ORIGINAL

Supreme Court, U.S.
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No. 03-6822

IN THE UNITED STATES SUPREME COURT

October Term, 2003

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL,
In his individual and official capacity as
Commissioner of the Alabama Department of Corrections,
and
GRANTT CULLIVER,
In his individual and official capacity as Warden of William C.
Holman Correctional Facility,
Respondents.

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

1. Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, which does not attack a conviction or sentence, is - simply because the person is under a sentence of death - to be treated as a habeas corpus case subject to the restriction on successive petitions which categorically precludes review of *any* constitutional violation not related to innocence (as the Fourth, Fifth and Eleventh Circuits hold), or can be maintained as § 1983 action (as the Sixth, Eighth and Ninth Circuits and several lower courts hold)?

2. Whether a cut-down procedure which involves pain and mutilation, conducted prior to an execution by lethal injection, violates the Eighth Amendment to the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

ATTACHMENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. COURSE OF PROCEEDINGS 3

B. STATEMENT OF FACTS 5

REASONS FOR GRANTING THE PETITION 22

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS BY DECIDING WHETHER ALL CLAIMS BROUGHT BY DEATH-SENTENCED INMATES PURSUANT TO 42 U.S.C. § 1983 ARE TO BE TREATED AS SUCCESSIVE HABEAS CORPUS PETITIONS. 23

II. THE CUT-DOWN MEDICAL PROCEDURE THAT THE RESPONDENTS INTEND TO PERFORM ON THE PETITIONER AS A PREDICATE TO THE LEGAL PROCEDURE OF EXECUTION BY LETHAL INJECTION UNDOUBTEDLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT PROSCRIBED BY THE EIGHTH AMENDMENT. 28

CONCLUSION 32

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS:

David Larry Nelson brought this action pursuant to 42 U.S.C. § 1983 to challenge the cut-down procedure which the Respondents intend to utilize in order to gain venous access prior to Mr. Nelson's execution. The cut-down procedure involves pain and mutilation. Mr. Nelson asserted that the Respondents should utilize the percutaneous central line placement to gain venous access. As such, Mr. Nelson was not and is not challenging the validity of his conviction or sentence but is challenging the cut-down procedure which will be utilized prior to his execution.

The District Court treated the action as a successive habeas petition and found that it did not have jurisdiction. Attached as Attachment 10. In so finding the District Court stated:

> It would seem that there should be a process by which Nelson can seek enforcement of his Eighth Amendment rights. (Attachment 10 at page 13).

On October 8, 2003 a Panel of the Eleventh Circuit affirmed the District Court by a vote of 2 to 1. Attached as Attachment 11. In dissent, Judge Wilson stated:

> In light of the clear authority indicating that Nelson's claim should be construed exclusively under §1983, I strongly disagree

with the majority's holding. (Attachment 11 at page 7)

Nelson seeks only a temporary stay of execution until concerns regarding the manner of his execution are addressed. (Attachment 11 at page 7)

The "cut down" procedure that is to be used in his execution is not within Alabama's execution procedure, nor has it been reviewed to ensure that it passes muster the Eighth Amendment. Nelson merely requests that a different, more humane procedure known as "percutaneous central venous cannulation" be used to carry out his execution, rather than the outmoded and painful "cut down" procedure. Regardless of which procedure is used, Nelson will be executed by lethal injection in accordance with his sentence. However, with the implementation of the "cut down" procedure, Nelson's Eighth Amendment rights may be compromised in the process. (Attachment 11 at page 9-10).

B. STATEMENT OF FACTS:

Petitioner David Nelson presently is incarcerated at William C. Holman Correctional Facility in Atmore, Alabama (hereinafter referred to as "Holman"). The Petitioner is scheduled to be executed by lethal injection at 6:00 p.m. Central Time on October 9, 2003 at Holman.

The Petitioner was transferred to Holman from Donaldson Correctional Facility in Bessemer, Alabama (hereinafter referred to as "Donaldson") upon his death warrant being issued by this Court.

REASONS FOR GRANTING THE PETITION

This case presents questions of extraordinary importance whether death-sentenced inmates are to be denied the right to bring actions under 42 U.S.C. § 1983 simply because of their sentence. If the decision below is correct, death-sentenced inmates who have filed a federal habeas corpus petition are barred from bringing any § 1983 action that could be brought by other inmates, such as suits based on failure to protect from know risk of harm from other inmates,[6] the malicious and sadistic infliction of harm by prison guards,[7] "unnecessary and wanton infliction of pain,"[8] denial of medical care,[9] or denial of the minimal civilized measure of life's necessities.[10]

The holdings below make this Court the only avenue for a unique and limited set of claims that may arise long after habeas corpus proceedings have ended, such as competence to be executed and some claims - such as deprivation of good conduct time credits - that can *only* be raised in habeas corpus, see Preiser v. Rodriguez, 411 U.S. 475 (1973), and burdening this Court with the duty to engage in fact-finding determinations usually conducted by trial courts

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6. See Farmer v. Brennan, 511 U.S. 825 (1994).
7. See Hudson v. McMillan, 503 U.S. 1, 6-7 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986).
8. See Rhodes v. Chapman, 452 U.S. 337, 346 (1981)
9. See Estelle v. Gamble, 429 U.S. 97 (1976).
10. See Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999).

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS BY DECIDING WHETHER ALL CLAIMS BROUGHT BY DEATH-SENTENCED INMATES PURSUANT TO 42 U.S.C. § 1983 ARE TO BE TREATED AS SUCCESSIVE HABEAS CORPUS PETITIONS.

This Court should grant the petition because the Eleventh Circuit and other circuits have misread this Court's decision in Gomez v. United States District Court, 503 U.S. 653 (1992) and Lonchar v. Thomas, 517 U.S. 314 (1996), to hold that any actions brought under 42 U.S.C. § 1983 by a death-sentenced prisoner are to be treated as successive habeas corpus petitions. The Eleventh Circuit has repeatedly held that Gomez and Lonchar "mandate the conclusion that 'a § 1983 claim is subject to the procedural requirements for bringing a second or successive habeas claim.'" Spivey v. Board of Pardons and Paroles, 279 F.3d 1301, 1302 (11th Cir. 2002) (quoting Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996)).

Despite the fact that § 1983 cases do not challenge the conviction or sentence, the Eleventh Circuit has applied Gomez to find that any claim raised in a § 1983 action "necessarily implies a challenge to the imposition of his sentence." Spivey, 279 F.3d at 1302 n. 1 (finding that challenge to propriety of clemency proceedings implied a challenge to his sentence); see also Felker v. Turpin, 101 F.3d 95, 96 (11th Cir. 1996) (finding challenge to means of execution to be the "functional equivalent" of a second habeas corpus petition).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
October 8, 2003
THOMAS K. KAHN
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No. 03-15095

D. C. Docket No. 03-T-1008-N

DAVID LARRY NELSON,

Plaintiff-Appellant,

versus

DONAL CAMPBELL, in his individual
and official capacity as Commissioner of
the Alabama Department of Corrections,
GRANTT CULLIVER,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(October 8, 2003)

Before ANDERSON, HULL and WILSON, Circuit Judges.

ANDERSON, Circuit Judge:

David Larry Nelson is an Alabama inmate convicted of capital murder and sentenced to death. On October 6, 2003, three days prior to his scheduled execution,

Nelson filed a 42 U.S.C. § 1983 action in the Middle District of Alabama. In his complaint, Nelson asserts that he has severely compromised veins 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.[1] Nelson further asserts a state law claim, pursuant to 28 U.S.C. § 1367, alleging that he has been denied access to his physician in violation of Alabama law. Among other relief, Nelson requests an order granting injunctive relief and staying his execution scheduled for October 9, 2003. By order dated October 7, 2003, the district court dismissed Nelson's complaint for lack of jurisdiction. We affirm.

As we stated in Hill v. Hopper, 112 F.3d 1088, 1088-1089 (11th Cir. 1997), "a prisoner may not circumvent the rules regarding second or successive habeas petitions by filing a § 1983 claim." See also Felker v. Turpin, 101 F.3d 95 (11th Cir. 1996); Spivey v. State Bd. of Pardons and Paroles, 279 F.3d 1301 (11th Cir. 2002). The full procedural history of this case prior to the instant § 1983 claim is set out in detail in Nelson v. Alabama, 292 F.3d 1291, 1293-1294 (11th Cir. 2002). However,

[1]The "cut-down" procedure would require making a two inch incision in Nelson's upper arm for the purpose of locating a peripheral vein to perform a central line procedure. The procedure would be performed using local anesthetic.