

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

APR 30 2004

Michael N. Milby, Clerk of Court

DAVID RAY HARRIS,

Plaintiff,

v.

GARY JOHNSON, et al.,

Defendants.

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CIVIL ACTION NO. H-04-CV-1514

ORDER

David Ray Harris, a death row inmate with an execution date of June 30, 2004, filed suit under 42 U.S.C. § 1983. Harris complains that Texas' use of lethal injection as an execution method violates the Eighth Amendment's prohibition against cruel and unusual punishment. Harris asks this Court to enter a permanent injunction barring the use of lethal injection. (Docket Entry No. 1 at 5).

"[S]tate prisoners may not obtain equitable relief under § 1983 when the federal habeas corpus statute is the exclusive remedial mechanism for obtaining the requested relief." *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 420 (5th Cir. 2002), *cert. denied*, 535 U.S. 1091 (2002). The Fifth Circuit considers a challenge to a method of execution as "a *de facto* habeas challenge." *Id.* at 421 (citing *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653 (1992)). Under prevailing federal law, Harris' § 1983 claim challenging his death sentence under the Eighth Amendment is the functional equivalent of a habeas action.

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The Supreme Court recently granted *certiorari* review in a case challenging Alabama's "cut down" method of lethal injection. In *Nelson v. Campbell*, No. 03-6821, 2003 WL 22327593 (Dec. 1, 2003), the Supreme Court certified the following question: "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" In apparent reliance on the Supreme Court's consideration of the *Nelson* case, other prisoners have recently challenged Texas' lethal-injection procedures under Section 1983. In each case, the district court construed the inmate's filing as a successive habeas action and the Fifth Circuit subsequently refused to stay each inmate's execution. The Fifth Circuit has commented that it is "keenly aware that the Supreme Court has under consideration the procedural question whether § 1983 is available as a vehicle for mounting attacks such as this; but until a different rule is announced, we continue to follow the procedure [established by precedent]." *Hines v. Johnson*, No. 03-21173, 2003 WL 22903367 (5th Cir. Dec. 9, 2003) (unpublished); *see also Bruce v. Johnson*, No. 04-70001 (5th Cir. Jan. 13, 2004); *Panetti v. Dretke*, No. 04-70002 (5th Cir. Jan. 26, 2004). Simply, "[t]he [Supreme] Court's grant of certiorari in a capital case does not cause us to deviate from circuit law, nor is it grounds for a stay of execution." *Cantu v. Collins*, 967 F.2d 1006, 1012 n.10 (5th Cir. 1992), *cert. denied*, 509 U.S. 926 (1993). Therefore, binding Fifth Circuit precedent holds that federal habeas corpus provides the appropriate mechanism for addressing Harris's Eighth Amendment claim.

Harris has already unsuccessfully sought federal habeas relief in another judicial district. *Harris v. Cockrell*, 313 F.3d 238 (5th Cir. 2002), *cert. denied sub nom. Harris v. Dretke*, ___ U.S. ___, 124 S. Ct. 1503 (2004). This Court must characterize Harris' current action as a request to file a successive federal habeas petition. *See Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002); *Martinez*, 292 F.3d at 424. The Anti-Terrorism and Effective Death Penalty Act requires this Court to dismiss any successive habeas petition. *See* 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Harris must seek authorization from the Fifth Circuit before filing a successive habeas petition in the appropriate judicial district.

This Court **DISMISSES** Harris' complaint. As Harris' pleadings do not make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(b)(2), no Certificate of Appealability will issue in this case.

The Clerk will deliver a copy of this Order to the parties.

SIGNED this 29th day of April 2004, at Houston, Texas.



Vanessa Gilmore
United States District Court