application for permission to appeal to Tennessee Supreme Court (granted). |
| 3/1/88 | State moves for 30-day extension of time to file application for permission to appeal (granted). |
| 3/21/88 | N&H files application for permission to appeal to Tennessee Supreme Court; State files application on sentencing phase issue. |
| 4/11/88 | State moves for 14-day extension to respond to Johnson's application for permission to appeal (granted). |
| 8/29-30/88 | Tennessee Supreme Court grants both sides' applications for permission to appeal. |
| 9/7/88 | Johnson moves for 60-day extension of time to file initial brief in Tennessee Supreme Court (granted). |
| 9/24/88 | State moves for 45-day extension of briefing deadline (granted). |
| 1/5/89 | State moves for 30-day extension of briefing deadline (granted). |
| 2/3/89 | State moves for additional 31-day extension of briefing deadline (granted). |
| 6/1/89 | Johnson moves for postponement of oral argument in light of conflicting federal criminal trial; argument postponed from June 6 to October 2, 1989. (Parties jointly offered to submit case on briefs if postponement unacceptable.) |
| 10/2/89 | Case argued in Tennessee Supreme Court. |
| 9/4/90 | Tennessee Supreme Court renders decision reversing Court of Criminal Appeals on sentencing relief but summarily affirming in all other respects. *Johnson v. State*, 797 S.W.2d 578 (Tenn. 1990). |

| | |
|---|---|
| 1/14/91 | Tennessee Supreme Court denies second petition to rehear. |
| 2/14/91 | First habeas corpus petition filed in United States District Court. Case assigned to Judge Thomas Wiseman. (N.B. Bypassed filing cert petition in U.S. Supreme Court, and there was no statute of limitations in effect at the time for filing of federal habeas petition.) |
| 3/11/91 | State moves for 30-day extension to respond to petition (granted). |
| 4/9/91 | State moves for an additional 30-day extension to respond to petition (granted). |
| Spring 1992 | N&H finally obtains access to the materials underlying what became Johnson's *Brady* claim in the District Attorney General's file after new court decisions on the Tennessee Open Records Act. (N.B. Trial counsel and, subsequently, post-conviction counsel had made numerous requests to which the evidence was responsive.) |
| 11/12/92 | Johnson files motion to add *Brady* claim to pending habeas petition. |
| 1/25/93 | Motion to Amend granted; *Brady* claim added. |
| 9/16/93 | In response to a letter from the Attorney General's Office, Judge Wiseman recuses himself. |
| 11/4/94 | District Court (Judge Robert Echols) conducts lengthy hearing on motions and cross-motions for partial summary judgment and takes them under advisement. |
| 2/28/95 | In light of then-recent Sixth Circuit and Tennessee decisions making it clear that Johnson had to return to state court to exhaust *Brady* claim or risk procedurally defaulting it in federal court. Johnson files second petition for post-conviction relief in state court. |
| 10/23/95 | Post-conviction court conducts evidentiary hearing on stipulated facts. |
| 4/24/96 | Congress enacts Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing extremely deferential standards of review in federal habeas corpus cases. |
| 5/6/96 | Post-conviction court enters order denying relief on *Brady* claim. |
| 6/3/96 | Johnson files notice of appeal to Court of Criminal Appeals. |
| 12/18/96 | State's motion for 30-day extension to file brief (granted). |

| | |
|---|---|
| 6/23/97 | U.S. Supreme Court decides *Lindh v. Murphy*, 521 U.S. 320 (1997), holding AEDPA standards of review inapplicable to habeas cases pending in federal court on date of statute's enactment (as was Johnson's first petition). |
| 7/15/97 | Case argued in Court of Criminal Appeals. |
| 11/3/97 | Despite fact that Johnson's federal habeas case had remained on the District Court's docket since 2/28/95 (filing date of second state post-conviction petition), State now files motion seeking dismissal of Johnson's federal case without prejudice. In subsequent filings opposing motion, Johnson repeatedly points out that sole purpose of State's motion was to make stricter AEDPA standards applicable to a second federal petition, which State never denies. |
| 11/25/97 | Court of Criminal Appeals renders decision denying relief. |
| 2/12/98 | Johnson files application for permission to appeal to the Tennessee Supreme Court (as required by exhaustion rule in federal court). |
| 3/9/98 | In response to State's motion to dismiss, District Court enters Order directing Johnson to either amend petition to remove *Brady* claim within 30 days, or else petition would be dismissed without prejudice. |
| 4/7/98 | In response to District Court's Order, Johnson serves notice that as between choice of amending his petition and losing *Brady* claim in federal court and dismissal without prejudice, he will acquiesce in the latter (while renewing his objection to the State's strategic ploy). |
| 6/17/98 | Receipt of Notice from Appellate Court Clerk advising that there might be a delay in the Tennessee Supreme Court's ruling on the application for permission to appeal.<br><br>U.S. District Court enters Order dismissing Johnson's federal habeas petition without prejudice. |
| 7/31/98 | District Court's Order dismissing federal petition becomes final. |
| 10/5/98 | Tennessee Supreme Court denies application for permission to appeal. |
| 1/18/99 | Second habeas corpus petition filed in federal court. (N.B. Once again bypassed opportunity to petition U.S. Supreme Court for writ of certiorari.) |
| 8/99 | Both sides file motions for summary judgment. |
| 9/30/02 | District Court grants State's Motion, denies Johnson's, and dismisses petition with prejudice. (N.B. Under advisement for over three years.) |

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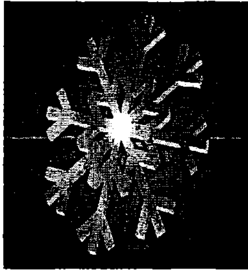
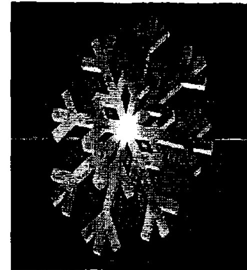
| 10/15/02 | Johnson files motion to alter or amend for purposes of preserving certain issues for appeal. |
| 10/24/02 | Johnson files initial notice of appeal to Sixth Circuit. |
| 2/25/04 | District Court grants in part and denies in part the motion to alter or amend. (N.B. Under advisement for over 16 months.) |
| 3/8/04 | Johnson files amended notice of appeal to Sixth Circuit. |
| 3/25/04 | District Court sua sponte enters Order denying a Certificate of Appealability ("COA") (jurisdictional requirement under AEDPA for appealing adverse decision on habeas petition). |
| 5/10/04 | Johnson files application for a COA in the Sixth Circuit. (N.B. There was no particular time limitation in effect, so this was quite expeditious.) |
| 5/12/04 | State files motion for 30-day extension of deadline for filing response to application for COA (granted). |
| 2/16/06 | Sixth Circuit enters Order granting a COA on six issues. (N.B. Application was under advisement for almost two years.) |
| 6/21/06 | State files motion for 14-day extension of briefing deadline (granted). |
| 3/15/07 | Case argued in Sixth Circuit. |
| 4/29/08 | Sixth Circuit issues 2-1 decision affirming District Court. (N.B. Under advisement for over a year.) |
| 7/17/08 | Sixth Circuit denies rehearing and rehearing en banc. |
| 11/5/08 | Cert petition filed in U.S. Supreme Court. |
| 3/30/09 | Cert denied. |
| 4/24/09 | Petition for rehearing filed in U.S. Supreme Court. |
| 5/18/09 | Rehearing petition denied. |
| 5/27/09 | State files Motion to Set Execution Date. |





# WINTER BREAK
# 6th Grade Social

Come kick off your winter break with all of your new and old friends at the BMS 6th Grade social!!!

Have fun with your friends while DJ Louis Lee entertains in the cafeteria. Snacks will also be served!

Where: BMS Cafeteria
When: Thursday, December 17th from 2:40-4:40pm
RSVP: Send in $5 and the form below by Tuesday, Dec.15th. PLEASE make checks payable to BMS PTO. The $5 fee will cover the cost of the winter social **and** the spring social to be held in May.

**PLEASE NOTE**
We **must** have the signed form for you to attend.

Questions, please call Sarah Toomey, 377-6821 or Heidi Kaye, 221-4332.

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Child's name: ________________________________________

Homeroom Teacher: ______________________ Team: ____________

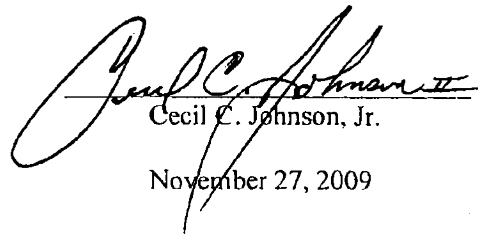
Parent Signature: ____________________________

_____Please call me to help chaperone/serve snacks

Phone # ____________________

## VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the factual allegations in the Verified Complaint filed on my behalf in the United States District Court for the Middle District of Tennessee (Case No. 3:09-1133) on November 25, 2009, are true and correct.



Cecil C. Johnson, Jr.

November 27, 2009