IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

CECIL C. JOHNSON, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:09-cv-1133**
	)	**Judge Echols**
PHIL BREDESEN, Governor of the State of Tennessee, *et al*,	)	
	)	
	)	
Defendants.	)	

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Seven days before the scheduled execution of the State's 29-year-old judgment of conviction and death sentence, and after receiving direct review of the judgment by the Tennessee Supreme Court, two complete rounds of review under Tennessee's Post-Conviction Procedure Act, and one complete federal habeas corpus review, Johnson seeks to enjoin his execution on grounds that the review process in his case has taken too long. Johnson cites no case in which a state has ever been enjoined from executing a death sentence on this basis and no legitimate justification for the eleventh-hour timing of his present filing. Indeed, guided by the 17-year delay referenced by the dissenting opinion in *Lackey v. Texas*, 514 U.S. 1045 (1995), Johnson could easily have pressed his claim in his 1999 federal habeas corpus proceeding. The balance of equities thus weighs strongly, if not entirely, in the State's favor. More importantly, however, Johnson's present complaint, while styled as a complaint for relief under 42 U.S.C. § 1983, is the equivalent of a second or successive

habeas application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements. Thus, under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631, the Court should transfer Johnson's application to the United States Court of Appeals for the Sixth Circuit for consideration in the first instance. Alternatively, his motions should be denied.

COURSE OF PROCEEDINGS

Johnson 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).

Johnson 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 prosecution 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, Johnson filed a second petition for post-conviction relief in the state

courts.[1] 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. App. 162a). The Tennessee Supreme Court denied Johnson's application for permission to appeal on October 5, 1998.

Johnson filed a petition for writ of habeas corpus in this Court 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. Johnson filed a motion to alter or amend on October 15, 2002, and an initial notice of appeal on October 24, 2002. On February 25, 2004, this Court entered an order granting in part and denying in part petitioner's motion and dismissing the habeas 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 Johnson's execution be carried out on December 2, 2009. Johnson filed his present complaint seven days before that date.

ARGUMENT

A. THE COURT LACKS JURISDICTION TO ENTERTAIN JOHNSON'S CLAIM ABSENT AUTHORIZATION BY THE SIXTH CIRCUIT UNDER 28 U.S.C. § 2244(b)(3)(A).

Johnson's present complaint seeks to permanently enjoin the State of Tennessee from carrying out his death sentence due to the extended passage of time since entry of the state judgment. His claim thus challenges the very "fact" or "validity" of his death sentence and falls within the

[1]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.

"core" of habeas corpus under 28 U.S.C. § 2254. *See Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004). Because this Court has already rejected a previous challenge to the constitutionality of Johnson's state-court judgment, his present complaint is the equivalent of a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2254 for which he has not yet obtained authorization from the Court of Appeals under 28 U.S.C. § 2244(b)(3)(A). As such, this Court lacks jurisdiction to entertain Johnson's complaint and should transfer the action to the appellate court.

In *Nelson,* the United States Supreme Court made clear that, even where the general provisions of 42 U.S.C. § 1983 appear "literally applicab[le]" to a prisoner's action, those provisions "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *Nelson*, 541 U.S. at 643 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). A state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus. *Preiser*, 411 U.S. at 489. By contrast, a suit seeking to enjoin a particular means of effectuating a death sentence does not directly call into question the fact or validity of the sentence itself for, as the Supreme Court has recognized, by simply altering its method, the State may go forward with its sentence. *Nelson*, 541 U.S. at 644. Here, Johnson asks this Court to declare his sentence unconstitutional in and of itself, an attack that lies at the very core of habeas corpus. However, he may not evade the procedural requirements of § 2254 simply by applying a different label to his pleading. *See, e.g., 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); *Allen v. Ornoski*, 435 F.3d 946 (9th Cir.), *cert. denied*, 546 U.S. 1136 (2006).

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

Under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), "when a second or successive petition for writ of habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from [the Sixth Circuit], the district court shall transfer the document to [the Sixth Circuit] pursuant to 28 U.S.C. § 1631."

B. EVEN IF THIS COURT POSSESSED JURISDICTION TO ENTERTAIN JOHNSON'S COMPLAINT UNDER 42 U.S.C. § 1983, HE HAS FAILED TO SATISFY THE REQUIREMENTS FOR AN INJUNCTION.

When considering a motion for preliminary injunctive relief, courts must balance: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus, Inc. v. Cramer*, 399 F.3d 754, 760 (6th Cir.), *cert. denied*, 126 S.Ct. 361 (citing *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 249 (6th Cir. 2003)).

Here, Johnson has *no* likelihood of success, much less a strong one. First, Johnson's complaint should be dismissed for the inexcusable delay in filing, if for no other reason. *See Hicks v. Taft*, 431 F.3d 916, 917 (6th Cir. 2005) (citing *Nelson v. Campbell*, 541 U.S. 637 (2004) (holding that "a court may consider the last minute nature of an application to stay execution in deciding

whether to grant equitable relief.")). As noted above, Johnson could easily have pressed his claim in his 1999 federal habeas corpus proceeding when he had already been on death row for 19 years. Moreover, even on the underlying merits of his complaint, Johnson utterly fails to support his contention that he has a "significant possibility" of succeeding on the merits of his claim, citing not a single case in which a state prisoner has obtained relief on grounds that the course of state and federal collateral review has taken too long. This is particularly so where, as here, the delay has been caused by the fact that Johnson has availed himself of procedures the law provides to ensure that executions are carried out only in appropriate circumstances.[2] Especially given that Johnson's complaint is devoid of merit, its filing and, consequently, his efforts to stay his execution on the basis of its filing, can only be seen as an obvious "attempt[] at manipulation" of the judicial process." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Federal courts can and should protect States from such tactics. *Id.*

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

[2] In fact, a cursory review of the chronology submitted as an attachment to Johnson's Verified Complaint reveals that Johnson's case was under advisement by various state and federal courts for at least 12 years since his conviction became final.

"the victims of crime [to] move forward knowing the moral judgment will be carried out." Id., 523 U.S. at 556.

WHEREFORE, defendants request that, under *Sims* and 28 U.S.C. § 1631, the Court transfer petitioner's application to the United States Court of Appeals for the Sixth Circuit. Alternatively, the Court should deny Johnson's motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 27, 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.

/s/ Jennifer L. Smith
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