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I. Facts

In October 1978 a jury convicted David L. Nelson of the capital murder of Wilson Thompson and sentenced Nelson to death.[1] Upon the State's motion, on September 3, 2003, the Supreme Court of Alabama set Nelson's execution date for October 9, 2003.[2] From the time the trial court sentenced Nelson through the United States Court of Appeals for the Eleventh Circuit's decision to affirm his sentence, Alabama's method of execution was electrocution.[3] In July 2002 Alabama changed its default method of execution to lethal injection and gave condemned defendants the choice of electrocution upon thirty days written notice.[4] Nelson did not make a timely request for execution by electrocution; therefore, the State planned to execute Nelson by lethal injection.[5]

After examining Nelson on September 10, 2003, a nurse at the Holman Correctional Facility, the execution site, discovered that Nelson's veins were compromised.[6] The Warden then informed Nelson that the staff needed to make a "0.5-inch incision in petitioner's arm and catheterize a vein 24 hours before the scheduled execution" to perform the lethal injection.[7] About a month later, six days before the execution date, the Warden informed Nelson that it would be necessary to make a two-inch incision in his arm or leg one hour before the execution using local anesthesia ("cut-down procedure") in order to access Nelson's veins.[8]

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1. Nelson v. Alabama, 292 F.3d 1291, 1293 (11th Cir. 2002). The United States Court of Appeals for the Eleventh Circuit denied Nelson's petition for habeas relief after a series of state and federal habeas appeals involving the trial court's failure to question Nelson about his decision to proceed pro se. *Nelson*, 292 F.3d at 1293–94; *see* Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)) (instructing a court to ascertain whether a defendant is " 'knowingly and intelligently' " waiving his right to proceed with counsel).

2. Nelson v. Campbell, 124 S. Ct. 2117, 2121 (2004).

3. *Id.* at 2120; *see* ALA. CODE § 15-18-82(a) (1995) (requiring death sentences to be carried out by electrocution).

4. *Nelson*, 124 S. Ct. at 2120; *see* ALA. CODE § 15-18-82.1 (Supp. 2003) (requiring the State to execute defendants sentenced to death by lethal injection unless they opt for electrocution).

5. *Nelson*, 124 S. Ct. at 2120–21.

6. *Id.* at 2121.

7. *Id.*

8. *Id.* Additionally, the Warden could not assure Nelson that a physician would be present during the cut-down procedure. *Id.*

The following Monday, three days before the execution date, Nelson filed a claim pursuant to 42 U.S.C. § 1983 asserting that the cut-down procedure constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[9] Nelson sought, *inter alia*, a temporary stay of his execution and a permanent injunction barring the Commissioner of the Alabama Department of Corrections from using the cut-down procedure.[10] The district court dismissed Nelson's claim on the grounds that he should have filed the claim as a second habeas corpus petition subject to the highly restrictive gatekeeping provisions of 28 U.S.C. § 2244(b).[11] The Eleventh Circuit affirmed the district court's dismissal and added that Nelson's claim did not satisfy the requirements of 28 U.S.C. § 2244(b) because he did not show that " 'but for the purported Eighth Amendment violation, no reasonable fact finder would have found [him] guilty of the underlying offense.' "[12]

II. Holding

The United States Supreme Court reversed the Eleventh Circuit's decision and remanded the questions of whether to enjoin the Warden from using the cut-down procedure and whether to grant a temporary stay on Nelson's execution.[13] The Court held that Nelson could challenge the Alabama cut-down procedure using 42 U.S.C. § 1983 and that he did not have to file the claim as a habeas corpus petition.[14] The Court noted that Nelson could invoke § 1983 if the cut-down procedure was an unnecessary part of the execution.[15] If the cut-down procedure was necessary in order to execute Nelson, however, then the district court would need to determine whether the claim was cognizable under § 1983.[16]

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9. *Id.*; *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); 42 U.S.C. § 1983 (2004) ("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 in an action at law . . . ."). Attached to the complaint was an affidavit from Dr. Mark Heath stating that the cut-down procedures are very painful and dangerous and that less painful alternatives are available. *Nelson*, 124 S. Ct. at 2121–22.

10. *Nelson*, 124 S. Ct. at 2121.

11. *Id.* at 2122; *see* 28 U.S.C. § 2244(b)(2) (2000) (instructing a court to dismiss a new claim raised in a successive habeas corpus petition unless the claim relies on a new rule of constitutional law, or the petitioner could not have previously discovered a piece of evidence, and the evidence as a whole is such that no reasonable fact finder would find the petitioner guilty of the offense).

12. Nelson v. Campbell, 347 F.3d 910, 912 (11th Cir. 2003) (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)).

13. *Nelson*, 124 S. Ct. at 2124–26.

14. *Id.* at 2120.

15. *Id.* at 2124–25.

16. *Id.* at 2124.

III. Analysis

A. Availability of 42 U.S.C. § 1983

The Commissioner of the Alabama Department of Corrections argued that Nelson's claim challenged "the fact of his conviction or the duration of his sentence."[17] The Supreme Court acknowledged that a prisoner must bring a "fact or duration" claim by means of a habeas corpus petition, even if it may be cognizable under § 1983.[18] Nelson claimed, however, that he was only challenging the conditions of his confinement, and that as such, he did not need to file his claim as a habeas corpus petition.[19] The Court agreed that a claim challenging the conditions of confinement is cognizable under § 1983, but concluded that Nelson's claim was neither a "fact or duration" challenge nor a "conditions of incarceration" challenge.[20]

The Court held that a petitioner may use § 1983 to challenge the constitutionality of an unnecessary part of a lethal injection procedure.[21] The Court limited its holding to claims challenging unnecessary execution procedures and did not rule on whether a prisoner may use § 1983 to challenge a method of execution in general.[22] The Court determined that inquiry into whether a procedure is necessary may include whether the procedure is statutorily mandated, whether it is physically necessary in order to perform the lethal injection, and whether acceptable alternative procedures exist.[23] The Court based its reasoning on its previous holdings that a prisoner may only bring a civil rights damage action under § 1983 if the claim does not necessarily challenge the "fact or duration" of the prisoner's sentence.[24] Thus, Nelson's claim was proper under § 1983, provided that Alabama could execute Nelson by lethal injection without the cut-down procedure.[25] The Court remanded the issue of whether the cut-down procedure was necessary.[26]

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17. *Id.* at 2122.
18. *Id.* (citing Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)).
19. *Nelson*, 124 S. Ct. at 2122.
20. *Id.* at 2123 (citing Muhammed v. Close, 124 S. Ct. 1303, 1304 (2004)).
21. *Id.* at 2124.
22. *Id.*
23. *Id.* at 2123–24.
24. *Id.* at 2124–25 (citing Heck v. Humphrey, 512 U.S. 477, 487 (1994)).
25. *Nelson*, 124 S. Ct. at 2124–25.
26. *Id.*; *see also* Brief of Amici Curiae Laurie Dill, M.D. et al. at 7–8, Nelson v. Campbell, 124 S. Ct. 2117 (2004) (No. 03-6821) (discussing alternative methods for gaining intravenous access of condemned prisoners with compromised veins).

B. *Temporary Stay of Execution*

Nelson requested a temporary stay of execution, but did not condition the request on Alabama's need to use the cut-down procedure.[27] In a warning to Nelson about the broadness of his request, the Court stated that a proper request would have included the condition.[28] If Nelson resubmitted a similarly broad request on remand, the Court instructed the district court to address whether such a broad request converts an otherwise viable § 1983 claim into a claim cognizable only in federal habeas proceedings.[29] The Court was concerned that such a broad request challenged the sentence as a whole.[30] However, the Court did not rule on whether Nelson's broad request turned his claim into the functional equivalent of a habeas corpus petition because the previous stay on Nelson's execution had expired and the State had not rescheduled the execution.[31] Thus, the Court stated that the district court would only need to rule on Nelson's request for a stay if the State rescheduled the execution prior to the district court's proceedings.[32]

The Court gave some guidance to courts ruling on whether to grant a stay of execution pending the decision of a § 1983 claim.[33] The Court cited *Gomez v. United States District Court*[34] for the proposition that the filing of a § 1983 claim does not necessarily entitle the petitioner to a stay of execution.[35] The Court listed three factors for courts to consider in deciding whether to grant a stay: (1) the possible success of the claims on the merits; (2) the relative harm to the parties; and (3) any unnecessary delays in bringing the claims.[36] The Court emphasized that the State has a significant interest in carrying out criminal judgments.[37] Further, the Court noted that last-minute claims create a strong presumption against the issuance of a stay of execution.[38]

The Court reasoned that its decision will not trigger an influx of method-of-execution claims and last-minute stay requests because of a court's power not to

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27. *Nelson*, 124 S. Ct. at 2125.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Nelson*, 124 S. Ct. at 2125–26.

34. 503 U.S. 653 (1992).

35. *Nelson*, 124 S. Ct. at 2125–26 (citing Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam)).

36. *Id.* at 2126.

37. *Id.*

38. *Id.* It is unclear whether Nelson could have brought his challenge any earlier. The prison officials only notified Nelson six days prior to his execution that they would make a two-inch incision in his arm or leg in order to gain venous access. *Id.* at 2121.

issue a stay of execution and the limited nature of the *Nelson* holding.[39] Further, the Court noted that the Prison Reform Litigation Act ("PRLA") also protects the State and courts from prisoners who engage in abusive litigation.[40] The Court stated that the PRLA commands courts to dismiss claims brought under § 1983 if the claim is " 'frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from [] relief.' "[41] Also, the PRLA instructs courts to examine whether granting relief on the claim would adversely affect the criminal justice system and requires inmates to exhaust all state remedies prior to filing their § 1983 claims.[42] Thus, various procedural and substantive hurdles exist before a federal court may rule on the merits of a prisoner's § 1983 claim.[43]

IV. Application in Virginia

Regarding the cut-down procedure, *Nelson* has had little impact in Virginia because the Virginia Department of Corrections does not permit the use of the procedure in executions.[44] However, the Supreme Court did not limit its holding to cut-down procedures. The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Fifth Circuit have applied *Nelson's* holding to § 1983 claims challenging the chemical "cocktail" used in a State's lethal injection protocol.[45] Other possible issues to raise under § 1983 include the use of non-medical professionals in administering the lethal injection, the failure to use a saline solution in the protocol, the lack of written procedures for prison officials performing the injection, and the use of inappropriate amounts of chemicals in the protocol.[46]

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39. *Id.* at 2125–26.

40. *Id.* at 2126; *see* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. §§ 3624(b), 3626, and in scattered sections of 28 and 42 U.S.C.) (enacting certain requirements for prisoners prior to seeking injunctive relief against prison officials in federal court).

41. *Nelson*, 124 S. Ct. at 2126 (quoting 42 U.S.C. § 1997e(c)(1) (2000)).

42. *Id.* (citing 18 U.S.C. § 3626(a)(1) (2000)).

43. *Id.*

44. Brief for Applicants at 3 n.1, Johnson v. Reid, 2004 WL 1784349, No. 04A-87 (U.S. August 11, 2004) (on file with author); *see Supreme Court Lifts Killer's Stay of Execution*, DAILY PRESS (Richmond, Va.), Aug. 12, 2004, at C5, *available at* 2004 WL 85878821 (stating that Virginia does not permit the use of the cut-down procedure).

45. *See* Reid v. Johnson, 105 Fed. Appx. 500, 503 (4th Cir. 2004) (holding that the condemned inmate could challenge Virginia's lethal injection protocol under § 1983); Harris v. Johnson, 376 F.3d 414, 416 (5th Cir. 2004) (observing that a § 1983 claim may be appropriate for challenging the chemical combination in Texas's lethal injection protocol).

46. *See generally* 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, 105–25 (2002) (discussing possible Eighth Amendment challenges to lethal injection protocols).

The Court limited its holding to claims that do not necessarily imply the invalidity of a State's method of execution.[47] A claim is cognizable under § 1983 if there is a possibility that the inmate's prevailing on the claim will not affect the State's ability to perform the execution.[48] The Court stated that Nelson could challenge the cut-down procedure with a § 1983 claim if the State could access Nelson's veins in a different manner.[49] However, the Court added that if Alabama had no alternative procedures, then Nelson's claim would fall outside of the Court's holding.[50] Arguably, attorneys challenging execution procedures after the denial of their clients' federal habeas corpus petitions must propose acceptable alternative execution procedures when framing their § 1983 claims in order to avoid the possibility of the court construing the claim as a general method of execution challenge.

Virginia has not codified its lethal injection procedures and did not disclose the procedures until recently.[51] *Nelson* stated that "[i]f . . . the cut-down were a statutorily mandated part of the lethal injection protocol . . . [the Director of the Alabama Department of Corrections] might have a stronger argument that success on the merits . . . would call into question the death sentence itself."[52] Thus, even if a procedure is physically unnecessary to perform the execution, courts may treat a procedure as necessary if a statute mandates the use of that procedure.[53] Unlike Alabama prisoners, condemned prisoners in Virginia will not have the problem of filing § 1983 claims that challenge statutorily mandated execution procedures. For instance, the Virginia legislature has not mandated who administers lethal injections, and Virginia arguably has alternatives to using non-medical professionals for administering injections.[54] Thus, a prisoner could use § 1983 to challenge Virginia's use of non-medical professionals in administering lethal injections, even though Alabama prisoners may not be able to use §

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47. *Nelson*, 124 S. Ct. at 2125–26.

48. *See id.* at 2124–25 (stating that a prisoner may challenge the lawfulness of a search using § 1983 because a finding that the search was unlawful may not necessarily imply that conviction was unlawful).

49. *Id.* at 2124.

50. *See id.* at 2123 ("[I]mposition of the death penalty presupposes a means of carrying it out.").

51. *See Reid*, 105 Fed. Appx. at 503 (holding that Reid could challenge Virginia's lethal injection protocol under § 1983).

52. *Nelson*, 124 S. Ct. at 2123–24.

53. *Id.*

54. The American Medical Association does not permit members to participate in executions. DENNO, *supra* note 46, at 112 (citing Council on Ethical and Jud. Affairs, AMA, Coucil Rep., *Physician Participation in Capital Punishment*, 270 JAMA 365, 365 (1993)). Thus, States may need to use non-medical professionals for lethal injections.

1983 because an Alabama statute mandates that the Warden or an employee of the Department of Corrections administer lethal injections.[55]

Nelson held that stating a § 1983 claim does not entitle the prisoner to a temporary stay of execution.[56] When deciding whether to grant a stay, the Court instructed lower courts to consider the possible success of the claims, the relative harm to the parties, and any unnecessary delays in bringing the claims.[57] Particularly, the Court stated that courts will regard last-minute claims with suspicion.[58] In *Harris v. Johnson*,[59] the Fifth Circuit denied a petitioner's § 1983 claim challenging Texas's lethal injection protocol because the petitioner filed it ten weeks prior to his execution date.[60] Thus, attorneys should file § 1983 claims well before a prisoner's execution date in order to give courts time to decide the claims on the merits.

V. Conclusion

The Court limited its holding to § 1983 claims that do not necessarily challenge the method of execution.[61] When asserting a § 1983 claim, attorneys must focus their claims to avoid challenging the method of execution in general. Further, the filing of a cognizable § 1983 claim does not necessarily warrant a stay of execution.[62] Thus, attorneys should file § 1983 claims as soon as possible in order to give courts enough time to decide the claims on the merits and to avoid the appearance of having filed the claim solely as a means of obtaining a stay of execution.

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55. *See* ALA. CODE § 15-18-82 (Supp. 2003) (stating that the Warden or an employee shall administer the lethal injection). *See generally* DENNO, *supra* note 46, at 112–16 (discussing physician involvement in lethal injections).

56. *Nelson*, 124 S. Ct. at 2125–26.

57. *Id.* at 2126.

58. *Id.* at 2125–26 (citing *Gomez*, 503 U.S. at 654). The Court in *Gomez* vacated the stay of execution because Gomez brought a § 1983 claim, challenging the constitutionality of execution by gas chamber, ten days prior to his execution when it could have been brought almost a decade earlier. *Id.* (citing *Gomez*, 503 U.S. at 654).

59. 376 F.3d 414 (5th Cir. 2004).

60. *Harris*, 376 F.3d at 415–16.

61. *Nelson*, 124 S. Ct. at 2124.

62. *Id.* at 2126.