Nos. 09-7839, 09-A-521

IN THE
SUPREME COURT OF THE UNITED STATES

CECIL C. JOHNSON, JR.,

Petitioner,

v.

PHIL BREDESEN, Governor of the
State of Tennessee, et. al,

Respondents.

ON APPLICATION FOR STAY OF EXECUTION AND ON
PETITION FOR CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

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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. § 2254(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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The December 1, 2009, decision of the Sixth Circuit Court of Appeals affirming the district court's transfer of petitioner's complaint for consideration as a second or successive habeas petition under 28 U.S.C. § 2244 and denying authorization to file a successive habeas application is unreported. (Pet. App. A). The order of the district court (Pet. App. B) is unreported.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244, which governs successive applications for a writ of habeas corpus under § 2254, provides in pertinent part:

> (b)(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.
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> * * *
>
> (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.

28 U.S.C. § 1631, which governs transfers to cure a want of jurisdiction in a civil action, provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF THE CASE

Petitioner, Cecil C. Johnson, Jr., was convicted in 1980 by a Davidson County, Tennessee, jury of three counts of first degree murder, two counts of armed robbery, and two counts of assault with intent to commit first degree murder. The jury sentenced him to death for the murders, and he received four consecutive life terms for the remaining convictions. The convictions and sentences were upheld by the Tennessee Supreme Court on direct appeal, and the United States Supreme Court denied certiorari. *State v. Johnson*, 632 S.W.2d 542 (Tenn.), *cert. denied*, 459 U.S. 882 (1982).[1]

Petitioner subsequently sought state post-conviction relief. Following a hearing, the state trial court denied his petition. On appeal, the Tennessee Court of Criminal Appeals reversed, finding that, during closing argument, the prosecutor had attempted to minimize the jurors' responsibility in imposing the death penalty in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Cecil C. Johnson v. State*, 1988 WL 3632 (Tenn. Crim. App. Jan. 20, 1988). The Tennessee Supreme Court granted the State's application for permission to appeal, reversed the Court of Criminal Appeals' decision, and reinstated the judgment of the trial court. *Johnson v. State*, 797 S.W.2d 578 (Tenn. 1990).

In February 1995, petitioner filed a second petition for post-conviction relief in the state courts.[2] The trial court denied relief, and that decision was affirmed on appeal. *State v. Cecil C. Johnson*, No. 01C01-9610-CR-00442, 1997 WL 738586 (Tenn. Crim. App. Nov. 25, 1997) (Pet.

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[1] The facts of Johnson's crimes are set out in the opinion of the Tennessee Supreme Court on direct appeal.

[2] Petitioner had filed an initial petition for writ of habeas corpus in the district court on February 14, 1991. *Johnson v. Dutton*, No. 3:91-CV-00119 (M.D.Tenn.). That petition was subsequently dismissed without prejudice for failure to exhaust state remedies.

App. 162a). The Tennessee Supreme Court denied petitioner's application for permission to appeal on October 5, 1998.

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee on January 18, 1999. On September 30, 2002, the court entered a memorandum opinion and order granting respondent's motion for summary judgment and dismissing the petition. The Sixth Circuit affirmed in an opinion filed April 29, 2008. *Johnson v. Bell*, 525 F.3d 466 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 1668 (2009).

On July 21, 2009, the Tennessee Supreme Court entered an order directing that petitioner's execution be carried out on December 2, 2009. On November 25, 2009, seven days before the scheduled execution of the State's 29-year-old judgment of conviction and death sentence, petitioner filed a Verified Complaint in the district court seeking to permanently enjoin the State from carrying out his execution on grounds that the review process in his case had taken too long. Citing Justice Stevens' memorandum in dissent from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), petitioner argued that the length of time that had passed in the course of his collateral challenges rendered the execution of his death sentence cruel and unusual under the Eighth Amendment, thereby justifying an injunction "forever prohibiting [his] execution." (Pet. App. 25). Although petitioner styled his pleading as a Verified Complaint for relief under 42 U.S.C. § 1983, the district court determined that the filing was the functional equivalent of a second or successive habeas corpus application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements and over which it lacked jurisdiction absent authorization by the court of appeals under § 2244(b)(3)(A). The district court thus transferred the matter to the Sixth Circuit under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631 for consideration in the first instance. (Stay App. B).

Following transfer of the proceeding, petitioner moved in the Sixth Circuit for a stay of execution pending consideration of the propriety of the district court's transfer determination. On December 1, 2009, the Sixth Circuit entered an order holding that the district court was correct in transferring petitioner's § 1983 claim, denying approval to file a second or successive application for a writ of habeas corpus under § 2244(b)(3)(C), and denying petitioner's motion for a stay of execution. (Stay App. A). Petitioner now seeks review by this Court by writ of certiorari and a stay of execution. He is entitled to neither, and his motion for stay of execution should be denied.

REASONS FOR DENYING A STAY AND DENYING REVIEW

BALANCING OF THE EQUITIES WEIGHS STRONGLY IN FAVOR OF DENYING A STAY OF EXECUTION.

A. Petitioner Cannot Demonstrate Any Likelihood of Success on the Merits.

In *Hill v. McDonough*, 547 U.S. 573 (2006), this Court reiterated that "a stay of execution is an equitable remedy." *Id.*, 547 U.S. at 584. Accordingly, "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Inmates like petitioner, who seek time to engage in further litigation beyond the standard three-tier appeals process, must make a showing "of significant possibility of success on the merits." Where, as here, the federal habeas process has concluded, the state's interest in executing its lawful judgment is "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). Stays of execution pending the filing and consideration of a petition for writ of certiorari should only be granted when: (i) it is reasonably probable that four Members of the Court would vote to grant certiorari; and (ii) there is a significant possibility that this Court will reverse the decision below. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Neither criteria is satisfied in this case. First, neither of the issues identified for possible review in petitioner's motion for a stay of

execution meets the criteria for a grant of certiorari under Sup. Ct. R. 10, since the Sixth Circuit's decision affirming the district court's transfer order is in accord with the decisions of all other federal courts of appeals that have addressed so-called *Lackey* claims. Petitioner identifies *no* precedent supporting his contention that such a claim may be pressed in a § 1983 action as a conditions-of-confinement challenge; rather, courts addressing the claim have uniformly recognized it for what it is — a constitutional challenge to the validity of a sentence, the core of habeas corpus. Furthermore, when the legality of a state prisoner's detention has been determined by a United States court on a prior application for a writ of habeas corpus, federal courts of appeals presented with such claims in any subsequent application have uniformly subjected petitioners to the criteria of 28 U.S.C. § 2244(b) for filing second or successive habeas applications.[3] *See, e.g., Allen v. Ornoski,* 435 F.3d 946 (9th Cir.), *cert. denied*, 546 U.S. 1136 (2006) (*Lackey* claim raised for the first time in a second habeas petition subject to requirements of 28 U.S.C. § 2244); *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir.), *cert. denied*, 522 U.S. 1085 (1998) (*Lackey* issue subject to AEDPA's limitations on successive habeas applications). For the same reasons, petitioner cannot show a significant possibility of reversal of the decision below and thus fails to meet the second requirement for a stay of execution under *Barefoot.*

In *Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004), this Court instructed that, even where the general provisions of 42 U.S.C. § 1983 appear "literally applicab[le]" to a prisoner's action, those provisions "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *Nelson*, 541 U.S. at 643 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). A state prisoner challenging his underlying conviction and

[3] Petitioner here concedes that he cannot satisfy § 2244's gateway requirements. App. for Stay of Execution at 2-3.

sentence on federal constitutional grounds in a federal court is limited to habeas corpus. *Preiser*, 411 U.S. at 489. Where, as here, a grant of relief would necessarily bar the State from carrying out an execution, thus effectively rendering the sentence invalid, the action must be brought under the habeas statute.[4] *Hill,* 547 U.S. at 583. A prisoner may not evade the procedural requirements of § 2254 simply by applying a different label to his pleading.

Beyond these procedural impediments to the presentation of this claim, petitioner identifies no instance in which a state has been enjoined from executing a lawful death sentence on this basis. *See Thompson v. McNeil*, 129 S.Ct. 1299 (2009) (Thomas, J., concurring in denial of certiorari) ("I remain 'unaware of any support in the American constitutional tradition or this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain that his execution has been delayed.'"); *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) (observing that courts considering such claim after Justice Stevens' invitation for further study in *Lackey* have "resoundingly rejected the claim as meritless"); *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995) (pre-AEPDA case dismissing *Lackey* claim in successive application as abusive) (Luttig, Cir. J., concurring) ("Petitioner's [*Lackey*] claim should be recognized for the frivolous claim that it is, and his delay in raising it, for the manipulation that it is."). Indeed, as Justice Thomas observed in his concurring opinion in *Knight*, "[i]f there were any [ ] support [for a *Lackey* claim] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, and the Privy Council [of Jamaica]." 528 U.S. at 990.

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[4] By contrast, a suit seeking to enjoin a particular means of effectuating a death sentence does not directly call into question the fact or validity of the sentence itself; by simply altering its method, the State may go forward with its sentence. *Nelson*, 541 U.S. at 644.

Johnson's contention that a *Lackey* claim, by its very nature, should not be subject to the gatekeeping requirements of § 2244 also lacks support in this Court's decisions or any decision of the lower federal courts of appeals. Citing *Panetti v. Quaterman*, 551 U.S. 930 (2007), petitioner contends that the district court should have re-characterized his petition as a habeas petition, but without the statutory limitations under 28 U.S.C. § 2244, because his claim was not ripe until the Governor of Tennessee denied his request for executive clemency. However, petitioner misplaces his reliance on *Panetti*, which dealt with a competence-for-execution claim. Unlike a claim challenging mental competency, which may fluctuate over time and thus does not ripen until execution is imminent, a *Lackey* claim turns on the "steady and predictable passage of time." *Ornoski*, 435 F.3d at 958. "[T]hat the passage of time makes [a] *Lackey* claim stronger is irrelevant to ripeness." *Id.* Here, Johnson has conceded at oral argument before the district court that he was harmed by his time on death row as early as 1992. In addition, the district court found that petitioner could have raised a *Lackey* claim in his 1999 federal habeas petition "when he had already been under a death sentence for over eighteen years." (R. 17: Order, p. 8). Because Johnson could have brought his *Lackey* claim earlier, it is a second or successive habeas application and is governed by § 2244.

B. The Timing of Petitioner's Latest Complaint Suggests an Intent to Seek Delay.

In addition to the need for a prisoner to demonstrate a likelihood of success on the merits, this Court stated in *Hill* that a court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650)). *See Nelson*, 541 U.S. at 649 ("last-minute nature of an application" or "attempts to manipulate the judicial process" may be grounds for denial of a

stay"). Here, petitioner filed his complaint seven days before his scheduled execution date. Petitioner presents no legitimate justification for the eleventh-hour timing of his filing. Indeed, guided by the 17-year delay referenced by the dissenting opinion in *Lackey*, petitioner could easily have pressed his claim in his 1999 federal habeas corpus proceeding when he had already been incarcerated on death row for 19 years.[5] Instead, as the district court observed, petitioner waited until the eve of his execution to press his claim. The balance of equities in any analysis for injunctive relief thus weighs strongly, if not entirely, in the State's favor. Especially in light of the fact that his complaint is devoid of merit, its filing and, consequently, petitioner's efforts to stay his execution on the basis of its filing, can only be seen as an obvious "attempt[] to manipulate the judicial process." This Court's denial of petitioner's stay application is particularly warranted under these circumstances. For the same reasons that the application for a stay fails to demonstrate a likelihood of success on the merits, this case does not provide an appropriate vehicle for resolving the questions presented by petitioner in his certiorari petition, and it too should be denied.

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

CONCLUSION

The application for stay of execution and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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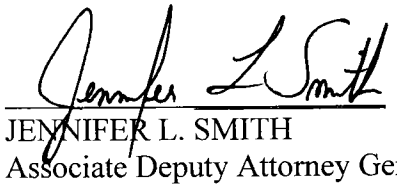

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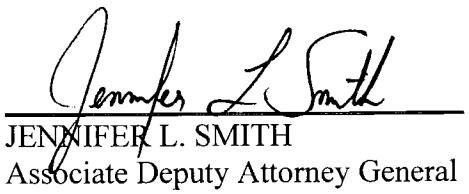
CERTIFICATE OF SERVICE

I hereby certify that, on December 1, 2009, the foregoing response was electronically filed with the Clerk of Court using the CM/ECF system, which will send by email a Notice of Electronic Filing to: James Thomas, James Sanders, and Elizabeth Tipping, Neal & Harwell, 150 Fourth Ave. North, 2000 Union Tower, Nashville, TN 37219-1713. I further certify that all parties required to be served have been served.



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