IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEWIS WILLIAMS,

and

JOHN GLENN ROE,

Petitioners,

v.

ROBERT TAFT, Governor,

REGINALD WILKINSON, Director,

and

JAMES HAVILAND, Warden,

Respondents.

Case No. C-2-03-1277
JUDGE GRAHAM
Magistrate Judge Kemp

OPINION AND ORDER

Petitioners, Lewis Williams and John Glenn Roe, have been sentenced to death by the State of Ohio and face execution dates of January 14, 2004 and February 3, 2004, respectively. This matter is before the Court on petitioners' original complaint for injunctive declaratory relief, attorneys fees, and costs of suit pursuant to 42 U.S.C. §1983, (doc.no. 3), as well as petitioners' motion for preliminary injunctive relief, (doc.no. 7).

In their complaint, petitioners seek preliminary and permanent injunctive relief barring respondents from executing them in the manner by which respondents plan to execute them, as well as a declaratory judgment that the current means by which respondents carry out executions violate

the Eighth and Fourteenth Amendments.[1] Specifically, petitioners contend that respondents intend to violate petitioners' constitutional rights because the current method of execution used by respondents -- a lethal injection protocol that includes a short-acting anesthetic that will leave petitioners paralyzed but conscious during suffocation and death -- will cause petitioners to be tortured to death.

In *In re Sapp*, 118 F.3d 460 (6th Cir.), *cert. denied, McQueen v. Sapp*, 521 U.S. 1130 (1997), *and cert. denied, McQueen v. Patton*, 521 U.S. 1130 (1997), the Sixth Circuit held that a challenge to the method of execution brought as a civil rights claim under 42 U.S.C. §1983 was properly construed as a habeas corpus petition, and was therefore subject to the rules governing second or successive habeas corpus petitions. Citing *Gomez v. District Court*, 503 U.S. 653 (1992), the Sixth Circuit explained that petitioner could not circumvent the requirements for a successive petition by styling his challenge as a §1983 action. *In re Sapp*, 118 F.3d at 462-63.

Petitioners question the validity of *In re Sapp* because the Sixth Circuit has also recognized that a plaintiff whose claim does not challenge the fact or length of his sentence may file a civil rights action under 42 U.S.C. §1983, *see Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1187 (6th Cir. 1997)[2], and because the United States Supreme Court recently granted certiorari to consider the issue of whether a complaint brought under 42 U.S.C. §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 his execution, is properly re-characterized as a habeas corpus petition under 28 U.S.C.

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[1] Petitioners also seek reasonable attorneys fees and any further relief deemed "just and proper." (Complaint, doc.no. 3, at 21).

[2] In *Woodard*, the petitioner sought to challenge process by which the Ohio Adult Parole Authority would consider his request for clemency. *Woodard*, 107 F.3d at 1187. The judgment was reversed on other grounds. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

§2254. *Nelson v. Campbell*, No. 03-6821, 2003 WL 22327593, 72 USLW 3363 (December 1, 2003). Petitioners also point out that, in a recent case involving facts indistinguishable from those presented in this case, the Court of Appeals for the Fourth Circuit issued a stay of execution and held the case in abeyance pending the Supreme Court's decision in the *Nelson* case. (Motion for Preliminary Injunctive Relief, doc.no. 5, at 7 (citing *Reid v. Johnson*, Case No. CA-03-1039-3, order of December 17, 2003)). Petitioners accordingly ask in the alternative for an order preventing respondents from executing them and holding these proceedings in abeyance pending the United States Supreme Court's decision in *Nelson v. Campbell.* Petitioners' arguments, however persuasive, do not change the fact that the Sixth Circuit's decision in *In re Sapp* is, unless or until it is overruled by the Court of Appeals, binding upon this Court.

Petitioners' action, as one seeking to interfere with their sentences, must be construed as a habeas corpus petition pursuant to *In re Sapp*. That being so, it is an unauthorized second or successive habeas corpus petition over which this Court has no jurisdiction, *see* 28 U.S.C. §2244(b)(3), and must be transferred to the Sixth Circuit pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997)("when a second or successive petition for habeas corpus or §2255 motion is filed in the district court without §2244(b)(3) authorization from this Court, the district court shall transfer the document to this Court pursuant to 28 U.S.C. §1631."). This Court is without jurisdiction to determine whether petitioners can satisfy the conditions set forth in 28 U.S.C. §2244(b)(2) for filing a second or successive petition. That determination must be made by the Sixth Circuit.

It is entirely possible that the Sixth Circuit will determine that the instant action is properly brought as a civil rights action under 42 U.S.C. §1983. If that occurs, it can be remanded to this Court for a decision on the merits. For the time being, however, this Court is bound by *In re Sapp*

to construe the instant action as a habeas corpus petition under 28 U.S.C. §2254. Since petitioners have already pursued habeas corpus relief, the instant action amounts to an unauthorized successive petition over which this Court has no jurisdiction.

For the foregoing reasons, the Court construes the instant action as a second or successive petition, and hereby TRANSFERS the action to the Sixth Circuit, pursuant to 28 U.S.C. §1631, for authorization under 28 U.S.C. §2244(b)(2). *See In re Sims, supra*, 111 F.3d at 47.

IT IS SO ORDERED.

s/James L. Graham
JAMES L. GRAHAM
Chief United States District Judge

DATE: January 6, 2004