No. 21–1268

In the Supreme Court of the United States

JOE CLARENCE SMITH, JR.,
Petitioner,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION AND REENTRY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that Smith's challenge was not cognizable under 42 U.S.C. § 1983.
2. Whether Smith's extended stay on death row, caused in large measure by his own efforts to obtain relief from the judgments lodged against him, constitutes cruel and unusual punishment.

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INTRODUCTION

On June 17, 1977, Smith killed Neva Lee. *State v. Smith (Smith IV)*, 159 P.3d 531, 535 (Ariz. 2007). Less than three weeks later, on July 7, 1977, Smith killed Sandy Spencer. *Id*. Smith asphyxiated both victims by stuffing dirt in their mouths after tying them up. *Id*. Upon discovery of the bodies, both bore numerous stab and puncture wounds. *Id*. Smith was convicted of two counts of first-degree murder and sentenced to death on each count. *State v. Smith (Smith I)*, 599 P.2d 187, 190 (Ariz. 1979).

STATEMENT OF THE CASE

A. Initial State Appeals

On direct appeal, the Arizona Supreme Court affirmed Smith's convictions but remanded for resentencing because, while Smith's appeal was pending, that court had found Arizona's death penalty statute unconstitutional because it limited a defendant's right to show mitigating circumstances. *Smith I,* 599 P.2d at 199 (citing *State v. Watson*, 586 P.2d 1253 (Ariz. 1978)). Following a new sentencing hearing, the trial court once again imposed death sentences. *State v. Smith (Smith II)*, 638 P.2d 696 (Ariz. 1981). After conducting an independent examination of the record, the Arizona Supreme Court concluded that the trial court properly imposed the death sentences and affirmed. *Id.* at 702. Smith filed a series of unsuccessful post-conviction relief petitions in state court. *Smith v. Stewart (Smith III),* 189 F.3d 1004, 1008 (9th Cir. 1999). Smith then filed a petition for writ of habeas corpus in federal district court. *Id.*

B. Initial Habeas Proceedings

Smith raised 34 claims in his habeas petition. *Id.* The district court found all but seven of those claims procedurally barred and denied the remaining claims on the merits. *Id.* at 1006. On appeal, the Ninth Circuit concluded that Smith's counsel was unconstitutionally ineffective in the resentencing proceedings and issued a writ directing that Smith be resentenced. *Id.* at 1014.

C. Resentencing Pursuant to *Ring v. Arizona*

Smith's case came back to the trial court in December 2000. *Smith IV*, 159 P.3d at 536. More than twenty years had elapsed since Smith committed the murders, and "counsel for both sides required considerable time to gather evidence and prepare for the resentencing proceedings." *Id.* While resentencing proceedings were pending, this Court invalidated Arizona's judge-sentencing procedure in capital cases, *Ring v. Arizona*, 536 U.S. 584 (2002), and the Arizona legislature amended Arizona's death penalty statutes to conform to *Ring, Smith IV,* 159 P.3d at 536.

The resentencing proceedings mandated by *Ring* commenced in April 2004. *Id.* Smith contended unsuccessfully that the delay following his convictions rendered him ineligible for the death penalty, asserting that the imposition of death would violate his speedy trial rights and subject him to cruel and unusual punishment. *Smith IV*, 159 P.3d at 543-44. Following the presentation of evidence by the parties, a jury resentenced Smith to death in connection with each murder. *Id.* at 536.

On direct appeal, Smith contended that the trial court erred when it concluded that imposing the death penalty would not violate his rights under the Sixth and Eighth Amendments. In rejecting Smith's speedy trial claim, the Arizona Supreme Court pointed out that (1) Smith did not allege any action by the State that would constitute deliberate delay, and (2) Smith was not prejudiced by the delay. *Id.* at 544. The court then noted that it had previously rejected an identical Eighth Amendment claim in *State v. Schackart*, 947 P.2d 315 (Ariz. 1997), and that "much of the delay resulted from Smith's pursuit of his rights to post-conviction relief, as opposed to intentional delay by the State in carrying out the death sentence." *Id.* at 544 n.14. After independently reviewing the aggravating and mitigating circumstances, the court affirmed the death sentences.

Smith filed a petition for writ of certiorari, asserting that the Eighth Amendment forbade his execution because more than thirty years had expired since he was convicted. *Smith v. Arizona*, 552 U.S. 985 (2007). This Court denied the petition, with a dissent from Justice Breyer. *Id.* Smith then unsuccessfully sought post-conviction relief in state court. *Smith v. Ryan (Smith V)*, No. CV-12-00318, 2014 WL 1247828, at *3 (D. Ariz. March 24, 2014).

D. Post-*Ring* Habeas Proceedings

Smith filed his petition for writ of habeas corpus in *Smith V* on December 21, 2012. Claim 29 of that petition set forth the same argument that he makes now; i.e., that executing him after such a lengthy confinement would constitute cruel and unusual punishment under the Eight Amendment. *Id.* at *39.

The district court denied Claim 29 on the merits, concluding that this Court has never held that a lengthy incarceration before execution of a death sentence constitutes cruel and unusual punishment and that multiple circuit courts, including the Ninth Circuit, had rejected such claims. *Id.* (citing cases).

Smith appealed to the Ninth Circuit. *Smith v. Ryan (Smith VI)*, 823 F.3d 1270 (9th Cir. 2016). Although the district court had not granted Smith a certificate of appealability ("COA") on Claim 29, Smith briefed it as an uncertified issue. *Id.* at 1278. The Ninth Circuit granted a COA on three of his other uncertified claims but not on Claim 29. *Id.* at 1278 n.5. After the Ninth Circuit affirmed the district court's judgment, Smith filed another petition for writ of certiorari in this Court. That petition did not raise the issue whether his prolonged confinement constituted cruel and unusual punishment. *Smith v. Ryan,* 137 S. Ct. 1283 (2017). This Court denied the petition with Justice Breyer issuing a statement respecting the denial. *Id.*

E. Claim Pursuant to 42 U.S.C. § 1983

His habeas appeal exhausted, Smith filed the present lawsuit on October 16, 2020, seeking to enjoin Respondents from ever carrying out Smith's lawfully imposed sentences of death. The district court screened Smith's complaint under 28 U.S.C. § 1915A(a). (App. 5.) The district court characterized Smith's attempt to distinguish the claim in his complaint from his habeas petition's challenge to the validity of his sentence as "mere[ ] semantics, because the remedy he seeks is the same: to 'never be executed.'" (App. 12.) The court pointed out that the

proper avenue to seek invalidation of a death sentence is by way of habeas corpus. *Id.* It distinguished Smith's claim from a method-of-execution challenge, which would be cognizable under § 1983, on the ground that such challenges seek to "enjoin only certain methods of *carrying out* an execution," while Smith, in contrast, "claims he cannot constitutionally be executed *at all*." (App. 15.) Finding that "[N]either the Ninth Circuit nor [this Court] has recognized a claim that the extended duration of a condemned prisoner's time awaiting execution amounts to a constitutional violation cognizable under § 1983," the district court dismissed the complaint for failure to state a claim under 28 U.S.C. § 1915A(b)(1). (App. 13, 15.)

Smith appealed the order of dismissal to the Ninth Circuit. Following de novo review, that court, on November 16, 2021, issued a memorandum decision affirming the order of dismissal. (App. 1.) The court began its analysis by characterizing Smith's claim as a *Lackey* claim: "A challenge to the imposition of the death penalty due to a plaintiff's extended stay on death row is known as a *Lackey* claim, derived from Justice Stevens' concurrence in the Supreme Court's denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995)." (App. 1, 2.) Relying on precedent of its own, as well as cases decided by this Court, the Ninth Circuit held that "the district court did not err in dismissing Smith's complaint based on its determination that Smith's *Lackey* claim was not cognizable under § 1983." (App. 2.) After reviewing a series of its own cases, the court noted that the cases "establish that a *Lackey* claim, like Smith's, is in 'the province of habeas corpus'" and thus could "'not be

brought in a § 1983 action." (App. 4, citing *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016) (en banc)).[1]

On March 18, 2022, Smith filed the present petition for writ of certiorari, contending that his "method-of-execution challenge is cognizable under 42 U.S.C. § 1983" and that "a method of execution involving 44 years of mostly solitary confinement on death row prior to execution constitutes cruel and unusual punishment in violation of the Eighth Amendment." (Petition at i.)

REASONS FOR NOT GRANTING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Smith presents no such reason. The law is clear that Smith's challenge must be brought by way of habeas corpus, and that it cannot be brought pursuant to 42 U.S.C. § 1983. In what can only be described as a quintessential effort to exalt form over substance, Smith attempts to claims that his extended stay on death row constitutes a "method of execution." It does not. He then asserts that the time he has spent awaiting execution, separate and apart from actual execution, constitutes cruel and unusual punishment. It does not.

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[1] At this point, the Ninth Circuit included the following footnote: "Smith's argument that his complaint states a challenge to the *method* of his execution as opposed to the *validity* of his death sentence, is a distinction without a difference considering the relief Smith seeks. Smith's complaint requests a declaration and permanent injunction against Defendants from *ever* imposing his execution." (App. 4, n.1; emphasis in original.)

I. Smith's challenge is not cognizable under 42 U.S.C. § 1983.

Smith predicates his claim that the courts below erred in holding that he could not bring his challenge under § 1983 on the erroneous premise that the period of time that has elapsed since the judgments were rendered against him constitutes a "method of execution." Merriam-Webster defines the term "method" as follows:

> [A] procedure or process for attaining an object, such as (a)(1): a systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art . . . 3(a) orderly arrangement, development, or classification: plan

https://www.merriamwebster.com/dictionary/method. Accessed 29 March 2022.

It is immediately apparent that the passage of time does not constitute a "method"; thus, the time that Smith has spent on death row cannot appropriately be characterized as a "method of execution." The district court was correct when it held that § 1983 must yield to the more specific habeas corpus statute. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004). Because Smith's objective is to obtain a remedy that prevents Respondents from enforcing his death sentences, his challenge focuses on the validity of his sentences, not a method of execution.

This Court has had more than one occasion to address the differences between an action under § 1983 and a federal habeas corpus proceeding. *See Hill v. McDonough*, 547 U.S. 573, 576 (2006) ("This is

not the first time we have found it necessary to discuss which of the two statutes governs an action brought by a prisoner alleging a constitutional violation."); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (discussing § 1983 and federal habeas corpus: "Both of these provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation.") As the courts below recognized, the question of which avenue of relief is appropriate turns not on how the moving party chooses to package his challenge, but on the nature of the remedy actually sought.

Smith seeks refuge in *Hill*, 547 U.S. 573, where the question before the Court was whether a challenge to "the constitutionality of a three-drug sequence the State of Florida likely would use to execute [Hill] by lethal injection" had to be "brought by an action for a writ of habeas corpus" or whether it could be brought under the auspices of § 1983. 547 U.S. at 576. The court noted that a challenge "to the validity of any confinement or to particulars affecting its duration [is] the province of habeas corpus." *Id.* at 579 (citing *Muhammad v. Close*, 540 U.S. 749, 750 (2004)). If the challenge is to "the circumstances of [the challenger's] confinement, however, [it] may be brought under § 1983." *Id.* (citing *Muhammad*, 540 U.S. at 750). The court ultimately concluded that Hill could seek relief under § 1983 because, as in *Nelson*, a grant of injunctive relief "would not necessarily prevent the State from executing [Hill] by lethal injection." *Id.* at 580. "[Hill's] complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin respondents 'from executing [Hill] in the manner they currently intend.'" *Id.* Hill

does not assist Smith, who seeks to enjoin Respondents from ever executing him. Such a challenge is not cognizable under § 1983.

In *Hill*, this Court went on to consider the effect of *Heck* and *Edwards v. Balisok*, 520 U.S. 641 (1997), on the question of which avenue of relief was proper for Hill: "In [*Heck* and *Balisok*] the question is whether 'the nature of the challenge to the procedures could be such as necessarily to imply the invalidity' of the confinement or sentence." *Id*. at 583 (quoting *Balisok*, 520 U.S. at 645). "Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action." *Id*. The differences between Smith's challenge and Hill's are manifest, compelling the conclusion that *Hill* is inapposite here.

Relying on *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wilkinson v. Dotson*, 544 U.S.74 (2005), Smith asserts that "[T]he lower courts' decisions to rigidly bifurcate Mr. Smith's claim as cognizable solely under habeas or § 1983 were erroneous. This Court has repeatedly acknowledged that habeas corpus and § 1983 claims often overlap, and that some claims may legitimately be asserted under both." (Petition at 9.) If Respondents correctly understand this argument, Smith is contending that the lower courts wrongfully created a false dilemma for Smith. Neither of the cases cited stands for any such proposition.

Preiser was serving an indeterminate sentence in a New York state prison facility. After Preiser had earned a number of good-behavior-time credits, his credits were canceled as a result of disciplinary

proceedings that had been brought against him. He and several similarly situated inmates filed § 1983 actions against prison officials, seeking injunctions compelling corrections officials to restore the credits; in each case, if an injunction were granted, each inmate (including Preiser) would be eligible for immediate release. The district court granted the relief sought, and the Second Circuit affirmed. This Court granted certiorari on the question whether the inmates were permitted to proceed pursuant to § 1983 in spite of the fact that the federal habeas corpus statute "clearly provide[d] a specific federal remedy." 411 U.S. at 477. At no time did Justice Stewart, writing for the majority, use the word "overlap" in his discussion of the relationship between federal habeas corpus and § 1983 actions. The only use of that term was in a dissent, where Justice Brennan noted that the statutes in question "necessarily overlap." *Id.* at 503-04. *Preiser* does not support Smith's assertion that his he is entitled to seek relief via both habeas corpus and § 1983.

In *Wilkinson*, two Ohio state inmates (Dotson and Johnson) filed actions under § 1983, claiming that Ohio's parole procedures were unconstitutional. The district court dismissed, concluding that if the inmates had any remedy, it was by way of habeas corpus. The Sixth Circuit consolidated the appeal and reversed, holding that the inmates could proceed under § 1983. This court affirmed the Sixth Circuit:

> "Throughout the legal journey from *Preiser* to *Balisok*, the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they

> seek to invalidate the duration of their confinement – either *directly* through an injunction...or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody."

544 U.S. at 81 (emphasis in original). The Court went on:

> Neither Respondent seeks an injunction ordering his immediate or speedier release into the community. See *Preiser*. 411 U.S at 500, 93 S.Ct. 1827; *Wolff* at 554, 94 S.Ct. 2963 [1974]. And as in *Wolff*, a favorable judgment will not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s].' *Heck*, [512 U.S. 477], 487, 114 S.Ct. 2364.

Id. at 82. In stark contrast to these cases, a favorable judgment here will, of necessity, imply the invalidity of Smith's death sentences. In sum, not only does Wilkinson not support Smith's claim, but it fortifies Respondents' argument that, when the actual substance and effect of Smith's claim are taken into account, it is clear that his claim is not cognizable under § 1983.

II. Smith's extended stay on death row does not constitute cruel and unusual punishment.

Assuming that Smith is successful in persuading the Court that his claim can be brought under the auspices of § 1983, he cannot succeed on the merits of his Eighth Amendment claim.

Faced with a claim identical to Smith's, the Ninth Circuit stated that "[w]e cannot conclude that delays caused by satisfying the Eighth Amendment

themselves violate it." *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (quoting *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir.), *opinion aff'd and adopted*, 57 F.3d 1493 (9th Cir. 1995 (en banc)). In so doing, the court observed that "[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment," and numerous other federal and state courts have rejected such claims. *Id.* at 958-60. Smith has failed to provide this Court with a reason why it should suddenly change course and hold that an inmate's extended stay on death row, independent of and apart from execution itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

CONCLUSION

For the reasons set forth above, Smith's petition for writ of certiorari should be denied.

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Respectfully submitted,

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