NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-6418

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CECIL C. JOHNSON,)	FILED
Plaintiff,)	DEC -1 2009
V.)) <u>ORDER</u>	LEONARD GREEN, Clerk
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 COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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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