UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CECIL C. JOHNSON, JR.,	)	
	)	
Plaintiff,	)	
	)	**CAPITAL CASE**
v.	)	
	)	**Civil Action No. 3:09cv1133**
PHIL BREDESEN, *et al.*,	)	**Judge Echols**
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Rather than raise any objection to the merits of Mr. Johnson's claim that it would violate the Eighth and Fourteenth Amendments to carry out his proposed execution after forcing him to remain on Death Row for nearly thirty years, the State hopes this Court will yet again look to alleged procedural defects to excuse its dilatory conduct. The State's arguments must fail, as the State relies on flawed interpretations of Supreme Court jurisprudence to invent these alleged defects.

A. Mr. Johnson's *Lackey* Claim Is A Proper Subject For A § 1983 Action

The core of the State's Response is the assertion that Mr. Johnson should have filed his action as a petition for writ of habeas corpus rather than a claim under 42 U.S.C. § 1983. In order to take this position, the State first has to improperly characterize 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 – that it actually presents. The State argues that because Mr. Johnson has asked the Court to permanently enjoin his execution, the claim must be filed under habeas corpus law. This reliance on the remedy sought

by Mr. Johnson to determine the type of action that must be filed is unsupported by Supreme Court law.

The Supreme Court has recognized the intersection and overlap between habeas corpus claims and § 1983 claims for many years.[1] *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Wilkinson v. Dotson*, 544 U.S. 74 (2005). It is generally understood that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus" while "[a]n inmate's challenge to the circumstances of his confinement … may be brought under § 1983." *Hill v. McDonough*, 547 U.S. 573, 579 (2006). 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*, the Supreme Court considered whether an inmate's claim for damages was cognizable under § 1983 when the lower courts had found that the claim challenged 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

[1] 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.

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

In that sense, Mr. Johnson's claim is analogous to the recent challenges inmates have raised concerning lethal injection, which the Supreme Court has held to be proper subjects under § 1983. *See Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 547 U.S. 573 (2006). The Court in *Nelson* noted 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, since 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.[2] *Id*. at 644-45.

Two years after the limited decision in *Nelson*, *Hill* presented the Supreme Court with an inmate's broader challenge to the drug cocktail used in Florida's lethal injection procedure. *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 state's argument that the 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 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 the Supreme Court has both demonstrated and explained that it is not the remedy sought that dictates whether the action is cognizable under § 1983, if and when it finally determines this question, the Court will undoubtedly continue to evaluate the substance of the claim rather than consider the request for a permanent injunction to be determinative. As such, the mere fact that Mr. Johnson seeks a

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

permanent injunction cannot lead to the conclusion that his *Lackey* claim may only be filed as a petition for writ of habeas corpus.[3]

B. Mr. Johnson Has Demonstrated That He Is Entitled To Injunctive Relief

The balance of the State's Response objects to Mr. Johnson's request for preliminary injunctive relief, in large part due to the timing of Mr. Johnson's motion. This argument ignores the fact that this action did not become fully ripe until Governor Bredesen denied Mr. Johnson's request for clemency on November 25 (nearly three months after the request was submitted). Moreover, if he wanted a decision on his executive clemency petition, Mr. Johnson was precluded from seeking any sort of judicial relief while his petition was pending. Although *Nelson v. Campbell* (which the State cites on this point) suggests that a court may consider the timing of a motion to stay execution, the Supreme Court did not say that motions filed close to the date of the scheduled execution should be denied. *See Nelson, supra*, 541 U.S. at 649-50. To the contrary, in *Nelson*, the Supreme Court issued a stay of execution even though the inmate had waited until ***three days*** before his scheduled execution to file his civil rights action and application for stay. *Id*. at 639; *Nelson v. Campbell*, 540 U.S. 942 (2003) (granting application for stay).

Thus, although the timing of the motion may be considered, the relevant inquiry on this issue is "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649-50. Here, Mr. Johnson filed his complaint and motions for injunctive relief the very day his claim became ripe, mere hours after the Governor denied his petition for clemency. It is indeed ironic that the State, which has caused delays at every turn in this case,

[3] The two Ninth Circuit cases that the State cites for the proposition that a *Lackey* claim must be filed as a habeas action do not even address this issue. Neither case considered the interaction between habeas corpus law and § 1983, as the petitioner in each case filed a habeas petition (which was dismissed in each instance). *See Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998); *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006).

would now suggest that Mr. Johnson acted with anything other than the utmost diligence and that his "delay" should bar his meritorious claim from consideration.

The State further denies that Mr. Johnson has a significant likelihood of success on the merits. It is astonishing that while the "instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years" is widely accepted, the State refuses to acknowledge that there could be any merit to Mr. Johnson's claim. *See Pratt v. Attorney General for Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (en banc) (U.K. Privy Council). The fact that the Supreme Court has not yet resolved the issue that this case presents does not lead to the State's conclusion that Mr. Johnson's claim is "devoid of merit." At least two Justices on the Supreme Court would certainly disagree with that contention. *See, e.g.*, *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari).

As detailed in the Verified Complaint, Mr. Johnson and his counsel made a concerted effort to move his case forward as expeditiously as possible, yet the State's misconduct has caused Mr. Johnson's case to continue for nearly thirty years. The State withheld exculpatory evidence despite explicit requests for more than ten years, then, when it perceived such a motion would operate to its benefit, the State moved to dismiss without prejudice Mr. Johnson's federal habeas case after it had been pending for nearly seven years. Mr. Johnson has been forced to languish on Death Row for at least eighteen avoidable years solely because of the State's misconduct and subsequent evasive maneuvers. His affirmative effort to expedite proceedings, rather than what many perceive as the "typical" death penalty defense strategy of delay, makes Mr. Johnson's case unique, and presents an ideal opportunity for the Supreme Court to address

the viability of a "*Lackey* claim." Mr. Johnson has satisfied his burden of demonstrating that he has a "significant possibility" of succeeding on the merits of this case.

The State has not challenged Mr. Johnson's analysis of the remaining factors to be balanced in determining whether to grant injunctive relief, as indeed, there can be no argument that these factors weigh in favor of the requested stay of execution. Since the State has not raised any legitimate objection to Mr. Johnson's motions for temporary restraining order and preliminary injunction, this Court should stay the proposed execution so that it can give due consideration to Mr. Johnson's § 1983 action, in keeping with Justice Stevens's suggestion in *Lackey* itself that the lower courts should "serve as laboratories" for the study of this issue before the Supreme Court finally addresses it. 514 U.S. at 1047. Insofar as undersigned counsel have been able to determine, this has not yet occurred to any significant degree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via the Court's electronic filing system upon Jennifer L. Smith, Esq., Associate Deputy Attorney General, 425 Fifth Avenue North, Second Floor, Nashville, TN 37202, this the 29th day of November, 2009.

s/Elizabeth S. Tipping