IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

DAVID LARRY NELSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**2:03cv1008-T**
	)	
DONEL CAMPBELL, and	)	
GRANTT CULLIVER.	)	
	)	
Defendants.	)	
	)	

MOTION TO DISMISS

COME NOW the defendants, by and through the Attorney General for the State of Alabama, and, move this Court to dismiss Nelson's complaint, filed under 42 U.S.C. § 1983. More specifically, Nelson's complaint is due to be dismissed in accordance with Rule 12(b)(1) and 12(b)(6), Fed.R.Civ.P. In support of this motion, the defendants submit the following:

1. This case is now before this Court on remand from the United States Supreme Court. Nelson v. Campbell, 541 U.S. ---, 124 S.Ct. 2117 (2004).

2. As defendants will explain below, the claims at issue have been resolved and, consequently, this case has been rendered moot. Therefore,

there are no issues over which this Court has jurisdiction and the Court must dismiss this matter.

3. The crux of Nelson's case is his claim that the use of a "cut-down" procedure to access his veins constitutes cruel and unusual punishment. In his complaint, Nelson asserted that a cut-down procedure would: create risks of complications; be inhumane; conflict with evolving standards of decency; and entail unnecessary mental and physical pain and suffering. *Complaint paragraphs 49, 58, 59, 60.*

Nelson also asserted that "[a]ny person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure." *Complaint paragraph 56.*

Finally, Nelson proposed an alternative procedure in lieu of the cut-down procedure. This procedure is known as a "percutaneous central line placement." *Complaint paragraph 63.* Nelson described the central line placement as "less invasive, less painful, faster, cheaper, and safer than the cut-down procedure." *Complaint paragraph 65.* In addition, Nelson submitted that this procedure " is humane", "does not violate the Plaintiff's Eighth Amendment rights," and "meets the contemporary standards of medical care." *Complaint paragraphs 68, 78.* Further, "[b]ecause of its

more widespread use, far more physicians and health care professionals are proficient and competent in performing the percutaneous technique." *Complaint Attachment 6, (Affidavit of Mark Heath M.D).*

4. Indeed, Nelson's success in overturning the original ruling of this Court is directly attributable to the extremely limited nature of his claim, and his repeated assertions that he was not challenging his execution per se, i.e., lethal injection itself, but was merely seeking to prohibit the use of a particular procedure, i.e., the cut-down. The Supreme Court made very clear that this fact was essential to its decision allowing Nelson to proceed with his complaint under § 1983. The Court emphasized that Nelson "has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are *wholly unnecessary* to gaining venous access." Nelson, 124 S.Ct. at 2124 (emphasis in original).

5. As a result of Nelson's representations – that he was challenging the use of a cut-down procedure and not his execution – the defendants have submitted, and this Court has ordered, that a cut-down procedure will not be administered upon Nelson. Instead, the defendants have agreed to utilize, should it become necessary, percutaneous central line placement – the very

procedure suggested and requested by the plaintiff in his complaint and in the Supreme Court. Nelson, 124 S.Ct. at 2124 (stating that "Petitioner has alleged alternatives that, if they had been used would have allowed the State to proceed with the execution as scheduled").

6. Because the defendants have agreed not to administer the cut-down procedure and to instead use the procedure requested in the complaint, Nelson has received the relief he requested. Thus, the claims and issues raised by Nelson in his complaint are now moot and, as a result, this Court lacks subject-matter jurisdiction. Jurisdiction may be abated if a case becomes moot because there is no reasonable expectation the alleged violation will recur and interim relief or events have completely eradicated the effects of the alleged violation. County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct 1379, 1383 (1979) (holding that the case had become moot during pendancy of the litigation where there was no reasonable expectation that the county would use invalidated written civil service exam); Scott v. Jones, 492 F.2d 130, 130-31 (5th Cir. 1974) (holding that transfer of prisoner from county jail to a state prison rendered moot his claims for injunctive and declaratory relief against county jail); Troy State Univ. v. Dickey, 402 F.2d 515, 516 (5th Cir. 1968) (stating that the court

lacks subject matter jurisdiction to "decide arguments after events have put them to rest") (citations omitted).

7. The remand from the Supreme Court further indicates that there are no longer justiciable issues in litigation. The Court noted that it "need not reach . . . the difficult question of how to categorize method-of-execution claims generally" because "[r]espondents at oral argument conceded that § 1983 would be an appropriate vehicle [to challenge a cut-down procedure] for an inmate who is not facing execution . . . ." Nelson, 124 S. Ct. at 2123. "That venous access is a necessary prerequisite [to lethal injection] does not imply that a particular means of gaining such access is likewise necessary." *Id.* Indeed, the Court noted, "the gravamen of petitioner's entire claim is that use of the cut-down would be *gratuitous*." Id. (emphasis in original).

8. As this Court will recall, it originally dismissed Nelson's complaint on the basis that it was a challenge to the method-of-execution. According to the Supreme Court, however, the question whether the cut-down is a "necessary" component of lethal injection must be answered in the affirmative before Nelson's complaint can be categorized as a method-of-execution claim. Indeed, the case was remanded with the following instructions: "If on remand and after an evidentiary hearing the District Court concludes that the use of the cut-down procedure as described in the

complaint is necessary for administering the lethal injection, the District Court will need to address the broader question, left open here, of how to treat method-of-execution claims generally." Id. at 2124. The Court expressly noted that "[a]n evidentiary hearing will in all likelihood be unnecessary, however, as the State now seems willing to implement petitioner's proposed alternatives." Id.

9. As the Supreme Court predicted, an evidentiary hearing is not necessary, as the defendant has agreed to utilize – again, only should it become necessary – Nelson's requested procedure. Now that the issue raised is moot, the only way Nelson can proceed is by challenging the use of the very procedure he and his expert recommended. Based on Nelson's actions subsequent to the removal of a cut-down as a possibility – for example, his efforts to obtain all of his prison records, medical and non-medical – it seems clear that his intent is to proceed. Thus, whatever it was previously, his complaint – to the extent it survives at all – is now a challenge to the method-of-execution itself. This Court does not have subject matter jurisdiction over such a claim. Alternatively then, should the Court decline to dismiss Nelson's complaint on the basis of mootness, Nelson's complaint should be dismissed because it raises an issue not cognizable in § 1983.

10. As pointed out in the State's original motion to dismiss, a claim challenging the constitutionality of the manner in which his execution is to be carried out is the "functional equivalent" of a second habeas petition and, therefore, is "subject to the law applicable to successive habeas petitions." Hill v. Hopper, 112 F.3d 1088, 1089 (11th Cir. 1997). Thus, this Court "lack[s] jurisdiction to consider [Nelson's] request for relief because [Nelson] ha[s] not applied to [the Court of Appeals] for permission to file a second habeas petition." Id.; see also Felker v. Turpin, 101 F.3d 95 (11th Cir. 1996); Williams v. Hopkins, 130 F.3d 333, 335 (8th Cir. 1997); McQueen v. Patton (In re Sapp), 118 F.3d 460 (6th Cir. 1997).

CONCLUSION

For the foregoing reasons, this Court is due to dismiss the complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,
Troy King
Alabama Attorney General

/s/ J. Clayton Crenshaw
J. Clayton Crenshaw
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Joe W. Morgan, III and Michael Kennedy McIntyre

/s/ J. Clayton Crenshaw
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