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Johnson v. Reid No. 04A-87, 2004 WL 1784349, at *1 (U.S. Aug. 11, 2004)

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I. Facts

In December 1997 James Edward Reid pleaded guilty to capital murder during the commission of attempted rape and attempted robbery, and the trial court sentenced Reid to death.[1] After Reid's subsequent appeals and habeas corpus petitions were denied, the Commonwealth of Virginia ("Commonwealth") set Reid's execution for December 18, 2003.[2] Three days before the scheduled execution, Reid filed an action pursuant to 42 U.S.C. § 1983 against three Virginia prison officials responsible for carrying out his execution, Gene M. Johnson, George M. Hinkle, and William Page True ("Applicants").[3] The § 1983 action asserted that the Commonwealth's lethal injection protocol violated the Eighth Amendment prohibition against "cruel and unusual punishment."[4] Reid

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1. Reid v. Commonwealth, 506 S.E.2d 787, 788 (Va. 1998); *see* VA. CODE ANN. § 18.2-31(4), (5) (Michie 2004) (stating that "[t]he willful, deliberate, and premeditated killing of" a person while committing attempted rape or attempted robbery shall constitute capital murder); *see also* VA. CODE ANN. § 19.2-283 (Michie 2004) (providing that a court may convict a defendant of a felony upon a plea of guilty). For a more complete description of Reid's case, see generally Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 465 (2004) (analyzing Reid v. True, 349 F.3d 788 (4th Cir. 2003)).

2. Reid v. Johnson, 105 Fed. Appx. 500, 501–02 (4th Cir. 2004) (opinion not selected for publication).

3. *Id.* at 502; *see* 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . ."). Gene Johnson is the Director of the Virginia Department of Corrections, George Hinkle is the Warden of the Greensville Correctional Center, and William Page True, Jr. is the Warden of Sussex I State Prison. *Reid*, 105 Fed. Appx. at 500.

4. *Reid*, 105 Fed. Appx. at 500–01; *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Commonwealth uses a mix of sodium thiopental, pancuronium bromide, and potassium chloride when executing a person by lethal injection. *Reid*, 105 Fed. Appx. at 502; *see also* Reid v. Johnson, 333 F. Supp. 2d 543, 546–48 (E.D. Va. 2004) (providing a complete description of the lethal injection protocol for Reid's execution). Reid's primary claim was that the pancuronium bromide neutralizes the effects of sodium thiopental, which renders a person unconscious shortly after the injection. *Reid*, 105 Fed. Appx. at 502. If a prisoner did not get the full effect of the sodium thiopental, Reid alleged that he would feel the painful effects of the potassium chloride during the execution. *Id.*; *see also* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 100 (2002) (stating that pancuronium bromide causes condemned inmates to appear to be in a serene state when they may actually be conscious and experiencing severe pain).

sought to bar the Applicants from injecting him with the particular chemical "cocktail" the Commonwealth uses in lethal injections.[5] The district court dismissed the action and held that Reid should have brought his claim in a petition for a writ of habeas corpus, not under § 1983.[6] The district court found that Reid, having already sought a writ of habeas corpus in federal court, had to obtain the United States Court of Appeals for the Fourth Circuit's permission in order to file a second habeas corpus petition.[7]

Reid then filed a notice of appeal from the district court's decision, and the Fourth Circuit granted a certificate of appealability ("COA").[8] On December 17, 2003, the Fourth Circuit stayed the execution and held in abeyance whether Reid's claim was cognizable under § 1983 until the United States Supreme Court decided *Nelson v. Campbell*.[9] The issue in *Nelson* was whether § 1983 was an appropriate means for an inmate on death row to seek an injunction barring a state from performing an execution in an unconstitutional manner.[10] On the day set for Reid's execution, the Supreme Court denied the Applicants' motion to vacate the Fourth Circuit's stay of Reid's execution.[11]

On May 24, 2004, the Supreme Court held in *Nelson* that an inmate sentenced to death may use a 42 U.S.C. § 1983 action to challenge a non-essential part of a State's lethal injection procedure.[12] Three days later, the Applicants petitioned the Fourth Circuit to vacate the stay of Reid's execution.[13] The Applicants argued that the stay was moot because the execution date had

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5. *Reid*, 105 Fed. Appx. at 502.

6. *Id.*; *see* Heck v. Humphrey, 512 U.S. 477, 481 (1994) (requiring a state prisoner challenging the fact or duration of his confinement to do so under 28 U.S.C. § 2254 and not under 42 U.S.C. § 1983).

7. *Reid*, 105 Fed. Appx. at 501; *see* 28 U.S.C. § 2244(b)(3) (2000) (requiring a petitioner to obtain permission from the court of appeals prior to filing a successive petition for a writ of habeas corpus).

8. *Reid*, 105 Fed. Appx. at 502; *see* 28 U.S.C. § 2253(c) (2000) (explaining when a petitioner needs to obtain a COA from the court of appeals in order to appeal a decision in a habeas action); *see also* 4TH CIR. R. 22(a) (providing procedures for seeking a COA from the Fourth Circuit). Regarding the appeal, the Fourth Circuit was unsure whether Reid needed a COA before the court considered his appeal. *Reid*, 105 Fed. Appx. at 501 n.1. The Fourth Circuit decided to assume that Reid needed a COA and subsequently granted him one. *Id.*

9. Brief for Respondent at 2, Johnson v. Reid, 2004 WL 1784349 (U.S. Aug. 11, 2004) (No. 04A-87) (on file with author); *see* Nelson v. Campbell, 124 S. Ct. 2117, 2123 (2004) (permitting a death row inmate to use a 42 U.S.C. § 1983 claim to challenge nonessential part of State's lethal injection protocol). For a more complete discussion of *Nelson*, see generally Justin B. Shane, Case Note, 17 CAP. DEF. J. 107 (2004) (analyzing Nelson v. Campbell, 124 S. Ct. 2117 (2004)).

10. *Nelson*, 124 S. Ct. at 2120.

11. Johnson v. Reid, 124 S. Ct. 980, 980 (2003).

12. *Nelson*, 124 S. Ct. at 2123–24.

13. Brief for Respondent at 3, *Reid* (No. 04A-87).

passed.[14] In July 2004 the Attorney General of Virginia demanded that the trial court set a new execution date for Reid.[15] Later that month, Reid sought a writ of prohibition from the Supreme Court of Virginia to enjoin the trial court from setting a new execution date and to enjoin the Commonwealth from seeking a new execution date.[16] The Supreme Court of Virginia issued a writ of prohibition preventing the trial court from setting a new execution date until the Fourth Circuit decided whether to vacate the stay of execution.[17]

On August 2, 2004, the Fourth Circuit made the decision it had been holding in abeyance since December.[18] The court found, consistent with the holding in *Nelson*, that Reid's § 1983 claim was proper and Reid was not required to pursue habeas relief.[19] Thus, the Fourth Circuit reversed the district court's decision and remanded the case for the district court to determine the merits of Reid's § 1983 claim and whether to grant another stay of execution.[20] The Fourth Circuit denied the Applicants' motion to vacate the stay of execution and ordered the stay to "remain in effect for ten days after the issuance of our mandate or until Reid reinstates his request for preliminary injunctive relief in the district court, whichever occurs first."[21]

II. Holding

In a forty-two word order, the Supreme Court of the United States summarily vacated the Fourth Circuit's stay of Reid's execution.[22] The Court did not, however, disturb the Fourth Circuit's decision to remand Reid's § 1983 claim to the district court.[23] Thus, the ruling allowed the Commonwealth to schedule and carry out Reid's execution before Reid exhausted his § 1983 claim.

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14. *Id.*

15. *Id.* at 4; *see* VA. CODE ANN. § 53.1-232.1 (Michie 2002) (instructing the trial court to call a hearing to set a date for execution once the Attorney General notifies the trial court that the United States Court of Appeals has denied a inmate's federal habeas corpus petition).

16. Brief for Applicants at 4, Johnson v. Reid, 2004 WL 1784349 (U.S. Aug. 11, 2004) (No. 04A-87) (on file with author).

17. *Id.*

18. *Reid*, 105 Fed. Appx. at 503.

19. *Id.*

20. *Id.*

21. *Id.*

22. Johnson v. Reid, No. 04-A87, 2004 WL 1784349, at *1 (U.S. Aug. 11, 2004).

23. *Id.*; *see Reid*, 105 Fed. Appx. at 503 (remanding Reid's § 1983 claim to the district court for a decision on the merits).

III. Analysis

The Supreme Court gave no reasons for vacating the stay of Reid's execution.[24] The Court's reasoning, however, can be inferred from the parties' filings, the Court's decision in *Nelson*, and the Fourth Circuit's decision in *Reid*.[25]

A. Sovereign Power

The Applicants first argued that the Commonwealth had a strong interest in exercising its sovereign power to carry out Reid's sentence.[26] The Fourth Circuit waited almost three months after the Court decided *Nelson* to decide whether to vacate the stay.[27] The Applicants argued that under Virginia Code § 53.1-232(B), the Commonwealth must reschedule an execution date when a scheduled execution passes because of a court-ordered stay.[28] The Applicants also cited *Nelson*, which noted that Alabama could reschedule Nelson's execution during remand proceedings because the original stayed execution date had expired.[29] Thus, the Applicants argued that the stay had expired and the confusion resulting from the Fourth Circuit's inaction prevented the Applicants from carrying out Reid's sentence.[30]

In response, Reid cited two rules supporting his position that the stay remained in effect. First, Reid cited Fourth Circuit Rule 8, which states that " '[a]n order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court.' "[31] Second, Reid cited Virginia Code section 53.1-232(D), which states that the Director of the Department of Corrections must respect a stay of execution ordered by any court.[32] Further, Reid supported his argument by referring to the Supreme Court of Virginia's decision to uphold the stay by issuing a writ of prohibition.[33]

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24. *Reid*, 2004 WL 1784349, at *1.

25. *See* Brief for Applicants at 4–8, *Reid* (No. 04A-87) (arguing that the Court should vacate the stay of Reid's execution); *see also* Brief for Respondent at 5–8, *Reid* (No. 04A-87) (arguing that the Court should not vacate the stay of Reid's execution).

26. Brief for Applicants at 4–6, *Reid* (No. 04A-87).

27. *Id.* at 3.

28. *Id.* at 4; *see* VA. CODE ANN. § 53.1-232(B) (Michie 2002) (stating that when the original execution date passes, the trial court that set the first date shall schedule a new execution date).

29. Brief for Applicants at 5, *Reid* (No. 04A-87).

30. *Id.* at 5–6. Applicants appeared to be making this argument because the Director of the Department of Corrections was unable to reschedule the execution date because of the Supreme Court of Virginia's order prohibiting the Director from performing such action. *Id.* at 4.

31. Brief for Respondent at 6, *Reid* (No. 04A-87) (quoting 4TH CIR. R. 8); *see* 4TH CIR. R. 8 (explaining the status of a judgment when a petitioner files a notice of appeal with the Fourth Circuit for review of that judgment).

32. Brief for Respondent at 6 n.3, *Reid* (No. 04A-87) (citing VA. CODE ANN. § 53.1-232(D)).

33. *Id.* at 6.

B. Nelson *Balancing Test*

Second, the Applicants argued that *Nelson* does not require courts to keep a stay of execution in effect while § 1983 claims are litigated.[34] The Court in *Nelson* stated that "the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right."[35] *Nelson* instructed courts to consider the possible success of the claim on the merits, the possible harm to the parties, and the last-minute nature of the claim when assessing whether to grant a stay of execution.[36] The Applicants claimed that the Court should vacate the stay because Reid had filed the action three days prior to the execution, Reid's claim was not likely to succeed because the Commonwealth had used the lethal injection protocol for years, and the Commonwealth had a strong interest in carrying out the sentence.[37] In particular, the Applicants emphasized that Reid brought a claim three days prior to the execution that he could have brought years earlier.[38]

In response, Reid argued that his claim challenged the Commonwealth's use of cut-down procedures and, thus, in light of *Nelson*, the Court should uphold the stay in order for the district court to rule on the constitutionality of the cut-down procedure prior to Reid's execution.[39] Reid attempted to distinguish his case from others where the Supreme Court had vacated stays by arguing that his execution was not imminent because the Commonwealth had not rescheduled a new execution date.[40] Reid implied that the Fourth Circuit's decision only kept the stay in effect for another ten days and a Supreme Court order vacating the stay was unnecessary because it would only allow the Director to schedule the

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34. Brief for Applicants at 6–7, *Reid* (No. 04A-87).

35. *Nelson*, 124 S. Ct. at 2125–26.

36. *Id.*; *see also* Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

37. Brief for Applicants at 7, *Reid* (No. 04A-87).

38. *Id.* at 7. Specifically, the Applicants seemed to say that Virginia did not require them to disclose the details of their lethal injection procedures until right before Reid's execution, but they would have disclosed the procedures had the defense asked. *See* Response Brief for Applicants at 2 n.2, Johnson v. Reid, 2004 WL 1784349 (No. 04A-87) (replying to Reid's claim that the procedures were not available to the defense prior to filing the § 1983 claim). According to Deborah W. Denno, the Commonwealth was one of four states that would not disclose the chemicals used in their lethal injection protocol as of 2001. DENNO, *supra* note 4, at 116, 146.

39. Brief for Respondent at 7, *Reid* (No. 04A-87). Although Reid's original § 1983 claim did not challenge the Commonwealth's use of a cut-down procedure for gaining venous access, Reid claimed that the Commonwealth did not disclose its intention to use the procedure until after the claim was filed. *Id.* Reid planned to amend his complaint to include a challenge to the use of the cut-down procedure. *Id.*

40. *Id.* at 7.

execution a few days earlier.[41] Further, Reid argued that he could not have brought his claim any earlier because the Commonwealth did not disclose its lethal injection procedures before Reid filed his claim.[42]

IV. Application in Virginia

The Supreme Court's summary decision in *Reid* seems to have hinged on the untimeliness of Reid's filing. The Supreme Court in *Nelson* and the Fourth Circuit in *Reid* recognized that a petitioner may challenge execution procedures by using a § 1983 claim as opposed to a habeas corpus petition.[43] However, when a defendant makes a challenge under § 1983, the court has discretion not to enter a stay of execution.[44] When a defendant makes such a claim, the court must review the likelihood that the claim will succeed, the relative harm to the parties, and the timeliness of the inmate's claim.[45] After setting out that test three months earlier in *Nelson*, it is safe to assume that the Court analyzed the Applicants' motion to vacate the stay under the same rubric.

The most significant feature of Reid's claim was its last-minute nature. Reid filed his claim three days prior to the execution.[46] Regardless of the reasons for lateness, the Court clearly disfavors claims filed that close to the execution.[47] As

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41. *See id.* at 5 ("[T]he Fourth Circuit already has provided for the timely termination of its preliminary injunction and for the district court's timely consideration of Reid's to-be-filed application for a preliminary injunction.").

42. *Id.* at 8. In addition to the Commonwealth's failure to make the information available, the defense emphasized that Virginia allows the Applicants to change abruptly the lethal injection protocol. *Id.* at 8 n.4. Thus, Reid could not challenge the lethal injection protocol itself because, even if it had been disclosed, there was no way of knowing what protocol the Applicants would actually use until the last minute. *Id.* Reid made the additional argument that this was not a " 'most extraordinary circumstance[]' " that warrants the Court's action. *Id.* at 5–6 (quoting SUP. CT. R. 23.3). The rule states, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." SUP. CT. R. 23.3. This argument may not have worked because the Applicants had previously filed a motion to vacate with the Fourth Circuit. Brief for Applicants at 3, *Reid* (No. 04A-87). Thus, the Applicants did seek the relief requested from the appropriate court below, and the Court was not restricted to entertaining the application only if it was an extraordinary circumstance. *Id.*

43. *See Nelson*, 124 S. Ct. at 2123 (stating that "[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself" is a challenge to the conditions of the sentence and cognizable under § 1983); *Reid*, 105 Fed. Appx. at 503 (explaining that Reid's claim was cognizable under § 1983 because it challenged the procedure involved in the execution and not the execution itself).

44. *Nelson*, 124 S. Ct. at 2124–25.

45. *Id.* at 2126.

46. *Reid*, 105 Fed. Appx. at 502.

47. *See Nelson*, 124 S. Ct. at 2126 ("[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.").

Reid demonstrates, the Court will not require federal courts hearing such a § 1983 claim to stay the execution while the claim is being decided. Thus, when challenging a lethal injection protocol, inmates need to file § 1983 claims as early as possible in order to give federal courts time to rule on the merits prior to any scheduled execution date.

Since *Nelson*, other federal courts have denied requests to stay executions based on the factors set forth in *Nelson*.[48] In *Harris v. Johnson*,[49] the prisoner brought a claim under § 1983 to enjoin the State of Texas from using a particular chemical mix in its lethal injection protocol.[50] The United States Court of Appeals for the Fifth Circuit granted the State's motion to vacate the temporary restraining order because Harris had waited until ten weeks prior to the scheduled execution to bring the claim.[51] The primary differences between Harris's and Reid's claims are that Harris had been on death row for 18 years without bringing the claim and Texas's lethal injection protocol had been public information.[52] In denying the claim, the Fifth Circuit hinted that death row inmates should bring their § 1983 claims during federal habeas proceedings in order to give federal courts adequate time to decide the claim.[53]

Nelson and *Reid* also teach inmates to carefully focus their claims.[54] An action challenging the cut-down procedure used in a lethal injection is cognizable under § 1983 as long as the cut-down procedure is unnecessary for carrying out the lethal injection.[55] However, the Court in *Nelson* notes that challenges to an execution procedure may not be cognizable under § 1983 if a statute mandates that procedure or the procedure is necessary for the execution.[56] In finding Reid's claim judicially cognizable under § 1983, the Fourth Circuit pointed to Reid's assertion that other constitutionally permissible lethal injection protocols exist.[57] Inmates may benefit by pointing to other acceptable execution procedures when asserting a § 1983 claim in order to demonstrate that they are not challenging the method of execution generally.

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48. *See* Harris v. Johnson, 376 F.3d 414, 417–19 (5th Cir. 2004) (denying Harris's request for an injunction against the State from using a particular execution method because of the last-minute nature of Harris's claim).

49. 376 F.3d 414 (5th Cir. 2004).

50. *Harris*, 376 F.3d at 415–16.

51. *Id.* at 416.

52. *Id.* at 417.

53. *Id.*

54. *See Nelson*, 124 S. Ct. at 2122 (finding that Nelson avoided having to file his claim as a writ of habeas corpus by carefully wording his complaint).

55. *Id.*

56. *Id.*

57. *Reid*, 105 Fed. Appx. at 503.

V. Conclusion

In asserting a § 1983 claim, inmates must focus their claims in a way that does not challenge the sentence as such.[58] An inmate's claim may only challenge the conditions of the sentence.[59] Further, such challenges should be brought as early as possible because federal courts are under no obligation to issue stays of executions while inmates litigate their § 1983 claims.[60] Particularly, inmates will have no excuse for waiting to assert claims on the eve of their executions because the Commonwealth's lethal injection protocol is now public knowledge.

VI. Epilogue

On September 3, the district court denied Reid's motion for injunctive relief in the form of a stay of the execution that the Commonwealth had set for September 9, 2004.[61] The district judge found that Reid did not establish that the chemical combination in the Commonwealth's protocol would cause Reid to experience immediate irreparable harm because "the chance that Reid will be conscious of any pain associated with the second two drugs and of his death is less than 6/1000 of one percent."[62] The United States Supreme Court rejected Reid's last-minute request for an injunction, and Governor Mark Warner denied Reid's clemency petition on the day the execution.[63] The Commonwealth executed James Edward Reid on September 9, 2004.[64] Due to his compromised veins, the executioner needed to insert the intravenous line in Reid's upper groin.[65] Reid's last words were, "I forgive you for what you are doing but I don't forgive you for what you think, or for what you feel, or what you say, or what you do. I forgive you because God has forgiven me."[66]

Justin B. Shane

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58. *Nelson*, 124 S. Ct. at 2122.

59. *Id.*

60. *Id.* at 2125–26.

61. *Reid*, 333 F. Supp. 2d at 554.

62. *Id.* at 551.

63. Frank Green, *Requests Denied; Killer is Executed; James Edward Reid Killed Christiansburg Woman in October '96*, RICH. TIMES-DISPATCH, Sept. 10, 2004, at B1, *available at* 2004 WL 61914911.

64. Ian Shapira, *Virginia Executes Elderly Woman's Killer*, WASH. POST, Sept. 10, 2004, at B3, *available at* 2004 WL 93175121.

65. Green, *supra* note 63, at B1.

66. *Id.*