

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.

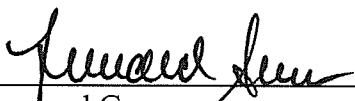
Both parties have submitted filings to this court. Johnson now (1) challenges the district court's characterization of his § 1983 claim as a *habeas* claim; (2) argues that even if it is a *habeas* claim, it should not be considered "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2);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

Leonard Green
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: December 01, 2009

Ms. Jennifer Lynn Smith
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

Mr. James G. Thomas
Ms. Elizabeth Sarah Tipping
Neal & Harwell
150 Fourth Avenue, N.
Suite 2000 One Nashville Place
Nashville, TN 37219

Re: Case No. 09-6418, *In re: Cecil Johnson, Jr.*
Originating Case No. : 09-01133

Dear Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034
Fax No. 513-564-7096

cc: Mr. Keith Throckmorton

Enclosure

No mandate to issue