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# How Can a Prison Inmate Challenge the Procedures for Carrying Out His Imminent Execution?

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# Case at a Glance

## How Can a Prison Inmate Challenge the Procedures for Carrying Out His Imminent Execution?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 334-337. © 2004 American Bar Association.

The Supreme Court is asked to determine whether a death row inmate's complaint brought under 42 U.S.C. § 1983 and seeking to stay the inmate's execution in order to pursue a challenge to the procedures for carrying out the execution was properly characterized as a habeas corpus petition filed in violation of the rules regarding second or successive habeas petitions.

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### ISSUE

Is a prison inmate's complaint seeking relief under 42 U.S.C. § 1983 the "functional equivalent" of a second or successive habeas corpus petition subject to the requirements of 28 U.S.C. § 2244 if the complaint asks for a stay of execution?

### FACTS

David Larry Nelson killed two men, James Cash and Wilson Thompson, the night of December 31, 1977. He killed Cash while in the course of robbing him. He shot Thompson in the back of the head after arranging for Thompson to have sex with his female companion in Thompson's trailer home. Nelson also shot and seriously wounded his female companion.

He was indicted in separate indictments for the two killings. He was first tried for the murder of Cash and convicted and sentenced to death. See *Nelson v. State*, 405 So.2d 392 (Ala.Crim.App.1980). In October 1978, he was tried for the Thompson murder and again sen-

tenced to death. Both convictions were reversed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court, pursuant to the U.S. Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980). See *Nelson v. State*, 405 So.2d 50 (Ala.Crim.App.1981); *Nelson v. State*, 405 So.2d 401 (Ala.1981).

Nelson was retried for the Cash murder and again found guilty. He was sentenced to life imprisonment. Nelson was also retried and found guilty of the murder of Thompson, but for that crime he was sentenced to death. The Thompson conviction was upheld by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *Nelson v. State*, 511 So. 2d 225 (Ala.Crim.App. 1986), *aff'd*, 511 So.2d 248 (Ala. 1987). The U.S. Supreme Court denied Nelson's petition for certiorari. *Nelson v. Alabama*, 486 U.S. 1017 (1988).

NELSON v. CAMPBELL  
DOCKET NO. 03-6821

ARGUMENT DATE:  
MARCH 29, 2004  
FROM: THE ELEVENTH CIRCUIT

In December 1990, Nelson filed a petition for a writ of habeas corpus in the U.S. District Court for the Northern District of Alabama. The district court denied the petition with respect to Nelson's guilt but granted it with respect to his death sentence. The U.S. Court of Appeals for the Eleventh Circuit affirmed. *Nelson v. Nagle*, 995 F.2d 1549, 1558 (11th Cir. 1993).

A new sentencing hearing was conducted in 1994. Nelson represented himself in the proceeding for a jury. In his closing argument, Nelson asked the judge and jury to sentence him to death. The jury returned a recommendation that Nelson receive the death penalty, and the judge sentenced him to death.

In April 1997, Nelson petitioned the U.S. District Court for the Northern District of Alabama for a writ of habeas corpus under 29 U.S.C. § 2254. The district court denied relief. The Eleventh Circuit affirmed. *Nelson v. Alabama*, 292 F.3d 1291 (11th Cir. 2002).

Until April 1, 2002, the sole method of carrying out death sentences in Alabama was by electrocution. On July 1, 2002, the Alabama legislature changed the mode of execution from electrocution to lethal injection. On September 3, 2003, the Alabama Supreme Court scheduled Nelson's execution by lethal injection for October 9, 2003. On Friday, October 3, 2003, the prison warden notified Nelson that the medical procedure that would be used to gain venous access before the lethal injection procedure would require a two-inch incision either in Nelson's leg or arm, with only a local anesthetic being used. The warden also informed Nelson that instead of being performed 24 hours before the execution, the procedure would begin one hour before the execution.

On October 6, 2003, three days before his scheduled execution, Nelson filed a civil rights action under 42 U.S.C. § 1983. In his complaint, Nelson asserted that he has severely compromised veins because of his history of intravenous drug use and that Alabama's proposed use of a "cut-down" procedure to gain venous access (if access to a suitable vein cannot be achieved) as part of the lethal injection procedure constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. He alleged that the procedure the defendants had proposed for accessing his veins is cruel and unusual. He is not asking that the courts permanently stop his execution, only that the lethal injection be delayed until he is assured that a safe, medically acceptable procedure will be used to gain access to his veins.

The U.S. District Court for the Middle District of Alabama held that Nelson's § 1983 claim was the functional equivalent of a habeas corpus petition and thus was subject to limits imposed on successive petitions under 28 U.S.C. § 2244. *Nelson v. Campbell*, 286 F.Supp.2d 1321 (M.D.Ala.2003). The district court explained that a § 1983 action seeking a stay of execution must be treated as a habeas petition for purposes of the prohibition on second or successive habeas petitions. The district court acknowledged that "[i]t would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment Rights. However, Eleventh Circuit law is clear that such a stay can be obtained through only habeas relief—relief which is now foreclosed."

Affirming the district court, the U.S. Court of Appeals for the Eleventh Circuit ruled that Nelson's § 1983

claim constituted the "functional equivalent" of a second or successive habeas petition as it sought an immediate stay of the imposition of Nelson's death sentence. Through his counsel, Nelson acknowledged that he had exhausted all available habeas corpus relief and that he would have to obtain permission from the Eleventh Circuit in order to file a second or successive habeas petition. The Eleventh Circuit reasoned that Nelson's request to stay his execution directly impeded the implementation of the state sentence and was indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus.

The Eleventh Circuit ruled that Nelson was not entitled to file a second habeas petition. His claim did not rely on a new rule of constitutional law. Nor did it possess a factual predicate that (1) could not have been discovered previously and (2) would have been sufficient to establish that, but for constitutional error, no reasonable fact finder would have found him guilty of the underlying offense.

In his dissent, Circuit Judge Wilson contended that a complaint seeking § 1983 relief in the form of a temporary stay of execution is not automatically equivalent to a successive habeas petition. He stated that before making the determination of whether the § 1983 proceeding should be considered a habeas petition or a civil rights action, a court must inquire into the fundamental question of whether the plaintiff is actually seeking to challenge either the fact of his conviction or the sentence. If Nelson's action, even if successful, would not demonstrate the invalidity of any outstanding criminal judgment against him, Judge Wilson asserted, the § 1983 action should be allowed to proceed in

(Continued on Page 336)

the absence of some other bar to the suit.

The Supreme Court granted Nelson's petition for a writ of certiorari. 124 S.Ct. 383 (2003).

### CASE ANALYSIS

Section 1983 of the Civil Rights Act of 1871 provides a remedy for vindicating violations of all rights, privileges, and immunities secured by law. To state a claim under § 1983, the plaintiff must establish two essential elements: (1) that there was a violation of a right "secured by the Constitution or laws of the United States," and (2) that the person who committed the alleged violation was "acting under color of state law."

The treatment an inmate receives in prison and the conditions under which an inmate are confined are subject to scrutiny under the Eighth Amendment's prohibition of "cruel and unusual punishments." Those confined within penal institutions cannot be subjected to cruel and unusual punishments by reason of offensive practices.

The writ of habeas corpus provides a means by which the legal authority under which a person is detained can be challenged. A writ of habeas corpus may be used to re-examine federal constitutional issues even after trial and review by the state courts. *Brown v. Allen*, 344 U.S. 443 (1953). By means of a writ of habeas corpus, a federal court may order the discharge of any person held by a state in violation of the federal Constitution or laws. See 28 U.S.C. § 2241(c)(3).

Congress made a number of important changes to the habeas corpus statutes in 1996 as part of the Antiterrorism and Effective Death Penalty Act of 1996. Although the requirement of exhaustion of state

remedies was preserved, 28 U.S.C. § 2244(b) was amended to provide a limit on second or successive applications by inmates in state custody. Under this provision, a claim presented in a second or successive application that was presented in an earlier application will be dismissed. 28 U.S.C. § 2244(b)(1).

Moreover, even if the claim in a second or successive application was not presented in a previous application, it will still be dismissed unless the applicant shows that the claim relies on a new and previously unavailable rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Similarly, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ."

The Eleventh Circuit's rule that a § 1983 action seeking a stay of execution must be treated as a habeas petition distinguishes between death row inmates whose execution dates are imminent and those whose dates are not. In *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002), the Eleventh Circuit allowed a death row inmate's § 1983 action that did not include a request for a stay of execution because a judgment in favor of the plaintiff would not "necessarily imply the invalidity of his conviction." See *Heck v. Humphrey*, 512 U.S. 477 (1994).

Nelson argues that serious constitutional issues may emerge concerning the procedures for executing an individual after that inmate's federal

habeas corpus proceedings have been completed. According to Nelson, the Eleventh Circuit's failure to provide any remedy for Eighth Amendment violations in these unusual situations would offend longstanding traditions of justice and raise grave constitutional questions that can readily be avoided by a proper interpretation of federal statutes. Nelson reasons that Congress enacted § 2244(b) to prevent state prisoners from using federal habeas corpus proceedings to attack their convictions or their sentences repetitiously or dilatorily. He claims that the Eleventh Circuit has converted § 2244(b) into a bar against the provision of any federal forum to a state inmate who is not attacking either a conviction or a sentence, but is seeking one—and only one—opportunity to present an Eighth Amendment claim of needless cruelty at the first opportunity after learning that a state prison official has decided to execute the sentence in a wantonly torturous manner.

Nelson relies on *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), in which the Supreme Court held that a federal habeas corpus petition presenting claims arising in the first instance out of the circumstances of a death row inmate's imminent execution—claims that were premature and unfit for adjudication until just before the execution was carried out—is not a second or successive petition for purposes of § 2244(b) when they are filed by an inmate who has earlier litigated and lost a habeas corpus proceeding raising claims that challenged the validity of the underlying conviction and sentence.

Under a proper construction of 28 U.S.C. § 1983, Nelson contends, a federal court does not invariably lose jurisdiction to entertain an otherwise cognizable § 1983 action

simply because the inmate has previously sought federal habeas corpus relief on unrelated grounds. According to Nelson, the Eleventh Circuit's rule allowing no exceptions in the case of prisoners whose claims in the later legal action could not have been presented in their earlier habeas corpus proceeding means that claims of this kind cannot be raised at all in the Eleventh Circuit because, by definition, they are always either too early or too late.

According to Nelson, when a previously unavailable claim that does not invalidate a conviction or sentence is otherwise cognizable under § 1983, a federal court is not jurisdictionally barred from reviewing the claim simply because the claimant is an inmate who has completed federal habeas corpus proceedings. Nelson points out that the Supreme Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), recognized that state prisoners may seek redress under § 1983 if a judgment in the prisoner's favor would not "necessarily imply" the invalidity of his or her conviction or sentence.

Relying on *Preiser v. Rodriguez*, 411 U.S. 475 (1973), Campbell asserts that Nelson's claim is not cognizable under § 1983 because it directly challenges the imposition of his death sentence. In *Preiser*, the Supreme Court stated that the fact that "[t]he broad language of § 1983" covers a prisoner-plaintiff's request for equitable relief is "not conclusive"; the "specific federal habeas corpus statute" is the exclusive remedy when it "clearly applies." By challenging a procedure that is a "condition precedent" to the imposition of his death sentence, Campbell contends, Nelson is challenging the sentence itself.

Campbell argues that the relief sought by Nelson—a stay of his impending execution—is not available under § 1983. According to Campbell, federal courts lack jurisdiction under § 1983 to stay executions.

If recharacterization of his § 1983 complaint is proper, Nelson says that the complaint should be entertained as a federal habeas corpus petition by the district court with no need for prior authorization by the court of appeals because it is not a second or successive habeas corpus application within the meaning of 28 U.S.C. § 2244(b). Nelson stresses that his claim could not have been presented in his previously federal habeas corpus proceeding because it was premature when that proceeding was maintained and finally adjudicated.

### SIGNIFICANCE

If the Supreme Court upholds the dismissal of Nelson's lawsuit, he will effectively be left without a federal forum for reviewing his Eighth Amendment claim. If a § 1983 action seeking a stay of execution must be treated as a habeas petition, this means that after a death row inmate has filed his first federal habeas petition, the inmate can probably never obtain a stay of execution from a federal court that would enable that court to review an Eighth Amendment claim regarding any later decision as to how the execution will be carried out.

On the other hand, if the Supreme Court reverses the Eleventh Circuit, inmates could still raise constitutional challenges to the means of execution despite having previously filed habeas corpus petitions. Inmates would still be restricted from filing successive actions challenging their sentences or convictions.

### ATTORNEYS FOR THE PARTIES

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