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David R. Dow

Jim Marcus

Morris Moon

Jared Tyler

Greg Wiercioch

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THE EXTRAORDINARY EXECUTION OF BILLY VICKERS, THE BANALITY OF DEATH, AND THE DEMISE OF POST-CONVICTION REVIEW

David R. Dow, Jim Marcus, Morris Moon, Jared Tyler, and Greg Wiercioch*

Accordingly, § 1983 challenges to an impending execution (like § 1983 challenges to a state's method of execution or § 1983 challenges seeking immediate or speedier release from prison) must be brought as habeas actions.¹

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 the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?²

On Tuesday, December 9, 2003, the State of Texas played Russian Roulette with Billy Vickers. Early that afternoon prison authorities removed him from his cell on death row at the Polunsky Unit in Livingston, Texas, and drove him to the Walls Unit — sometimes known as the death house, in Huntsville. They placed Vickers in a holding cell outside the execution chamber, where he would spend his final hours, in anticipation of a six o'clock execution. Vickers ate his last meal, thanked his lawyer, and said his good-byes. Every time Vickers heard a commotion, it was a hammer falling on an empty chamber. Midnight arrived and Vickers was still alive — the death warrant had expired. Prison authorities loaded Vickers back into a van and returned him to death row. A month and a half later, on Wednesday, January 28, 2004, at shortly after 6:00 p.m. local time, the State of Texas finally

* Dow is the Distinguished University Professor at the University of Houston Law Center and the Director of the Texas Innocence Network (TIN). Marcus is the Executive Director of the Texas Defender Service (TDS). Moon is a staff attorney at TDS. Tyler is the Assistant Director of the TIN. Wiercioch is a staff attorney at TDS. The authors represented Billy Vickers, as well as Kenneth Bruce and Kevin Zimmerman, in his lethal injection litigation. Therefore, factual knowledge of his case, and others', contained in this Article was gained through first-hand exposure.

¹ *Martinez v. Tex. Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir.), *cert. denied*, 535 U.S. 1091 (2002).

² This was the question presented in the petition for writ of certiorari in *Nelson v. Campbell*, 347 F.3d 910 (11th Cir.), *cert. granted*, 540 U.S. 1046 (2003).

executed the convicted murderer.³ He was the fourth person executed in Texas in 2004, and the 317th since the death penalty resumed in 1982.⁴ Vickers was a so-called career criminal. Prior to being convicted of capital murder and sentenced to death in 1993 for murdering Phillip Kinslow in the course of a robbery, Vickers had been twice convicted of burglary, twice convicted of being a felon in possession of burglary tools, and convicted of arson and conspiracy to commit arson.⁵ The evidence that he killed Kinslow was substantial.⁶ On the gurney on the evening of January 28, Vickers claimed responsibility for having committed as many as a dozen other murders in addition to the one for which he was being put to death.⁷ Perhaps he was simply sticking his finger in the state's eye. Regardless, Vickers was not a good person. He committed at least one murder and maybe quite a few more.⁸ His case has nothing to do with actual innocence. It deals instead with how the legal system operates in ordinary death penalty cases, in those that are banal, in cases where a death row inmate's constitutional rights are ignored, but where the victim of the constitutional violation does not raise a claim of innocence. In this Article, by focusing on the *Vickers* litigation, we illustrate how our legal system operates when a death row inmate says, "I committed the crime but you have treated me unconstitutionally."

I. MARTINEZ, NELSON, AND THE DOCTRINAL BACKGROUND

Habeas corpus litigation permits a prisoner to attack the legality of his conviction or his sentence.⁹ According to 28 U.S.C. § 2254, a federal court may grant a writ of habeas corpus on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."¹⁰ This provision has been construed to encompass challenges to the legality of the conviction as well as the legality of the sentence.¹¹ Hence, even a death row

³ For an account of Vickers's execution, the facts surrounding his crime, the procedural history of his case, and his prior criminal record, see *Billy Frank Vickers*, at <http://www.clark-prosecutor.org/html/death/US/vickers893.htm> (last visited Dec. 16, 2004).

⁴ *Id.*

⁵ *Id.*

⁶ *See id.*

⁷ *Id.*

⁸ *Id.*

⁹ Throughout, we use the masculine pronoun simply to reflect that the vast majority of death row inmates are men. See Texas Department of Criminal Justice, at <http://www.tdcj.state.tx.us/stat/racial.htm> (reporting the gender statistics of death row offenders).

¹⁰ 28 U.S.C. § 2254 (2000).

¹¹ See, e.g., Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 966-67 n.79 (2000); *Habeas Relief for Federal Prisoners*, 91 GEO. L.J. 862 (2003).

inmate who does not claim innocence of the crime can attack the validity of his death sentence in federal habeas corpus proceedings.¹²

Although as a matter of federal law, death row inmates are not entitled to post-conviction counsel,¹³ at around the same time that Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁴ many states simultaneously passed laws providing post-conviction representation to death row inmates in connection with their state habeas litigation. These state laws typically guarantee that death row inmates receive competent post-conviction counsel.¹⁵ Because a death row inmate who fails to raise valid constitutional claims on his first trip through state court will ordinarily not be permitted to raise them in later state court proceedings,¹⁶ and because a death row inmate who fails to raise a given issue in state court will ordinarily be precluded from subsequently raising that issue in federal court,¹⁷ a death row inmate who does not have a highly competent lawyer in his state post-conviction proceedings will almost certainly never obtain federal review of the merits of his claims.¹⁸ Put differently, if a death row inmate's state habeas lawyer is less than fully competent, and neglects to raise certain claims in state post-conviction proceedings, the ability of the inmate to raise those claims later will be forever lost, no matter how compelling the claims, and no matter how dogged the subsequent lawyers may be.

Like most states with the death penalty, Texas enacted a statute guaranteeing death row inmates competent post-conviction lawyers.¹⁹ Studies indicate, however, that the quality of lawyers provided pursuant to this statute is rather uneven.²⁰ An

¹² See *Sawyer v. Whitley*, 505 U.S. 333 (1992).

¹³ See *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Giarattano*, 492 U.S. 1 (1989).

¹⁴ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁵ See, e.g., Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 59-60 (2002); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 36 (discussing "whether, and to what extent, the government's decision to provide postconviction counsel triggers a constitutional obligation to provide effective assistance of counsel").

¹⁶ See generally John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. REV. 1, 40-42 & nn.214-17 (1998); Hammel, *supra* note 15, at 12-13 & nn.98-99.

¹⁷ *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).

¹⁸ See Hammel, *supra* note 15, at 11-13.

¹⁹ See TEX. CRIM. PROC. CODE ANN. art. 11.071, § 2(a) (Vernon 1971). *But see Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) (holding that statutory guarantee of "competent" counsel does not guarantee a certain level of performance).

²⁰ See TEXAS DEFENDER SERVICE, *LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY*

exhaustive examination of all state habeas petitions filed between 1995 and 2001 revealed, for example, that lawyers filed motions for discovery in only twelve percent of the cases, despite the statutory requirement of a diligent investigation.²¹ Fifteen percent of the state habeas petitions were fifteen pages long or shorter, and an astonishing nine percent were ten pages or fewer.²² In more than two-thirds of the cases, there were no materials indicating the performance of an investigation outside the record.²³ At least two lawyers appointed to represent death row inmates in Texas acknowledged after filing state habeas petitions that they were entirely unqualified to do so.²⁴

The price paid by the death row inmates for their lawyers' ineptitude was staggeringly high: they forfeited all opportunities to have a federal court review the merits of their claims. Consequently, in early 2002, three Texas death row inmates — Johnny Martinez, Gary Etheridge, and Napoleon Beazley — all of whom had received incompetent state post-conviction counsel,²⁵ resulting in the default of compelling legal claims, filed suit in federal court under 42 U.S.C. § 1983²⁶ arguing that the State of Texas, by providing inept post-conviction counsel, deprived them of access to the courts. Simply stated, the lawsuit alleged that the State of Texas in effect precluded these inmates from obtaining federal review in habeas corpus proceedings by assigning them counsel who caused all their claims to be defaulted or waived. The Fifth Circuit held that a suit under § 1983 was not available to these inmates.²⁷ The court's language in *Martinez* was broad.²⁸ The court held that a death row inmate could not challenge any aspect of his sentence through a § 1983 action; the sole procedural vehicle that could be used is the writ of habeas corpus.²⁹

APPEALS (2002) (a report prepared by the Texas Defender Service reviewing the Texas state post-conviction process), *available at* <http://www.texasdefender.org/resources.htm> (last visited Feb. 16, 2005).

²¹ *Id.* at 13.

²² *Id.* at 14.

²³ *Id.* at 15.

²⁴ *Id.* at 25 (discussing the lawyer for Ricky Kerr who acknowledged that he may have been incompetent regarding his client's matter); *id.* at 32 (discussing the lawyer for Johnny Martinez who admitted to the courts that he had never "handled a state Habeas Corpus Writ of a death penalty case").

²⁵ *See id.* at 30–38.

²⁶ 42 U.S.C. § 1983 (2000).

²⁷ *See Martinez v. Tex. Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir.), *cert. denied*, 538 U.S. 1091 (2002).

²⁸ *See supra* text accompanying note 1 (quoting one of the broadest statements in the *Martinez* opinion).

²⁹ *Martinez*, 292 F.3d at 424.

The federal circuits are split on the issue that the Fifth Circuit addressed in *Martinez*.³⁰ Nevertheless, the Supreme Court did not immediately take any steps to resolve the split. However, during the October 2003 Term, the Supreme Court agreed to decide *Nelson v. Campbell*.³¹ The precise question the Court agreed to resolve was: "[w]hether 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 the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?"³² It was obvious that the Supreme Court's resolution of the question presented in *Nelson* would have some impact on the Fifth Circuit's rule as articulated in *Martinez*.

In November 2003, shortly before the grant of certiorari in *Nelson*, a number of death penalty lawyers from around the country began to talk seriously about challenging the particular mix of chemicals that many states use to administer a lethal injection.³³ The issue had already received attention in the academic literature,³⁴ but had not yet been widely litigated in federal post-conviction proceedings. Important legislative developments suggested that one of the drugs used in carrying out executions might well run afoul of the "evolving standards of decency" norm embodied in the Eighth Amendment.³⁵ A challenge to the particular chemical cocktail, however, is not a challenge to either the conviction or the sentence. These inmates were not arguing that lethal injection is inherently unconstitutional, but simply that the specific chemicals that certain states intended to use to carry out the lethal injections caused unnecessary pain and torture in violation of the Eighth Amendment. Consequently, the lawsuit did not appear to be

³⁰ In contrast to the Fifth Circuit, the Eighth Circuit has held that a stay of execution may be obtained in an action under § 1983. *See, e.g.,* *Wainwright v. Brownlee*, 103 F.3d 708, 710 (8th Cir. 1997).

³¹ 540 U.S. 1046 (2003).

³² *Id.*

³³ Howard Witt, *Pain of Execution Debated; Drug Used on Humans Deemed Unfit for Dogs*, CHI. TRIB., Jan. 21, 2004, at 8 ("A recent series of legal challenges in a half-dozen states . . . has raised stark new questions about the execution process . . ."). Gary Clement, of the Louisiana Capital Assistance Center, and his colleagues have been at the forefront of developing the legal basis for the challenge to lethal injection described in this Article.

³⁴ *See, e.g.,* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997); Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099 (2003).

³⁵ The phrase "evolving standards of decency" originated in the non-death penalty case, *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The idea underlying this phrase, however, has been present in death penalty jurisprudence since the dawn of the modern death penalty era. *See, e.g.,* *Furman v. Georgia*, 408 U.S. 238, 388–89 (1972) (Burger, C.J., dissenting); *Gregg v. Georgia*, 428 U.S. 227 (1976) (Brennan, J., dissenting); *see also Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

one that could warrant relief under 28 U.S.C. § 2254 because the inmates were not challenging the legality of their confinement.³⁶ The obvious vehicle for bringing this challenge was 42 U.S.C. § 1983. Yet, the problem with an action under § 1983 was that cases, like *Martinez*, had held that a challenge to the mode of execution could not be brought in an action under § 1983. The conjunction of the language of § 2254 coupled with the broad language of *Martinez* left death row inmates with no obvious legal recourse. The manner by which states intended to carry out lethal injections seemed to raise serious constitutional questions, but there was no apparent legal vehicle for bringing an appropriate challenge. Then, on December 1, 2003, the Supreme Court granted certiorari in *Nelson*.³⁷

II. A SHORT HISTORY OF VICKERS'S FINAL FIFTY DAYS

No central authority sets execution dates in Texas. Instead, the presiding judge of the court where the death row inmate was convicted sets the date, usually upon being asked to do so by the district attorney for that county.³⁸ Until the mid-1990s, execution warrants quaintly directed the warden to carry out an execution "before sunrise" on a given date, meaning that executions occurred between midnight and dawn. In 1995, Texas began to carry out executions after 6:00 p.m.; thus, execution warrants in Texas now direct the warden to carry out an execution "after 6:00 p.m." on a given day. Whereas prior to 1995, prison authorities could carry out an execution in the roughly six-hour window between midnight and dawn, prison authorities must now carry out executions between 6:00 p.m. and midnight. Texas had scheduled three executions for the week of December 8, 2003: Billy Vickers was scheduled to be executed after 6:00 p.m. on Tuesday, December 9, 2003; Kevin Zimmerman was scheduled for execution on Wednesday, December 10, 2003; and Bobby Hines was scheduled to be executed on Thursday, December 11, 2003. On Monday, December 8, 2003 — just one week following the grant of certiorari in *Nelson* — Vickers, along with Zimmerman and Hines, filed a lawsuit in federal district court, pursuant to 42 U.S.C. § 1983, seeking to enjoin the use of a particular array of chemicals for executing death-sentenced inmates in Texas.³⁹ The substance

³⁶ Pursuant to 28 U.S.C. § 2254, a federal court may only entertain a claim for habeas relief on behalf of an inmate who claims to be "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (2000). *See, e.g.*, *Sylvester v. Hanks*, 140 F.3d 713 (7th Cir. 1998) (questioning whether § 2254 is the proper remedy when petitioner claims his custody should take one form — prison's general population — rather than another — segregation — because § 2254 is only an appropriate remedy when a petitioner attacks fact or duration of custody).

³⁷ 540 U.S. 1046 (2003).

³⁸ *Scheduled Executions*, Texas Department of Criminal Justice, at <http://www.tdcj.state.tx.us/stat/scheduledexecutions.htm> (last visited Dec. 16, 2004).

³⁹ *See Hines v. Johnson*, 83 Fed. Appx. 592 (5th Cir. 2003).

of the Eighth Amendment claim will be discussed in greater detail below.⁴⁰ The immediate point is that the lawyers for the three inmates filing the suit believed that the issue was not ripe until an execution date had been set and, further, that the Supreme Court's grant of certiorari in *Nelson* had called into question the continuing vitality of *Martinez*.⁴¹ *Martinez* had held that an action under § 1983 could not be used to challenge an execution;⁴² *Nelson* was going to address precisely that question. The lawyers also believed that the suit was not properly brought as a habeas action because none of the death row inmates challenged the legality of his conviction or sentence; all conceded that the State could execute them. They insisted, however, that the lethal injection had to occur without the use of a chemical that would cause torture.

The AEDPA generally precludes death row inmates from bringing more than one habeas action. In order to obtain habeas review following the original habeas action, a prisoner must pass through the gate-keeping provision of 28 U.S.C. § 2244.⁴³ A death row inmate who has filed one federal habeas petition and wishes to file another must first file a motion for authorization in the appropriate court of appeals.⁴⁴ Absent a motion for authorization, the district court lacks jurisdiction over the habeas petition.⁴⁵ Moreover, the courts of appeals are tightly circumscribed with respect to their power to grant a motion for authorization. The statute precludes a court of appeals from authorizing a second or subsequent habeas petition unless the petitioner shows either: (i) that the Supreme Court has announced a retroactively applicable new rule,⁴⁶ or (ii) that new facts, which could not have been previously discovered through the exercise of due diligence, tend to establish the inmate's innocence.⁴⁷

Vickers was stymied by the statute. Invoking *Martinez*,⁴⁸ the district court characterized the suit brought by Vickers⁴⁹ as a successive habeas petition. The

⁴⁰ See *infra* text accompanying notes 99–145.

⁴¹ See *Hines*, 83 Fed. Appx. at 592–93 (stating that the court 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”).

⁴² See *Martinez*, 292 F.3d 417.

⁴³ We discuss § 2244 in greater detail below. In this paragraph we simply summarize its pertinent provisions.

⁴⁴ See 28 U.S.C. § 2244(b)(3)(A) (2000) (“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.”).

⁴⁵ See, e.g., *United States v. Winestock*, 340 F.3d 200 (4th Cir.), *cert. denied*, 124 S. Ct. 496 (2003).

⁴⁶ 28 U.S.C. § 2244(b)(2)(A) (2000).

⁴⁷ 28 U.S.C. § 2244(b)(2)(B) (2000).

⁴⁸ In *Martinez*, the Fifth Circuit ruled that “§ 1983 challenges to an impending execution (like § 1983 challenges to a state’s method of execution or § 1983 challenges seeking immediate or speedier release from prison) must be brought as habeas actions.” 292 F.3d at 423.

⁴⁹ Although the lead plaintiff in the suit was actually a death row inmate, Bobby A.

district court reasoned that because the action brought by Vickers was a habeas petition, rather than a suit under 42 U.S.C. § 1983, it was required to pass through the § 2244 gateway. Because it had not done so, the district court concluded that it lacked jurisdiction. The district court therefore dismissed the action on December 8, a day before the scheduled execution.⁵⁰ In his district court pleadings, Vickers had argued that *Martinez* was not controlling because he was not challenging the mode or method of his execution; that is he was not claiming that lethal injection is a categorically cruel and unusual punishment. Moreover, and perhaps more critically, Vickers insisted that with respect to the threshold jurisdictional question — the question of whether the precise challenge he was seeking to bring could be brought under § 1983 — the Supreme Court's grant of certiorari in *Nelson* had cast serious doubt upon the validity of *Martinez* and the execution should therefore be stayed pending the Supreme Court's disposition of *Nelson*. The suit therefore comprised two distinct strands. The substantive strand revolved around the claim that the particular chemical combination that the State intended to use to effectuate the execution violated the Eighth Amendment. The procedural strand turned on the issue of how the substantive question could be raised.⁵¹ But the district court mechanically cited *Martinez* without addressing the particulars of Vickers's argument.

Vickers's lawyers had not expected to have any better luck on appeal to the Fifth Circuit, a court of appeals that is famously inhospitable to claims brought by death row inmates. Yet at 1:30 on the afternoon of December 9, the date of the scheduled execution, the Fifth Circuit issued an unusual opinion.⁵² The court of appeals stated that it is was "keenly aware that the Supreme Court has under

Hines, whose execution was stayed pending resolution of his *Atkins* claim, *Atkins v. Virginia*, 536 U.S. 304 (2002), we refer to the suit brought by Billy F. Vickers because the circumstances of his case were the most striking.

⁵⁰ See *Billy Frank Vickers*, at <http://www.clarkprosecutor.org/html/death/US/vickers-893.htm> (last visited Dec. 16, 2004).

⁵¹ In May 2004, less than two months after the case was argued, the Supreme Court issued a unanimous opinion in *Nelson*. *Nelson v. Campbell*, 541 U.S. 637 (2004). In an opinion by Justice O'Connor, the Court held that because Nelson's suit did not call into question the validity of his sentence, and because Nelson's challenge would not "necessarily prevent" the state from going forward with the execution, it was properly brought under § 1983. See 124 S.Ct. at 2123, 2125. Of course, it is also true that Vickers's challenge did not call into question the validity of his sentence, and even if he had prevailed, the State of Texas could have gone forward with the execution (albeit with a different combination of chemicals). Following the Supreme Court's decision in *Nelson*, Texas death row inmate David Harris filed a suit under § 1983, raising the same lethal injection challenge that Vickers had. The federal district court granted a temporary restraining order. The Fifth Circuit assumed that in view of *Nelson*, the case was properly brought under § 1983, but it vacated the temporary restraining order, holding that Harris was not entitled under equitable principles to the relief he sought. *Harris v. Johnson*, 376 F.3d 314 (5th Cir. 2004), reversing 323 F. Supp. 2d 797 (S.D. Tex.).

⁵² *Hines v. Johnson*, 83 Fed. Appx. 592 (5th Cir. 2003).

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 described by the district court.”⁵³ Moreover, with respect to the merits of the underlying Eighth Amendment claim, the Fifth Circuit’s opinion was also far from dismissive. The court noted, “[s]ubstantively, [Vickers has] submitted evidence that appears to be facially stronger than that which has supported prior complaints of this nature; but we are not in a posture to deal further with it under our present precedent.”⁵⁴ As Vickers’s lawyers read the panel’s opinion, the court was signaling that it found the merits of the challenge intriguing, but was precluded by circuit precedent from examining the merits.⁵⁵ The panel also noted that the Supreme Court’s grant of certiorari in *Nelson* did seem to implicate the very circuit precedent that prevented it from inquiring further into the merits.⁵⁶ The Fifth Circuit issued its opinion at approximately 3:30 p.m. on December 9, 2003, the day of Vickers’s scheduled execution. Although Vickers’s lawyers had originally planned to seek immediate review in the Supreme Court, the language of the panel’s opinion seemed to invite counsel to request en banc review. Consequently, at around 4:00 p.m. on December 9, Vickers’s lawyers filed a motion seeking that the Fifth Circuit take the case en banc.

The Fifth Circuit is accustomed to deciding death penalty cases under the pressure of execution deadlines. Indeed, in the not-so-distant past, Texas used execution dates to drive death penalty litigation. By setting an execution date, the State coerces the courts to adjudicate cases faster than they otherwise might. This practice has provoked condemnation from some judges on the Fifth Circuit, including those not typically solicitous to claims brought by death row inmates.⁵⁷ The short of it is that the Fifth Circuit is a well-oiled machine when it comes to disposing of death penalty cases quickly to permit an execution to proceed on schedule. Yet at five o’clock there was still no decision on the motion for en banc review. Then it was 6:00, 6:30, 7:00 p.m., and still nothing. Vickers’s lawyers concluded that the Fifth Circuit had to be on the verge of granting en banc review, and that someone was writing a dissenting opinion, which was causing the delay. There was no other explanation for the silence. At around eight o’clock, two hours into the execution window, the clerk of the court phoned Vickers’s lawyers and the Attorney General’s office. The clerk announced that the Fifth Circuit would be taking no further action on the case that evening. Everyone on the phone, Vickers’s

⁵³ *Id.* at 592.

⁵⁴ *Id.*

⁵⁵ Even in death penalty cases, the Fifth Circuit follows the practice of all the federal circuits whereby a panel of the court is bound by a prior panel’s resolution of the legal issue presented. *See, e.g.,* *Goodwin v. Johnson*, 132 F.3d 162, 175–76 (5th Cir. 1997).

⁵⁶ *Hines*, 83 Fed. Appx. 592.

⁵⁷ *See* David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 705–06 & nn.41 & 42 (1996) (discussing criticism of Judges Reavley and Jones).

lawyers and the State's lawyers as well, were utterly nonplussed. The warden was holding a valid execution warrant directing him to carry out the execution before midnight, and the Fifth Circuit was going home. Vickers's lawyers asked the clerk whether a motion could be filed with the panel, requesting that the panel stay the execution until the en banc court issued an order the following day. The clerk's response was that Vickers could file anything he wanted, but the Fifth Circuit would be taking no further action that day. The clerk reminded counsel that because there was no stay in effect, the State was free to go forward with the execution.

At the same time that Vickers's lawyers had requested en banc review in the Fifth Circuit, they had lodged a stay motion with the Supreme Court. Under this practice, lawyers can provide the clerk of the Court with pleadings that they will later file, so that the pleadings are already at the Court and are ready for distribution to the Justices' chambers. Following the conference call, counsel for the parties engaged in a series of discussions regarding the appropriate course of action in light of the court of appeals's unprecedented action. The Attorney General agreed that it would be inappropriate to execute Vickers under the circumstances. The Attorney General informed Vickers's counsel that she would advise the warden not to carry out the execution. Vickers's lawyers asked whether she would put that in writing, and she declined to do so.⁵⁸ Vickers's lawyers then asked whether she could assure them that the warden would heed her advice. The Attorney General told them she could not. Finally, Vickers's lawyers attempted to speak directly with the warden, to ask him whether he intended to follow the advice of his lawyers in the Attorney General's office, but Vickers's lawyers were denied permission to speak directly to the warden.

By this time it was 10:00 p.m. Vickers's lawyers had two choices: do nothing, or inform the clerk at the Supreme Court that they wished to file the stay motion that they had lodged with the Court earlier that day. The advantage of filing the stay motion was that if the Court granted it, everyone could go home for the evening; the disadvantage was that if the Court denied it, the warden might perceive that he had been authorized to go forward with the execution. Vickers's counsel decided to do nothing. Two hours later, the execution had not been carried out, and the execution warrant expired.⁵⁹ Vickers was returned to death row.

Although the prison had apparently abandoned its plan to execute Vickers as early as 8:30 or 9:00 p.m. that evening, if not before, this fact was never communicated to Vickers. Not until moments prior to midnight did he learn that he would live to see the next day. Every time he heard a commotion, he thought they

⁵⁸ It was not terribly unreasonable for the Attorney General's office to be reluctant to indicate in writing that it had advised its client to defy a court order, even though defiance of that order was undoubtedly appropriate.

⁵⁹ Texas Execution Information Center, Billy Vickers, at <http://www.txexecutions.org/reports/317.asp> (Jan. 29, 2004).

were coming for him. Vickers committed a vile crime, and it might be difficult to feel much sympathy for someone like him, but the United States Constitution prohibits torture,⁶⁰ even if the torture victim committed atrocious acts.

Vickers could relax a bit on December 10, 2003, but his lawyers could not, and neither could Kevin Zimmerman, because Zimmerman's execution was scheduled for December 10, and the same lawyers who represented Vickers also represented Zimmerman. Zimmerman and Vickers were both parties to the motion for rehearing that the Fifth Circuit had gone home the night before without resolving. Zimmerman's lawyers were hopeful on December 10 that the court would issue an order early in the day announcing that the en banc court would review the case. Instead, the clock started ticking again. At 10:00 a.m. the Fifth Circuit had not issued an order. Then it was 11:00 a.m., noon, and 1:00 p.m. Zimmerman's lawyers decided that if the Fifth Circuit had not taken some action by 4:00 p.m., a stay motion would be filed with the Supreme Court. The view was that it was too risky to put Zimmerman through what Vickers had gone through the day before.⁶¹ At 3:30 p.m., the Fifth Circuit finally ruled. The court issued a boiler-plate order denying en banc review. Why it took nearly twenty-four hours for the court to produce the order that it ordinarily issues within a couple of hours after the motion for en banc review gets filed is anybody's guess. Zimmerman's lawyers filed a stay motion with the Supreme Court. At twenty minutes before six, Justice Scalia entered an order halting the execution. For several days, it appeared as though the challenge to the lethal injection combination would either cause the state to alter the chemical cocktail, or cause the execution process temporarily to halt. That appearance, however, survived for a mere four days. The following Monday, the full Court, by a vote of five-to-four, vacated the stay that Justice Scalia had issued the preceding Wednesday.⁶²

Neither Vickers nor Zimmerman had ever filed a petition for writ of certiorari. On Friday, December 12, 2003, three days before the Court dissolved the stay in Zimmerman's case, Vickers's counsel informed the district attorney and the trial judge that Vickers would in fact be filing such a petition. When, on the following Monday, the Supreme Court vacated the stay it had issued for Zimmerman,⁶³ Vickers and Zimmerman were obviously disappointed, but four dissenting votes caused the lawyers to be hopeful concerning the prospects for the Court's granting the petition for writ of certiorari.⁶⁴ Nevertheless, despite knowing that Vickers's

⁶⁰ See U.S. CONST. amend. VIII.

⁶¹ This reluctance to place Zimmerman in the position Vickers had occupied was augmented by a rumor that the Governor's office, in contrast to the Attorney General's office, had been urging that the execution of Vickers go forward the night before.

⁶² See *Zimmerman v. Johnson*, 540 U.S. 1087 (2003).

⁶³ *Id.*

⁶⁴ By convention, the Court grants certiorari upon the affirmative vote of four Justices, although a smaller number is sometimes sufficient. See ROBERT L. STERN ET AL., SUPREME

counsel intended to seek certiorari review, and despite knowing that four Justices had dissented from the dissolution of the Zimmerman stay, the State of Texas, on December 16, 2003, without holding a hearing or discussing the matter with Vickers's counsel, rescheduled Vickers's execution for January 28, 2004. At around the same time, Zimmerman's execution was set for January 21, 2004. A third death row inmate, Kenneth Bruce, was set for execution on January 14, 2004.⁶⁵

The week after Vickers was originally scheduled to die, the State of Virginia set an execution date for James Reid.⁶⁶ Using an approach similar to the one that lawyers for Vickers and Zimmerman had employed in Texas, lawyers for Reid in Virginia filed an action under 42 U.S.C. § 1983, challenging not only the specific chemical mixture that would be used to carry out the execution, but also the legality of the so-called cut-down procedure — the same procedure that had been implicated in the *Nelson* case from Alabama.⁶⁷ A panel of the Fourth Circuit stayed Reid's execution on December 17, 2003.⁶⁸ The Fourth Circuit observed that the jurisdictional issue presented by Reid was similar if not identical to the issue the Supreme Court was going to decide in *Nelson*, and that it was therefore appropriate to stay the Reid execution pending *Nelson*. The Virginia Attorney General asked the Supreme Court to vacate the Fourth Circuit's stay, but, on December 18, 2003, the Supreme Court refused.⁶⁹

The picture on December 19, 2003, was therefore somewhat opaque. The Court had granted certiorari in *Nelson*, but had then dissolved the stay in Zimmerman's case, even though the case presented the same jurisdictional question. Three days later, the Court refused to dissolve a stay in the *Reid* case. It was not entirely clear what was going on. Nevertheless, the certiorari grant in *Nelson* coupled with the Court's refusal to permit the Reid execution to go forward seemed significant. Consequently, lawyers for Vickers and Zimmerman filed a second motion for rehearing in the Fifth Circuit, apprising that court of the Fourth Circuit's action in *Reid*, and the Supreme Court's refusal to intervene. The Fifth Circuit does not prohibit parties from filing a second motion for rehearing, and a review of the

COURT PRACTICE 261–62 (6th ed. 1986); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–1109 (1988) (discussing the Supreme Court's practice for granting certiorari). In contrast to a petition for writ of certiorari, a motion for a stay of execution requires five votes. S. REP. NO. 107–315, at 33–34 (2002).

⁶⁵ See *Kenneth Eugene Bruce*, at <http://www.clarkprosecutor.org/html/death/US/bruce891.htm> (last visited Dec. 16, 2004).

⁶⁶ See *James Reid*, at <http://www.vadp.org/cases/reid.htm> (last visited Dec. 16, 2004). This website provides information regarding the crime Reid was convicted of and the procedural history surrounding his appeal for a stay of execution.

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Johnson v. Reid*, 540 U.S. 1097 (2003) (denying an application to vacate the stay of execution). Reid was eventually executed on September 9, 2004.

court's published opinions reveals a number of opinions addressing issues raised in second motions for rehearing.⁷⁰ Nevertheless, not only did the Fifth Circuit decline to write an opinion or an order denying the motion, the court literally refused to accept it. The court would not even docket the motion. Indicating that she had been instructed to do so by the court, the Fifth Circuit clerk returned the original and all required copies to counsel for Vickers and Zimmerman.

In 2004, a pattern began to emerge. On January 6, 2004, Texas executed Ynobe K. Matthews, but Matthews had been — in the argot of death penalty lawyers — a volunteer, having refused to authorize any appeals to be filed on his behalf.⁷¹ The first scheduled execution for a non-volunteer was the impending execution of Kenneth Bruce, set to die on January 14, 2004. In the meantime, the State of North Carolina had executed Raymond Rowsey on January 9, 2004.⁷² A panel of the Fourth Circuit, bound by the prior panel's action in the *Reid* case,⁷³ had originally halted the execution. The North Carolina Attorney General asked the Supreme Court to intervene, and the Court dissolved the stay of execution by a vote of five-to-four.⁷⁴ It was not immediately clear what distinguished *Nelson* and *Reid*, on the one hand, from Rowsey's case, on the other. Next, the State of Oklahoma executed Tyrone Darks on January 13, 2004.⁷⁵ Darks had received a stay from the Tenth Circuit on grounds similar to the stay issued by the Fourth Circuit in the *Reid* case. The Supreme Court dissolved the stay by a vote of five-to-four.⁷⁶ On January 14, 2004, the State of Ohio executed Lewis Williams, Jr.⁷⁷ A panel of the Sixth Circuit, by a vote of two-to-one, had declined to follow the Fourth Circuit's lead in *Reid*.⁷⁸ The dissenting judge argued that it was inappropriate for the execution to go forward in a case where the inmate had raised the precise procedural question that the

⁷⁰ See, e.g., *United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996), *cert. denied*, 522 U.S. 823 (1997); *Ates v. Commissioner*, 672 F.2d 468 (5th Cir. 1982); *Fry v. Estelle*, 527 F.2d 420 (5th Cir. 1976); *Jenkins v. United States*, 298 F.2d 443 (5th Cir.), *cert. denied*, 370 U.S. 928 (1962).

⁷¹ See *Ynobe Katron Matthews*, at <http://www.clarkprosecutor.org/html/death/US/matthews886.htm> (last visited Dec. 16, 2004).

⁷² See *Raymond Dayle Rowsey*, at <http://www.clarkprosecutor.org/html/death/US/rowsey888.htm> (last visited Dec. 16, 2004).

⁷³ See, e.g., *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

⁷⁴ See *Beck v. Rowsey*, 540 U.S. 1098 (2004).

⁷⁵ See *Tyrone Peter Darks*, at <http://www.clarkprosecutor.org/html/death/US/darks-889.htm> (last visited Dec. 16, 2004).

⁷⁶ See *Ward v. Darks*, 540 U.S. 1146 (2004).

⁷⁷ See *Lewis Williams, Jr.*, at <http://www.clarkprosecutor.org/html/death/US/williams-890.htm> (last visited Dec. 16, 2004).

⁷⁸ See *In re Williams*, 359 F.3d 811 (6th Cir. 2004).

Supreme Court would review in *Nelson*.⁷⁹ Williams's lawyers asked the Supreme Court for a stay. It was denied by a vote of five-to-four.⁸⁰

Bruce was set for execution in Texas on the same day Williams was executed in Ohio. Although Bruce, Vickers, and Zimmerman each had independent counsel,⁸¹ the same set of lawyers represented all of the inmates in connection with the lethal injection litigation. For perhaps obvious reasons, the lawyers unbundled the cases of the three Texas inmates set for execution in January. Their plan was to use lessons learned from litigating one case when litigating the next. If one inmate got a stay, the tactics employed to obtain it would be repeated; if the inmate was executed, the tactics would be modified.

Yet, the modifications did not seem to be making a difference in the cases outside of Texas. During early January, a clear pattern of five-to-four denials had emerged. It was possible that the stay that had stood up in *Reid* was an anomaly, without any significant analytical distinctiveness. But it was also possible that there was a coherent explanation, albeit an elusive one. If there was some coherent theory that explained *Nelson* and *Reid*, on the one hand, and the five-to-four denials from Oklahoma, Ohio, and North Carolina, on the other, then the fates of Vickers, Zimmerman, and Bruce hinged on the ability of their lawyers to figure out what that theory was.

Unfortunately for Bruce, the most likely factor that seemed responsible for the stay in *Reid* was the likelihood that Reid, like Nelson, would be subjected to a cut-down procedure, and Bruce had no viable claim that he would be subject to that practice. Consequently, lawyers from *Bruce* attempted to coax the four Justices who had voted to grant stays into voting to grant certiorari. If they could obtain a certiorari grant, they would then approach the state courts and ask the state courts for a stay of execution in view of the willingness of the Supreme Court to rule on the merits of the procedural issue.⁸² However, when the Texas courts refused to grant a stay

⁷⁹ See *id.* at 814–16 (Moore, C.J., dissenting).

⁸⁰ See *Williams v. Taft*, 540 U.S. 1146 (2004).

⁸¹ Each of the inmates scheduled for execution in January was also represented by appointed counsel. Bruce was represented by Mike Charlton, of Santa Fe, New Mexico. Vickers was represented by Keith Hampton, of Austin, Texas. Zimmerman was represented by Richard Ellis, of San Francisco, California. These three lawyers also worked on the lethal injection litigation, while simultaneously pursuing avenues unrelated to the lethal injection challenges; a discussion of those other avenues is outside the scope of this Article.

⁸² Astonishingly, there had previously been a Texas death penalty case where an inmate scheduled for execution, whose petition for writ of certiorari had been granted, was unable to secure a fifth vote for a stay of execution from the Supreme Court. *Ex parte Herrera*, 828 S.W.2d 8 (Tex. Crim. App. 1992). In *Herrera*, the Supreme Court had granted the inmate's petition for certiorari by the vote of four Justices on the day of his scheduled execution, though there had not been a fifth vote to provide a stay. However, the Texas Court of Criminal Appeals (CCA) entered an order vacating the execution date. Thereafter, the trial court entered an order setting another execution date for Herrera. As the new date

even in advance of the Supreme Court's vote in the case,⁸³ Bruce was out of options. His stay motion in connection with the lethal injection litigation was denied by the now routine vote of five-to-four, and he was executed on January 14, 2004.

Attention now turned to Zimmerman. He was scheduled for execution a week after Bruce. The jurisdictional argument standing alone did not appear to be garnering stays. Like Reid and Nelson, however, Zimmerman had been a serious intravenous drug abuser, and there were legitimate questions about the condition of his veins. He had complained in many forums about the prospect of a cut-down procedure. His lawyers therefore believed that his best hope for a stay was to emphasize the potential use of that procedure to make his case more like the cases of Nelson and Reid, and less like the cases of the four inmates who had been executed following the Supreme Court votes of five-to-four. However, that approach failed as well. Thus, on January 21, 2004, five and one-half weeks after Justice Scalia stayed his original date, Zimmerman was executed when the Supreme Court, by a vote of five-to-four, declined to issue a new stay.⁸⁴ When Zimmerman was executed, members of Vickers's family were outside the prison protesting. They realized that the fate of their relative was deeply connected to that of Zimmerman, and Zimmerman's death gave them no reason to be hopeful.

Vickers's lawyers had a week to think of something to distinguish his case. The problem they faced was that, following the Zimmerman execution, there was simply no good theory as to why Reid's stay had held up while all the others were denied. Two things did seem clear, however. First, the procedural question alone — the question the Supreme Court was set to address in *Nelson* — would not result in a stay.⁸⁵ Second, the issue relating to the arguable unconstitutionality of the chemical mixture used to carry out lethal injections was not of sufficient interest

approached, Herrera filed an application for a stay of execution with the CCA, asking the state court to issue a stay in view of the pendency of the case before the Supreme Court. The CCA issued a stay, noting that "it would be improper for this Court to allow applicant's execution to be carried out before his petition for writ of certiorari is fully reviewed by the Supreme Court." *Id.* at 9. *Herrera* is therefore authority for the proposition that if the Supreme Court has granted certiorari in a case, Texas courts will preclude the execution of a death row inmate whose case the Court has already decided to review.

⁸³ Bruce had filed a Writ of Prohibition in the Texas Court of Criminal Appeals. Petition for Writ of Prohibition Or, In the Alternative, Application for Stay of Execution, State ex rel. Bruce v. Dretke, No. WR-43,165-03 (Tex. Crim. App. Jan. 14, 2004). That writ was denied while the petition for writ of certiorari was still pending.

⁸⁴ See *Zimmerman v. Johnson*, 540 U.S. 1159 (granting stay of execution), *cert. denied*, 540 U.S. 1208 (2004).

⁸⁵ The Court may have perceived that the routine issuance of stays on the procedural question would have the consequence of halting the death penalty pending the decision in *Nelson*.

to five Justices to merit a stay, even though there did appear to be four votes to grant certiorari.⁸⁶

But Vickers's case was unique. On December 9, 2003, he had become the only person in the history of the death penalty in Texas not to be executed despite the existence of a valid death warrant that was neither rescinded nor stayed. The lethal injection claim was not going to get him a fifth vote for a stay, but Vickers's lawyers decided that perhaps one Justice might be persuaded by a claim arising out of the facts of December 9, 2003, and that Justice, in combination with the four who had dissented in all the lethal injection cases over the preceding month-and-a-half, would be sufficient to keep Vickers alive until the Supreme Court decided the jurisdictional question in *Nelson*. The gist of the claim arising out of the events of December 9, 2004, was that the State's failure to inform Vickers that it was not going to go forward with the execution for more than three hours after it had made the decision not to go forward constituted cruel and unusual punishment, and that the State's new attempt to carry out his execution amounted to double jeopardy.

Vickers had new substantive arguments, but he faced a procedural dilemma. The highest Texas state criminal court, the Texas Court of Criminal Appeals (CCA), adheres to a doctrine it calls the "two-forum rule."⁸⁷ Under this rule, the CCA refuses to adjudicate any case where there is an identical or closely related issue pending in federal court.⁸⁸ Consequently, were Vickers to have filed his action in federal court, the state courts would perhaps have refused adjudication. However, in the face of the way his case had already been treated by the Fifth Circuit — first by that court's refusal to rule on the motion for rehearing en banc on the night of the scheduled execution and then by that court's refusal to docket Vickers's second motion for rehearing following the Fourth Circuit's action in *Reid* — Vickers's lawyers were reluctant to place all their eggs in the federal court basket. So the action was filed in state court on Friday, January 23, 2004 — less than two days following the Zimmerman execution. The following Monday, January 26, Vickers's lawyers lodged his § 1983 suit in federal court, still reluctant to file it officially in view of the state's two-forum rule.⁸⁹ Late Monday afternoon, the clerk for the CCA

⁸⁶ See *supra* note 64 (discussing the rule of four used by the Supreme Court to review petitions for certiorari).

⁸⁷ See *infra* note 90 (discussing the two forum rule).

⁸⁸ See *infra* note 90. The doctrine has been recently modified, but not in a way that would have had any impact on the lethal injection litigation. See *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004).

⁸⁹ Also on Monday, January 26, 2004, Vickers moved in the court of appeals for a stay of execution pursuant to Fifth Circuit Local Rule 8.9, which provides for stays of execution when:

there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari and . . . there is a substantial possibility of reversal

informed Vickers's counsel that the CCA would be taking no action until, at the earliest, the next day. Vickers's lawyers could wait no longer and filed the federal lawsuit first thing Tuesday morning.⁹⁰

By mid-afternoon, the district court had dismissed the suit. However, Vickers's counsel did not immediately receive a copy of the district court's order. Counsel assumed that the district court followed circuit precedent and construed the § 1983 action as a habeas petition just as different district courts had done in the *Bruce* and *Zimmerman* cases. Vickers's counsel further assumed that because the Fifth Circuit had not authorized a successive petition under 28 U.S.C. § 2244, the district court had concluded that it lacked jurisdiction. Vickers's lawyers had confronted this very disposition during the lead-up to the first scheduled execution of December 9, 2003, and again during the *Bruce* and *Zimmerman* executions in the preceding two weeks.

of [the Fifth Circuit's] decision, in addition to a likelihood that irreparable harm will result if its decision is not stayed.

5TH CIR. R. 8.9, available at <http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf> (last visited Sept. 9, 2004). The fact that four Justices had dissented from all the denials of motions for stays of execution over the preceding month suggested that those four were willing to grant certiorari on the issue; nevertheless, the Fifth Circuit summarily denied the Rule 8.9 motion several hours after it was filed.

⁹⁰ Texas law pertaining to the filing of a second or successive habeas petition in state court is similar to federal law, except that a second or successive petition may be authorized even if the inmate does not raise a claim of actual innocence. See TEX. CRIM. PROC. CODE ANN. art. 11.071 § 5 (Vernon 2003). The CCA will authorize a death row inmate to file a successive habeas petition if the inmate can establish that "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *Id.* § 5(a)(1). See generally *Ex parte Davis*, 947 S.W.2d 216 (Tex. Crim. App. 1996).

On Tuesday afternoon, before the federal district court ruled, the CCA refused to authorize Vickers to file a successive state habeas petition. By a vote of seven-to-one, with one judge not participating, the CCA ruled that although the claim relating to the events of December 9 was unavailable when Vickers filed his previous state habeas application, Vickers had not shown that he was entitled to relief. For reasons beyond the focus of this Article, that is a bizarre ruling, in that the CCA's role is simply to determine whether a successive petition is authorized, not to evaluate the substantive merits of the petition. See TEX. CRIM. PROC. CODE ANN. art. 11.071 § 5(a) (Vernon 2003). If the CCA determines that a subsequent petition is authorized under state law, the trial court is to consider whether relief is warranted. See, e.g., *Ex parte Lewis*, No. 44725-02, 2003 WL 21751491 (Tex. Crim. App. July 24, 2003). The CCA did not adhere to this customary procedure in the *Vickers* case.

The CCA further held that the claim relating to the constitutionality of the chemical mix used in carrying out a lethal injection was not unavailable when Vickers first sought state habeas relief, and therefore could not be brought in a successive petition. *Ex parte Billy Frank Vickers*, No. 39-015-03 (Tex. Crim. App. Jan. 27, 2004), available at <http://www.cca.courts.state.tx.us/Opinions-Non%20Published/3901503.htm> (last visited Dec. 16, 2004).

As a result, an appeal to the Fifth Circuit was already prepared. The clerk of the Fifth Circuit called counsel to ask whether there would be any filing in the court of appeals, and counsel told her that there would be. The clerk informed counsel that it would have to arrive by 5:00 p.m., when the court would close for the day. At approximately 4:30 p.m., counsel sent an appeal via e-mail to the clerk's office. Minutes later, counsel finally received a copy of the district court's order.

As it happened, the district court had *not* disposed of the case the same way it had in the prior § 1983 litigation in December 2003, nor had the court acted in the same way as the district courts in the *Bruce* and *Zimmerman* litigation. Instead, following a practice used in several other federal circuits,⁹¹ but not the Fifth Circuit, the district court purported to transfer the case to the Fifth Circuit, pursuant to 28 U.S.C. § 1631.⁹² That section provides:

Whenever a civil action is filed in a court as defined in section 610 of this title . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed . . . , and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred⁹³

This ostensible transfer order created a serious jurisdictional issue that Vickers's counsel had not anticipated, and that was therefore not addressed at all in the appellate papers they had prepared. For example, the Fifth Circuit had held that a transfer order issued under § 1631 is not an appealable interlocutory order.⁹⁴ Yet it was critical that Vickers's lawyers be permitted to appeal the district court's order: if the action they filed in district court was properly construed as a second or successive habeas petition that had to pass through the § 2244 gateway, then the Supreme Court would not review the Fifth Circuit's judgment because the AEDPA provides that the decision of a court of appeals not to authorize a second or successive petition "shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari."⁹⁵ In other words, the fact that the district court purported to transfer the case, rather than dismiss it, placed an unanticipated impediment to getting the issue ultimately before the Supreme Court. Counsel immediately phoned

⁹¹ See, e.g., *Brown-Bey v. Ray*, 55 Fed. Appx. 508 (10th Cir. 2003); *Robinson v. Johnson*, 313 F.3d 128, 139–40 (3d Cir. 2002), *cert. denied*, 540 U.S. 826 (2003); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997).

⁹² 28 U.S.C. § 1631 (2000).

⁹³ *Id.*

⁹⁴ *Brinar v. Williamson*, 245 F.3d 515 (5th Cir. 2001).

⁹⁵ 28 U.S.C. § 2244(b)(3)(E) (2000).

the clerk for the Fifth Circuit and informed her that they did not wish to file the appeal that they had sent via e-mail minutes earlier. She informed counsel that the document would not be filed, and she asked when an appeal would in fact be sent. Vickers's lawyers assured her that it would be sent first thing the following morning, Wednesday, January 28, 2004.

There were now three questions Vickers's lawyers had to address: the availability of an action under 42 U.S.C. § 1983 to raise a challenge to events that had transpired on December 9, 2003; the applicability of the gateway provisions of 28 U.S.C. § 2244;⁹⁶ and whether the Fifth Circuit had jurisdiction, a question that arose because of the district court's order purporting to transfer the case. Vickers's lawyers divided up the work and began rewriting the appeal, focusing in significant part on the third issue (relating to transfer) — the only issue that had been completely unexpected. Shortly before 8:00 p.m. the fax machine rang, and an order started to arrive from the Fifth Circuit. The lawyers assumed this would be good news. No appeal had been filed, and the only thing an order could do, therefore, was stay the execution. As it happened, that was not what the Fifth Circuit did. A two-judge quorum issued an order that disposed of all "anticipated" filings by Vickers. The Fifth Circuit order held that (i) the district court properly recharacterized the § 1983 action as a subsequent habeas petition; (ii) the gate-keeping provisions of § 2244(b)(2) had not been satisfied and authorization to file a subsequent habeas application was therefore denied;⁹⁷ (iii) Vickers's claims relating

⁹⁶ The argument will be discussed in greater detail in the following section. The essence of the claim was that should the court construe the pleading as a § 2254 application, the application was not "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2). Vickers's argument was predicated in part on the Fifth Circuit's decision in *In re Cain*, 137 F.3d 234, 236–37 (5th Cir. 1998), which held that a later petition challenging the administration of a sentence filed by a prisoner who had previously filed a habeas petition challenging the validity of his underlying conviction and sentence was not "second or successive" and, therefore, did not implicate the AEDPA's gate-keeping provisions.

⁹⁷ Had Vickers actually filed a pleading in the court of appeals prior to the time that court ruled against him, he would have filed an *appeal* of the district court's order, not a motion for authorization to file a successive habeas petition. The Fifth Circuit nevertheless treated his case as if it were a second or successive petition that was required to pass through the § 2244 gateway. What makes the Fifth Circuit's resolution of the case still more astonishing, if that is possible, is that in treating the case as one that was required to comply with § 2244, the Fifth Circuit then proceeded to abrogate that very section.

Specifically, the Fifth Circuit decided the case by a two-judge quorum. The plain language of the AEDPA, however, prohibits the courts of appeals from deciding motions for authorization by two-judge panels. According to the statute: "A motion in the court of appeals for an order authorizing the district court to consider a second or successive application *shall be determined by a three-judge panel of the court of appeals.*" 28 U.S.C. § 2244(b)(3)(B) (2000) (emphasis added).

The various provisions contained in AEDPA demonstrate that Congress knows how to allow fewer than three judges to resolve an issue when it so wants. For example, in 28 U.S.C.

to the events of December 9, 2003, would be denied; and (iv) all anticipated requests for a stay of execution would be denied. Peculiarly, the quorum also ordered that any motion for rehearing be physically filed by 10:00 a.m. central time the following day, even though Vickers had still not filed his original appeal.

The district court's opinion had literally ignored — i.e., not mentioned a single word about — Vickers's argument that even if the action was properly recharacterized as a habeas petition, it was not subject to the gate-keeping provisions of § 2244. Nearly one-third of the legal memorandum Vickers filed in federal district court addressed this very issue. The Fifth Circuit likewise stated nothing about this issue, perhaps because that court simply did not know that Vickers was even making this argument, having disposed of his appeal before the appeal was ever filed. The Fifth Circuit did not even address the issue of its own jurisdiction, perhaps because it had not read the lower court's order carefully enough to realize that the court had purported to transfer the case (rather than dismissing it), or because Vickers's lawyers had never actually filed an appeal discussing that very issue.

Vickers elected not to seek further review in the Fifth Circuit, and instead filed a stay application and a petition for writ of certiorari in the Supreme Court. At approximately ten minutes before six, the Court denied the stay by a vote of five-to-four.⁹⁸ Vickers was executed several minutes thereafter. He was pronounced dead shortly after 6:00 p.m.

III. THE ARGUMENTS THAT VICKERS'S EXECUTION LEFT UNANSWERED

In this section we briefly lay out the specific arguments Vickers sought to have adjudicated in order to illuminate the daunting difficulties that face death row

§ 2253(c)(1), Congress provides that “a circuit justice or judge” can issue a certificate of appealability. More significantly, the version of Federal Rule of Appellate Procedure 22(b) originally adopted by Congress as part of AEDPA stated that a request for a certificate of appealability “shall be considered by a circuit judge or judges as the court deems appropriate.” Pub. L. No. 104–132, 110 Stat. 1214 (1996). Reading these provisions *in pari materia* with § 2244(b)(3)(B), which is appropriate because they were all enacted as part of the same legislation, it becomes particularly evident that Congress knew how to give the circuit courts flexibility to have a panel of fewer than three judges decide some habeas matters but consciously chose to require a three-judge panel to conduct the gate-keeping function for successive petitions. See *Hohn v. United States*, 524 U.S. 236, 249–50 (1998) (recognizing appropriateness of *in pari materia* construction of AEDPA's “requirements for certificates of appealability and motions for second or successive applications [because they] were enacted in the same statute”); *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks omitted) (citations omitted).

⁹⁸ See *Vickers v. Johnson*, 540 U.S. 1212 (2004) (denying certiorari).

inmates who seek to obtain review of issues that involve facts that were not in existence at the time they filed their original habeas applications. We begin by briefly sketching the substantive aspects of the claims Vickers raised, i.e., the Eighth Amendment claim relating to lethal injection, the Eighth Amendment claim relating to whether the expiration of the death warrant on December 9, 2003, constituted torture that precluded the state from later executing him, and the Fifth Amendment claim relating to double jeopardy. We then turn to the two procedural questions: one dealing with whether challenges like his are cognizable under 42 U.S.C. § 1983, the other dealing with whether — assuming such actions are properly characterized as habeas actions — suits like Vickers's are subject to the gate-keeping provisions of 28 U.S.C. § 2244.

A. *Lethal Injection*

Our objective in this section is to sketch briefly the essence of the claim that the chemical combination used to carry out a lethal injection in Texas violates the Cruel and Unusual Punishment Clause. The factual underpinnings of the argument have been addressed in the scholarly literature at some length.⁹⁹ We stress at the outset that the challenge Vickers sought to bring was *not* to the method of lethal injection, per se. It was therefore different from challenges to the use of the electric chair, which asserted that electrocution constitutes cruel and unusual punishment, or to other broad, generalized challenges to a particular mode of execution.¹⁰⁰ Had Vickers prevailed, Texas would have been permitted to execute him by lethal injection; it would simply have been required to alter the chemical combination used to achieve that end.

The Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a death sentence.¹⁰¹

⁹⁹ See *supra* note 34.

¹⁰⁰ See, e.g., *In re Kemmler*, 136 U.S. 436, 444–49 (1890) (stating that execution by electrocution is not unnecessary and wanton infliction of pain); see also *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001) (stating that execution by electrocution is not cruel and unusual); *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir. 1998) (stating that execution by hanging is not cruel and unusual); *Williams v. Hopkins*, 130 F.3d 333, 337 (8th Cir. 1997) (passing an electrical current through the body more than once is not cruel and unusual punishment); *Hunt v. Nuth*, 57 F.3d 1327, 1337–38 (4th Cir. 1995) (asserting that execution by lethal gas is not unnecessary and wanton infliction of pain), *cert. denied*, 516 U.S. 1054 (1996); *O'Bryan v. McKaskle*, 729 F.2d 991, 994 (5th Cir. 1984) (asserting that execution by lethal injection is not unnecessary and wanton infliction of pain).

¹⁰¹ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Fierro v. Gomez*, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (Execution by lethal gas in California was unconstitutional where evidence indicated “death by this method is not instantaneous. Death is not ‘extremely rapid[]’ or ‘within a matter of seconds.’ Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes

One example of unnecessary pain is a protracted killing; thus, a punishment is cruel if it involves "a lingering death."¹⁰² It is one thing if a protracted execution occurs inadvertently or rarely; it is quite another if a certain punishment will foreseeably cause suffering. A punishment that involves the *foreseeable* infliction of suffering is particularly constitutionally offensive.¹⁰³ This argument — that lethal injection in Texas will foreseeably cause a lingering death and excruciating suffering — formed the essence of the challenge that Vickers and others before him sought to have adjudicated. Although no court addressed the merits of the claim, the merits are not easily dismissed.

As currently practiced in Texas, Virginia, North Carolina, Oklahoma, Ohio, and several other states, lethal injection causes unnecessary pain, a lingering death, and torture. The basic physiology of the claim is not new. On the contrary, evidence has existed for at least fifty years that the "drugs used in lethal injections pose a substantial threat of torturous pain to persons being executed."¹⁰⁴ In *Chaney v. Heckler*, the Court of Appeals found that

[a]ppellants have presented substantial and uncontroverted evidence to support their claim that execution by lethal injection poses a serious risk of cruel, protracted death. . . . Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation.¹⁰⁵

In the litigation in Texas involving Bruce, Zimmerman, and Vickers, officials acknowledged that the Texas lethal injection protocol has not changed since it was first used in 1982.¹⁰⁶ But the Eighth Amendment has an additionally salient strand: punishments that are permissible at a given historical moment may become un-

their face," and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger," whose symptoms "include intense chest pains, . . . acute anxiety, and struggling to breath [sic]." (citation omitted), *aff'd*, 77 F.3d 301 (9th Cir.), *vacated on other grounds*, 519 U.S. 918 (1996).

¹⁰² *In re Kemmler*, 136 U.S. 436, 447 (1890).

¹⁰³ *Furman v. Georgia*, 408 U.S. 238, 273 (1973) (stating that if the failed execution in *Resweber* had been intentional and not unforeseen, "the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status").

¹⁰⁴ *Chaney v. Heckler*, 718 F.2d 1174, 1190 (D.C. Cir. 1983), *overturned on other grounds*, 470 U.S. 821 (1985).

¹⁰⁵ *Id.* at 1191 (citation omitted).

¹⁰⁶ *Judge Denies Stays of Three Executions; Suit Argues 3-Drug Combo Inhumane*, HOUS. CHRON., Dec. 9, 2003, at A29 (quoting a Texas Department of Criminal Justice official who acknowledges that no changes have been made to the procedure in place since 1982).

constitutional at a later time because the constitutional value embodies society's evolving standards of decency.¹⁰⁷ As the Court has observed throughout the entire history of death penalty litigation, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁰⁸ What changed in the two decades following the first notice that the chemical mix used in many states to inflict lethal injection could cause torture was a movement away from the use of those very chemicals in the euthanizing of pets.¹⁰⁹ If evolving standards of decency, as reflected by legislative action and the professional association of veterinarians, prohibit the use of these particular drugs when killing a dog or a cat, then those same standards of decency would certainly require a more humane, readily available version of the lethal injection for human beings as well. One could perhaps argue that animals that are euthanized are "innocent," in some philosophic sense, and deserve better than a convicted murderer. That argument would of course be a position on the merits of the Eighth Amendment issue. In the litigation pursued by Vickers, Zimmerman, and Bruce, however, no discussion of the merits ever occurred.

Texas carries out lethal injections by administering a combination of three chemical substances: sodium thiopental, or sodium pentothal (an ultrashort-acting barbiturate); pancuronium bromide, or pavulon ("a curare-derived agent which paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition or sensation");¹¹⁰ and potassium chloride (a chemical which activates the nerve fibers lining the person's veins, causes great pain, and can interfere with the rhythmic contractions of the heart and cause cardiac arrest).¹¹¹ Far from producing a rapid and sustained loss of consciousness and humane death, this particular combination of chemicals often causes the inmate to suffer an excruciatingly painful and protracted death, and to be conscious while so dying.¹¹²

Sodium thiopental, or sodium pentothal, is a short-acting barbiturate that is ordinarily used only in the induction phase of anesthesia to render a surgical patient unconscious for mere minutes.¹¹³ In ordinary surgery, the agent's short-acting characteristic is desirable because it facilitates the reawakening of the patient who

¹⁰⁷ See *supra* note 35 (discussing roots of "evolving standards of decency" strand of death penalty jurisprudence).

¹⁰⁸ *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

¹⁰⁹ See *infra* notes 134–45 and accompanying text.

¹¹⁰ See Keith Hampton, 2003: *A Legal Perspective: Death Penalty Litigation: Lethal Injections in Texas*, 67 TEX. B.J. 60 (2004) (explaining that pancuronium bromide is "a curare-derived agent which paralyzes all skeletal or voluntary muscles").

¹¹¹ *Id.*

¹¹² *Id.* at 61.

¹¹³ PHYSICIANS' DESK REFERENCE 480–81 (57th ed. 2003).

will be able to breathe on his own power if any complications arise in inserting a breathing tube before surgery.¹¹⁴ Because of its brief duration, sodium thiopental may not provide a sedative effect throughout the entire execution process.¹¹⁵ Dr. Dennis Geiser, the chairman of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee, recently explained:

[s]odium thiopental is not a proper anesthetic for use in lethal injection. Indeed, the American Veterinary Medical Association standards for euthanasia indicate that the ideal barbituric acid derivative for use in euthanasia should be potent, long acting, stable in solution, and inexpensive. Sodium pentobarbital (not sodium thiopental) best fits these criteria. Sodium thiopental is a potent barbituric acid derivative but very short acting with one therapeutic dose.¹¹⁶

Due to the chemical combination used in the Texas execution process, some probability exists that the sedative effect of the sodium thiopental is neutralized by the second chemical, pancuronium bromide.¹¹⁷ As Dr. Mark Heath, Assistant Professor of Clinical Anesthesia at Columbia University states:

Sodium thiopental is an ultra short-acting barbiturate. It would not be used to maintain a patient in a surgical plane of anesthesia for purposes of performing surgical procedures. It is unnecessary, and risky, to use a short-acting anesthesia in the execution procedure. If the solution of Sodium thiopental comes into contact with another chemical, such as pancuronium bromide, the mixture of the two will cause the sodium thiopental immediately to precipitate or crystallize. These factors are significant in the risk of the inmate not being properly anesthetized, especially since no-one checks that the inmate is unconscious before the second drug is administered.¹¹⁸

¹¹⁴ See *Why Lethal Injection Is Inhumane and Cruel Punishment*, Campaign to End the Death Penalty, at <http://www.castine.net/lethal%20injection.htm> (last visited Dec. 16, 2004) [hereinafter *Why Lethal Injection Is Inhumane*].

¹¹⁵ See *id.*

¹¹⁶ Affidavit of Dr. Dennis Geiser, *Texas v. Jesus Flores*, No. 877,994A.

¹¹⁷ See *Why Lethal Injection Is Inhumane*, *supra* note 114.

¹¹⁸ Affidavit of Dr. Mark Heath, *Texas v. Jesus Flores*, No. 877,994A.

Concerns about using sodium thiopental are heightened by the lack of medical personnel, the lack of proper monitoring of the inmate during the process and the lack of inmate-specific dosing of the barbiturate.¹¹⁹ According to Dr. Geiser:

[T]he dosage [of thiopental sodium] must be measured with some degree of precision, and the administration of the proper amount of the dosage will depend on the concentration of the drug and the size and condition of the subject. Additionally, the drug must be administered properly so that the full amount of the dosage will directly enter the subject's blood stream at the proper rate. If the dosage is not correct, or if the drug is not properly administered, then *it will not adequately anesthetize the subject, and the subject may experience the untoward effects of the neuromuscular blocking agent used.*¹²⁰

Moreover, drug manufacturers warn that without careful medical supervision of dosage and administration, sedatives can cause "paradoxical excitement" and can heighten sensitivity to pain.¹²¹ Manufacturers warn against administration by intravenous injection unless a patient is unconscious or out of control.¹²²

The second chemical involved in the lethal injection process, pancuronium bromide, or pavulon, is a derivative of curare that acts as a neuromuscular blocking agent.¹²³ If the sedative effect of the sodium thiopental is ineffective or neutralized, the pancuronium bromide would serve only to mask the excruciating pain of the condemned inmate.¹²⁴

Pancuronium bromide makes the patient look serene because of its paralytic effect on the muscles. The face muscles cannot move or contract to show pain and suffering. It therefore provides a "chemical veil" over the proceedings. By completely paralyzing the inmate, pancuronium bromide masks the normal physical parameters that an anesthesiologist or surgeon would rely upon to determine if a patient is completely unconscious and within a proper surgical plane of anesthesia. Because pancuronium bromide is an invisible chemical veil and not a physical veil like

¹¹⁹ See *Why Lethal Injection Is Inhumane*, *supra* note 114.

¹²⁰ Affidavit of Dr. Dennis Geiser, *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted on other grounds*, 535 U.S. 981, and *cert. dismissed as improvidently granted*, 537 U.S. 88 (2002) (emphasis added).

¹²¹ PHYSICIANS' DESK REFERENCE, *supra* note 113, at 480–81.

¹²² See *id.* at 482.

¹²³ See *supra* note 110 (describing pancuronium bromide).

¹²⁴ See *Why Lethal Injection Is Inhumane*, *supra* note 114.

a blanket or hood that is easily identifiable, the use of pancuronium bromide in lethal injection creates a double veil. It disguises the fact that there is a disguise over the process.¹²⁵

In *Abdur'Rahman v. Bell*,¹²⁶ Dr. Geiser asserted that "[w]hile Pavulon paralyzes skeletal muscles, including the diaphragm, it has *no effect on consciousness or the perception of pain and suffering*."¹²⁷ Administration of pavulon is "*like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond*."¹²⁸ This assertion is corroborated by the experience of eye surgery patient, Carol Weihrer.¹²⁹ During Ms. Weihrer's surgery, the sedative she received was ineffectual, and Ms. Weihrer was conscious of the entire surgery.¹³⁰ Due to the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness to doctors:

I experienced . . . what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death.¹³¹

In short, the second chemical, pancuronium bromide, or pavulon, in the lethal injection protocol serves no purpose in carrying out the execution. Its administration serves only to mislead witnesses of the execution, who believe that they are seeing someone being "put to sleep," when in fact they are observing a human being experience the painful and ravaging consequences of potassium chloride.¹³² The

¹²⁵ Affidavit of Dr. Mark Heath, *Texas v. Jesus Flores*, No. 877,994A.

¹²⁶ *Abdur'Rahman*, 226 F.3d 696.

¹²⁷ Affidavit of Dr. Dennis Geiser, *Abdur'Rahman*, 226 F.3d 696 (emphasis added).

¹²⁸ *Id.*

¹²⁹ Affidavit of Carol Weihrer, *Texas v. Jesus Flores*, No. 877,994A.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² [P]ancuronium bromide creates the serene appearance that witnesses often describe of a lethal injection execution, because the inmate is totally paralyzed. The calm scene that this paralysis ensures, despite the fact that the inmate may be conscious and suffering, is only one of the many controversial aspects of this drug combination.

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, 100 (2002).

witnesses remain unaware because the inmate, paralyzed by the pancuronium bromide, cannot express his agony.¹³³

Of course, the chemical agents themselves that are used in carrying out lethal injections have been used for two decades. Yet, there have been recent legislative changes that bear on the constitutionality of their continued use. Since 1981, at least nineteen states, including Texas, have passed laws that preclude the use of a sedative in conjunction with a neuromuscular blocking agent in the euthanasia of animals.¹³⁴ Moreover, in 2000, the leading professional association of veterinarians promulgated guidelines for euthanasia that prohibit the practice.¹³⁵ Those guidelines specifically state that “[a] combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.”¹³⁶ It is at least arguable that a euthanasia practice widely considered unfit for a dog is, pursuant to the evolving standards of decency component of the Eighth Amendment, also unfit for humans.

This argument rooted in the idea of “evolving standards of decency” had especial resonance in Texas because the Texas legislature had been the most recent legislative body to enact legislation mandating humane methods of euthanizing animals, which preclude the use of neuromuscular blocking agents such as pancuronium bromide.¹³⁷ With this legislation, Texas joined numerous states with laws recognizing that use of these chemicals would be inhumane in the euthanasia of dogs and cats.¹³⁸ Moreover, in addition to forbidding explicitly the use of a sedative with a neuromuscular blocking agent, the American Veterinary Medical Association (AVMA) stressed that only personnel trained and knowledgeable in anesthetic techniques should administer potassium chloride (the third drug in

¹³³ *Id.*

¹³⁴ See *infra* note 139.

¹³⁵ 2000 Report of the American Veterinary Medical Association Panel on Euthanasia, 218 J. AM. VETERINARY MED. ASS'N 669, 681 (2000) [hereinafter 2000 AVMA Report].

¹³⁶ *Id.* at 680.

¹³⁷ TEX. HEALTH & SAFETY CODE ANN. § 821.052 (Vernon 2003) (prescribing the methods of euthanasia for cats and dogs in the custody of animal shelters and requiring that shelters euthanize all other animals “only in accordance with the applicable methods, recommendations, and procedures set forth in the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia”).

¹³⁸ See FLA. STAT. ANN. §§ 828.058, 828.065 (West 2000); GA. CODE ANN. § 4-11-5.1 (1995); ME. REV. STAT. ANN. tit. 17, § 1044 (West 1987); MD. CODE ANN., CRIM. LAW § 10-611 (2002); MASS. GEN. LAWS ANN. ch. 140, § 151(A) (West 2002); N.J. STAT. ANN. § 4.22-19.3 (West 1987); N.Y. AGRIC. & MKTS. § 374(2)(b) (Consol. 2004); OKLA. STAT. ANN. tit. 4, § 501 (West 2003); TENN. CODE ANN. § 44-17-303 (2000). Other states have implicitly banned such practices. See 510 ILL. COMP. STAT. ANN. 70/2.09 (West 2004); KAN. STAT. ANN. § 47-1718(a) (2000); LA. REV. STAT. ANN. § 3:2465 (West 2003); MO. CODE REGS. ANN. tit. 2, § 30-9.020(14)(F)(5) (2004); R.I. GEN. LAWS § 4-1-34 (1998); CONN. GEN. STAT. ANN. § 22-344(a) (West 2001); DEL. CODE ANN. tit. 3, § 8001 (2001); KY. REV. STAT. ANN. § 321.207 (Michie 2004); 201 KY. ADMIN. REGS. 16:090, § 5(1) (2004); S.C. CODE ANN. § 47-3-420 (Law. Co-op. 1987).

Texas's lethal injection procedure) in conjunction with any anesthesia.¹³⁹ According to the AVMA:

It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.¹⁴⁰

Statutes in at least five other states in addition to Texas also expressly refer to the AVMA guidelines when delimiting humane methods of animal euthanasia.¹⁴¹ Vickers and others who raised the claim objecting to the chemical mix used in the lethal injection protocol were therefore relying on contemporary developments that reflect a recent turn against the use of these drugs. Such an argument is a classic Eighth Amendment claim because "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."¹⁴² In *Atkins*, which held that states cannot execute the mentally retarded and thereby overruled a decision from thirteen years earlier that had identified no such prohibition,¹⁴³ the Supreme Court emphasized that "evolving standards of decency" are best reflected in the various relevant laws enacted throughout the country.¹⁴⁴ The Court characterized state legislation as the "clearest and most reliable objective evidence of contemporary values."¹⁴⁵

The unmistakable trend over the past two decades of condemning the use of neuromuscular blocking agents, such as pancuronium bromide, in euthanasia is clear evidence, Vickers argued, that the practice violates the Eighth Amendment's ban on cruel and unusual punishment. These recent alterations of euthanasia protocols for

¹³⁹ 2000 AVMA Report, *supra* note 135, at 681.

¹⁴⁰ *Id.*

¹⁴¹ See 510 ILL. COMP. STAT. 70/2.09 (2004); KAN. STAT. ANN. § 47-1718(a) (2000); LA. REV. STAT. ANN. § 3:2465(c)(1) (West 1985); MO. CODE REGS. ANN. tit. 2, § 30-9.020(F)(5) (2003); R.I. GEN. LAWS § 4-1-34 (1998).

¹⁴² *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). The scope of the substantive protections afforded by the Eighth Amendment, as the Court recently reiterated, is defined by "evolving standards of decency that mark the progress of a maturing society." *Id.* at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁴³ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹⁴⁴ *Atkins*, 536 U.S. at 312 (quoting *Trop*, 356 U.S. at 101).

¹⁴⁵ *Id.* at 311 (quoting *Penry*, 492 U.S. at 331).

animals underscore the inhumanity of the chemicals currently used in Texas. The problem for an inmate like Vickers is that these recent developments had yet to transpire when he was sentenced to death or when he originally pursued federal habeas corpus relief. As a result, it became dauntingly difficult, if not impossible, for him to pursue it later.

B. Other Constitutional Claims Relating to the Events of December 9, 2003

Although the two Texas death row inmates who originally raised the lethal injection challenge with Vickers attempted to obtain federal review of that single issue, Vickers occupied a somewhat different position prior to his demise because of the events that he uniquely experienced on December 9, 2003, when his original death warrant expired. Consequently, prior to Vickers's execution on January 28, 2004, he also attempted to obtain federal review of two additional issues, both occasioned by the expiration of the death warrant.

Vickers did not argue that the State of Texas should have executed him on December 9, 2003, when the Fifth Circuit refused to rule on his pending motion for en banc review. He did argue, however, that the State of Texas had an obligation to inform Vickers that it had decided not to go forward with the execution as soon as that decision was reached, and that the State's action — pretending as if the execution would go forward for more than three hours after a decision to the contrary had been reached — amounted to unconstitutional torture.

Vickers's claim that grew out of the events of December 9, 2003, relied on a strand of Eighth Amendment doctrine that is well over a century old. As early as 1878, the Court observed that the Eighth Amendment forbids torture as well as unnecessary cruelty.¹⁴⁶ In *Gregg v. Georgia*,¹⁴⁷ Justice Stewart explicitly extended this principle to death penalty jurisprudence, noting that the American draftsmen of the Eighth Amendment "were primarily concerned . . . with proscribing 'tortures.'"¹⁴⁸

All prisoners who are executed probably undergo some degree of apprehension and fear, but Vickers's case was singularly different. Though he did not obtain a stay of execution, he was not executed. Further, the State continued to act as if he *would* be executed on December 9 for three or more hours after the decision not to go forward had been reached. His experience is less like ordinary apprehension and more like purposeful psychological torture. That no physical pain was inflicted upon Vickers is of no moment, for the Supreme Court has long recognized that the

¹⁴⁶ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] to the Constitution.").

¹⁴⁷ 428 U.S. 153 (1976) (plurality opinion).

¹⁴⁸ *Id.* at 170.

Constitution proscribes psychological as well as physical torture.¹⁴⁹ And mock executions are perhaps the quintessential illustration of impermissible psychological torture.¹⁵⁰

To be sure, there are times that the execution protocol will need to be carried out twice, through no fault of the state. For example, in *Louisiana ex rel. Francis v. Resweber*,¹⁵¹ an equipment malfunction prevented the state from carrying out the execution of an inmate on whom the execution process had begun. The Supreme Court held that the Fourteenth Amendment did not prevent the state from making a second attempt at carrying out the electrocution.¹⁵² But the Court noted in *Resweber* that the failure to execute the prisoner was unintentional and accidental. Indeed, Justice Frankfurter, who provided the necessary fifth vote in *Resweber*, insisted that “different questions” would have been raised had the facts demonstrated that the first attempt to carry out the execution had been something other than “an innocent misadventure.”¹⁵³

¹⁴⁹ See, e.g., *Trop*, 356 U.S. at 102 (stating that expatriation as penalty for desertion “subjects the individual to a fate of ever-increasing fear and distress”); *Rhodes v. Chapman*, 452 U.S. 337, 349–51 n.15 (1981) (explaining that possible psychological problems of inmates factored into Eighth Amendment analysis); *Hudson v. McMillan*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (“I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary.”); *Furman v. Georgia*, 408 U.S. 238, 271–73 (1972) (Brennan, J., concurring) (concluding that the imposition of the death penalty constituted cruel and unusual punishment). In addition, the Court in *Furman* stated that “the Framers also knew ‘that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.’” *Id.* at 271 (quoting *Weems v. United States*, 217 U.S. 349, 372 (1910)).

¹⁵⁰ Mock executions and other threats of imminent death are widely recognized to be a form of unconscionable torture. Legislation passed by the United States Congress on April 30, 1994, implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, identifies “the threat of imminent death” as a form of torture. 18 U.S.C. § 2340(2)(C) (2000). This provision was designed to bring “mock executions” within the ambit of the legislation. David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 455–56 (1991). The United States Department of State likewise recognizes mock executions to be a form of torture. See, e.g., U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, S. PR. 103–7 (Joint Comm. Print 1994) (recognizing mock executions as a form of torture in Chad, Sudan, Moldova, Liberia, and Colombia), available at http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_toc.html (last visited Dec. 16, 2004). Finally, federal courts themselves have recognized mock executions as forms of torture. See *Acree v. Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988).

¹⁵¹ 329 U.S. 459 (1947).

¹⁵² *Id.* at 465–66.

¹⁵³ *Id.* at 470–72 (Frankfurter, J., concurring).

In Vickers's case, there was certainly no "innocent misadventure." Whether the State tortured him in violation of the Eighth Amendment is a question that has no ready answer because the merits of his claim were never addressed. The claim was certainly plausible, however; and just as certainly, the claim could not have been brought in Vickers's original habeas proceeding.

Vickers raised a second constitutional claim as well. That claim was that the Double Jeopardy Clause precluded his execution.¹⁵⁴ The double jeopardy guarantee is applicable not only to trials, but also extends to any proceeding that results in the imposition of punishment for criminal conduct.¹⁵⁵ Once Vickers was scheduled to be put to death by lethal injection on December 9, 2003, he was placed "in jeopardy of life."¹⁵⁶ Absent a development that had the legal effect of erasing the death warrant that created that jeopardy, he could not be placed in such jeopardy again.

Fifth Amendment law distinguishes between "double" jeopardy and "continuing" jeopardy, and only the former is proscribed.¹⁵⁷ Thus, if the execution warrant of January 28 constituted "continuing jeopardy," then it raised no viable Fifth Amendment concerns.¹⁵⁸ However, because the December 9, 2003, death warrant in his case was neither withdrawn nor nullified by a stay of execution, there was no event that could be analogized to the "continuing jeopardy" that results when a convicted felon obtains an appellate reversal.¹⁵⁹ Instead, the warrant expired by governmental acquiescence, thereby terminating the execution of judgment. When the warrant expired at that moment, jeopardy for his life was terminated in a way analogous to an acquittal. Vickers attempted to argue that the same values that underlie the Double Jeopardy Clause entailed that the State not be permitted to go forward with his execution on January 28, 2004. Among other interests, the double jeopardy preclusion serves a "constitutional policy of finality for the defendant's benefit."¹⁶⁰ Further, the Double Jeopardy Clause protects citizens from repeated subjection "to embarrassment, expense and ordeal and compelling [them] to live in a continuing

¹⁵⁴ The Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This guarantee is applicable to the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784 (1969).

¹⁵⁵ *See, e.g., Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994); *United States v. Halper*, 490 U.S. 435 (1989).

¹⁵⁶ *See, e.g., Price v. Georgia*, 398 U.S. 323, 326 (1970) (explaining the application of the continuing jeopardy principle).

¹⁵⁷ *Id.*

¹⁵⁸ *See United States v. Ball*, 163 U.S. 662, 669–71 (1896). *See also United States v. Scott*, 437 U.S. 82, 91 (1978) (stating that the retrial after defendant successfully appealed is no "act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect").

¹⁵⁹ *See Price*, 398 U.S. at 326.

¹⁶⁰ *United States v. Jorn*, 400 U.S. 470, 479 (1971).

state of anxiety and insecurity.”¹⁶¹ Whether the Double Jeopardy Clause was intended to apply to the execution of a death warrant, or whether Vickers would have prevailed on the merits of this constitutional question are probably close questions.

Indeed, with respect to both Vickers’s Eighth Amendment and Fifth Amendment claims, it seems likely that had the merits of either claim been reached or even addressed by a court, the sheer perversity of the claims would have militated against finding in Vickers’s favor. Yet, the claims Vickers raised relating to the events of December 9 were arguably perverse, *not* because the underlying legal theories were particularly exotic; on the contrary, both claims were rooted in well-established strands of Eighth and Fifth Amendment jurisprudence. The claims were perverse simply because the factual predicate that gave rise to them is exceedingly unusual — so unusual that there is no documented instance of its ever having occurred before.

We cannot know whether the claims Vickers sought to have reviewed would have succeeded because the merits of the claims were never addressed. Yet we can be certain of two things. The first is that, unlike the lethal injection claim, which rested on the proposition that the standards of decency had evolved such that a punishment that had previously been permissible no longer was so, the claims relating to December 9, 2003, were rather plebian. The second is that these plebian claims grew from an extraordinary event that transpired a mere seven weeks before Vickers died. Vickers could not have brought these claims terribly much sooner than he did. Now, we turn to this timing issue.

IV. FEDERAL JURISDICTION OVER NEW CLAIMS

Under the AEDPA, a death row inmate generally can file only a single federal habeas petition.¹⁶² According to 28 U.S.C. § 2244, a federal court is required to dismiss any petition that raises claims already decided.¹⁶³ The statute does contemplate additional federal habeas petitions that raise claims based on new developments, but the only new developments that the statute identifies are those based on so-called new rules of constitutional law or those establishing that the death row inmate is actually innocent.¹⁶⁴ According to the statute:

¹⁶¹ *Green v. United States*, 355 U.S. 184, 187 (1957).

¹⁶² 28 U.S.C. § 2253(c)(1) (2000).

¹⁶³ 28 U.S.C. § 2244(a) (2000).

¹⁶⁴ *See id.* How the actual innocence component of § 2244(b) pertains to claims that an inmate is innocent of the sentence, which was Vickers’s argument following the events of December 9, has not yet been addressed by the Supreme Court. In *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Supreme Court held in a pre-AEDPA case that, in the context to a challenge of a death sentence in federal post-conviction proceedings, a death row inmate shows that he is “actually innocent” by establishing that no reasonable juror would have

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.¹⁶⁵

The claims that Vickers sought to have adjudicated after December 9, 2003, were not based on new rules and thus did not satisfy § 2244(b)(2)(A). Nor did Vickers challenge the reliability of either his conviction or sentence — meaning that his claims also did not satisfy § 2244(b)(2)(B)(ii). As a result, when Vickers, Zimmerman, and Bruce sought to challenge the use of certain chemicals in the lethal injection cocktail in early December 2003, there was no way they could satisfy the § 2244 gate-keeping provisions.

But why did they need to? Habeas relief is available to inmates who are challenging the legality of their detention. 28 U.S.C § 2254 provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

found him eligible for death under applicable state law. *See also* *Haley v. Cockrell*, 325 F.3d 569, 570–72 (5th Cir. 2003) (Smith, J., dissenting) (rejecting the court’s denial of petition for rehearing en banc by noting that the Supreme Court has not discussed the meaning of “actual innocence” of the death sentence under AEDPA), *vacated on other grounds*, *Dretke v. Haley*, 541 U.S. 386 (2004); *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002) (suggesting that *Sawyer* has been codified in the AEDPA), *cert. denied*, 537 U.S. 1236 (2003). *Cf.* *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (adopting a miscarriage of justice standard that is consistent with AEDPA’s central concerns); *Calderon v. Thompson*, 523 U.S. 538, 558–60 (1988).

¹⁶⁵ 28 U.S.C. § 2244(b)(1)–(2) (2000).

violation of the Constitution or laws or treaties of the United States.¹⁶⁶

Vickers, Zimmerman, and Bruce were not claiming that they were “in custody in violation of the Constitution of laws or treaties of the United States.”¹⁶⁷ Nor were they claiming that the State was precluded from executing them,¹⁶⁸ or even that the State was precluded from using lethal injection as the mode of execution.¹⁶⁹ Their challenge was to the use of a specific component of the lethal injection mixture, a component not necessary to the carrying out of their execution. Consequently, the lawsuit these inmates filed in December 2003 was not an action under § 2254, and so the inability to pass through the § 2244 gateway is irrelevant. If their action was not a habeas action, however, what was it?

A. 42 U.S.C. § 1983

Vickers, Zimmerman, and Bruce filed an action under 42 U.S.C. § 1983, which creates a cause of action against state officials for the violation of “any rights, privileges, or immunities secured by the Constitution and laws [of the United States].”¹⁷⁰ If, as Vickers and his co-plaintiffs alleged, the chemical combination that the State intended to use to carry out their executions would cause unnecessary pain and torture, then under well-established Eighth Amendment principles, that chemical combination would violate the Constitution by amounting to cruel and unusual punishment.¹⁷¹ Section 1983 permits a court to order injunctive relief in order to correct such a constitutional violation. When these rights are violated, § 1983 creates an action for damages and injunctive relief for the benefit of any citizen of the United States against the state actor responsible for the violation.¹⁷²

¹⁶⁶ 28 U.S.C. § 2254(a) (2000).

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g., Sawyer*, 505 U.S. 333.

¹⁶⁹ *See Gomez v. Fierro*, 519 U.S. 918 (1996).

¹⁷⁰ 42 U.S.C. § 1983 (2000).

¹⁷¹ *See supra* text accompanying notes 99–145.

¹⁷² *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (quoting *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 700–01 (1978)). The Supreme Court has “given full effect to [the statute’s] broad language [by] recognizing that § 1983 ‘provide[s] a remedy . . . against all forms of official violation of federally protected rights.’” *Id.* at 445. *See also Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976). The secondary literature on § 1983 litigation is vast. For especially valuable recent contributions, see, e.g., Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

As a general proposition, a federal court has the power to issue injunctive relief when four conditions are satisfied: (1) a substantial likelihood that the plaintiff will prevail on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant; and (4) granting the preliminary injunction will not disserve the public interest.¹⁷³ These same criteria govern the issuance of equitable relief in actions predicated on 42 U.S.C. § 1983.¹⁷⁴ Each of these four conditions was seemingly satisfied in the lethal injection litigation. The substantive claim the parties sought to litigate was, as the Fifth Circuit conceded, substantial, and there appeared to be a substantial likelihood that they would prevail on the merits; their injury would obviously be irreparable; the injunction would do no harm to the State because it could carry out the execution with a different chemical combination; and it is difficult to see how the public interest is disserved by prohibiting the use of a chemical agent that offends the Constitution.

Neither the federal district court nor the Fifth Circuit ruled against the litigants on the merits. Instead, in the *Bruce* and *Zimmerman* cases, the federal district court, relying on the Fifth Circuit's opinion in *Martinez*,¹⁷⁵ characterized the action as a habeas action, then dismissed the petition for not having been authorized pursuant to § 2244.¹⁷⁶ In *Vickers*, in a wrinkle, the district court also characterized the action as a habeas petition, but rather than entering an order of dismissal, the court purported to transfer the case to the Fifth Circuit, pursuant to 28 U.S.C. § 1631. In each case, the Fifth Circuit similarly treated the challenge as a habeas action, and denied authorization under § 2244.¹⁷⁷ In none of the judicial proceedings did the court explain why the action was even appropriate under 28 U.S.C. § 2254, much less why it was inappropriate under 42 U.S.C. § 1983.

Although it takes a tortured reading of § 2254 to insist that an action challenging the use of a certain chemical for lethal injection constitutes a habeas action, and although it takes a similarly perverse reading of § 1983 to conclude that such an action cannot be brought under that statute, what is even more astonishing about the

¹⁷³ O'Shea v. Littleton, 414 U.S. 488, 502 (1974); Lindsay v. San Antonio, 821 F.2d 1103, 1105 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); Canal Auth. v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974).

¹⁷⁴ Mitchum v. Foster, 407 U.S. 225, 242-43 (1972); Tex. Catastrophe Prop. Ins. Ass'n v. Morales, 975 F.2d 1178, 1180 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993); Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988); Duke v. Texas, 477 F.2d 244, 254 & n.5 (5th Cir. 1973) (Goldberg, J., concurring), *cert. denied*, 415 U.S. 978 (1974).

¹⁷⁵ 292 F.3d 417 (5th Cir. 2002).

¹⁷⁶ See Andrew Hammel, *Death-Penalty Appeals and Post-Conviction Proceeding: Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 387 (2003).

¹⁷⁷ *Id.*

executions of Vickers, Zimmerman, and Bruce — not to mention the half dozen or more death row inmates in Ohio, Florida, Oklahoma, and North Carolina who were also executed while attempting to raise the same issue — is that the Supreme Court was already poised to address the very jurisdictional issue presented in all these cases. In *Nelson v. Campbell*, the Supreme Court granted certiorari to resolve:

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 the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?¹⁷⁸

Prior to the decision in *Nelson*, there was a split among the circuits with regard to whether any action brought under 42 U.S.C. § 1983 by a death-sentenced prisoner that did not challenge the conviction or sentence should nonetheless be treated as a successive habeas corpus petition. The Eighth and Ninth Circuits had concluded that a challenge to the method of execution was properly brought as a § 1983 action. According to the Ninth Circuit, “[t]o hold otherwise would carve out of habeas and § 1983 law a separate jurisprudence for death penalty cases. There is no authority for such a dichotomy.”¹⁷⁹ In contrast, the Fifth Circuit had held that similar actions by a death-sentenced prisoner when there is an impending execution must be brought as habeas petitions.¹⁸⁰

To be sure, Vickers and his cohorts were seeking an equitable remedy, and a party who seeks equity is held to certain standards.¹⁸¹ One such standard is that the

¹⁷⁸ *Nelson v. Campbell*, 540 U.S. 1046 (2003).

¹⁷⁹ *Fierro v. Gomez*, 77 F.3d 301, 304 (9th Cir.), *vacated*, 519 U.S. 918 (1996). *See also* *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (explaining that an action regarding interference by a state official in clemency proceedings is properly brought as a § 1983 action); *Wilson v. U.S. Dist. Court for the N. Dist. of Cal.*, 161 F.3d 1185 (9th Cir. 1998) (denying a motion to vacate a temporary restraining order granted by a district court to hear a § 1983 action regarding clemency proceedings); *Duvall v. Keating*, 162 F.3d 1058 (10th Cir.) (considering a § 1983 action regarding clemency procedures), *cert. denied*, 525 U.S. 1061 (1998); *Booker v. Murphy*, 953 F. Supp. 756, 762 (S.D. Miss. 1997) (“The Court is thus persuaded that the Plaintiffs’ challenge in this case to the manner in which their sentence of death will be carried out, that is, by lethal gas, is properly cognizable under section 1983.”); *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993), *cert. denied*, 512 U.S. 1246 (1994).

¹⁸⁰ *Martinez*, 292 F.3d at 423 (“Accordingly, § 1983 challenges to an impending execution (like § 1983 challenges to a state’s method of execution or § 1983 challenges seeking immediate or speedier release from prison) must be brought as habeas actions.”), *cert. denied*, 535 U.S. 1091 (2002). *See also* *Beets v. Tex. Bd. of Pardons & Poles*, 205 F.3d 192, 193 (5th Cir. 2000) (holding that challenges to clemency proceedings must be pursued by a writ of habeas corpus).

¹⁸¹ *See, e.g., Dunlop-McCullen v. Local 1-S*, 149 F.3d 85, 90 (2d Cir. 1998) (discussing principles of equity).

lawsuit not be brought for purposes of delay.¹⁸² The delay issue gave rise to the question of whether Vickers had waited too long. Should Vickers, Zimmerman, and Bruce have filed suit earlier, and, by delaying, were they precluded from obtaining equitable relief?¹⁸³

To begin with, it is by no means certain that a party — even a death row inmate — can agree to an unconstitutional punishment.¹⁸⁴ If the litigants were correct on the merits of their claim, then even if they *had* delayed bringing the suit, the court was still authorized — and even required — to grant relief, for the simple reason that no matter how dilatorious their behavior, they were incapable of acceding to an impermissible punishment.

More to the point, however, the litigants were actually quite diligent in pursuing relief. In arguing to the contrary, the State relied on the Supreme Court's decision in *Gomez v. United States District Court for the Northern District of California*,¹⁸⁵ in which the Supreme Court refused to decide whether a suit challenging the state's method of execution should have been brought as a habeas action or a suit under § 1983 and instead held that the death row inmate, who had filed four habeas actions, could have included the claim in one of his previous filings. Vickers's lawsuit was clearly distinguishable from *Gomez* for at least four reasons. First, unlike *Gomez*, Vickers was not challenging the mode of his execution. *Gomez* had argued that execution by lethal cyanide gas is inherently unconstitutional.¹⁸⁶ Consequently, once he was sentenced to death in a state (California) where lethal injection was the prescribed mode of execution, his challenge to the inherent unconstitutionality of lethal injection immediately ripened. In contrast, however, whereas *Gomez*'s challenge to the mode of execution ripened as soon as sentence was pronounced, it is difficult to say exactly when Vickers's action ripened. Although Texas law prescribed lethal injection as the mode of execution at the time Vickers was sentenced to death, the statute did not specify (nor does it specify today) the precise chemical combination to be used in carrying out the execution.¹⁸⁷ The decision relating to the chemical combination is left to prison authorities, and they are free to change the mixture as they see fit. Vickers's action under § 1983 was not ripe until the State had announced that it intended to carry out his execution using a specific mixture of chemicals.¹⁸⁸ Prior to that time, his injury was speculative. If Vickers had

¹⁸² FED. R. CRIM. P. 11 advisory committee's notes.

¹⁸³ The State argued that the parties could not obtain equitable relief because they had waited too long. See *Gomez v. U.S. Dist. Court for the N. Dist. of Cal.*, 503 U.S. 653 (1992).

¹⁸⁴ *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.").

¹⁸⁵ 503 U.S. at 653–54.

¹⁸⁶ *Id.* at 653.

¹⁸⁷ See TEX. CRIM. PROC. CODE ANN. § 43.14 (Vernon 2004).

¹⁸⁸ See, e.g., *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, 513 U.S. 868

obtained relief from either his conviction or sentence in his habeas proceedings, or if the State had elected not to use pancuronium bromide as part of the lethal injection drug combination, then his challenge to the particular chemical combination would never have ripened.

Second, it was not until the Supreme Court granted certiorari in the *Nelson* case that Vickers had any potentially available procedural vehicle for raising his Eighth Amendment challenge. The Supreme Court did not grant certiorari in *Nelson* until December 1, 2003.¹⁸⁹ Until that time, Vickers was foreclosed from pursuing his challenge by Fifth Circuit precedent, which had held since *Martinez* that § 1983 is not an appropriate vehicle for challenges to the method of execution.¹⁹⁰

Third, insofar as the Eighth Amendment challenge to the lethal injection mixture hinged on so-called "evolving standards of decency,"¹⁹¹ Vickers had no substantive argument until the evidence of those evolving standards had become manifest. The evidence that supported Vickers's argument that "evolving standards of decency" now preclude the use of these well-known chemicals is of relatively recent vintage. For example, the Report of the American Veterinary Medical Association Panel on Euthanasia, deeming a combination of a neuromuscular blocking agent and a barbiturate as "not an acceptable euthanasia agent," was only released in 2000 and was not published in the *Journal of the American Veterinary Medical Association* until March 1, 2001.¹⁹² The Texas law adopting the AVMA guidelines took effect on September 1, 2003.¹⁹³ Another state explicitly prohibited the use of such drugs only during the two years immediately preceding Vickers's execution.¹⁹⁴ In the context of an Eighth Amendment challenge premised on "evolving standards of decency," the recentness of these events is of singular importance.

Finally, whatever comments one might have about the timing of the suit challenging lethal injection, clearly Vickers could not have raised his claims arising out of the December 9, 2003, events any sooner. One additional point should be mentioned. *Gomez* was decided in 1992, before passage of the AEDPA.¹⁹⁵ That statute dramatically restricted the universe of claims that can be brought in

(1994); *Bowman v. Franklin*, 980 F.2d 1104, 1108 (7th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993); *Powers v. Coe*, 728 F.2d 97, 102-03 (2d Cir. 1984).

¹⁸⁹ *Nelson*, 540 U.S. 1046 (denying certiorari).

¹⁹⁰ See *Martinez*, 292 F.3d at 423 (holding that "§ 1983 challenges to an impending execution (like § 1983 challenges to a state's method of execution or § 1983 challenges seeking immediate or speedier release from prison) must be brought as habeas actions"), *cert. denied*, 535 U.S. 1091 (2002).

¹⁹¹ See *Atkins*, 536 U.S. at 311-12 (quoting *Trop*, 356 U.S. at 101).

¹⁹² 2000 AVMA Report, *supra* note 135.

¹⁹³ TEX. HEALTH & SAFETY CODE ANN. § 821.052 (Vernon 2004).

¹⁹⁴ See TENN. CODE ANN. § 44-17-303 (2003).

¹⁹⁵ See *Baker v. Duckworth*, No. 96-1851, 1997 U.S. App. LEXIS 10805, at *3 (7th Cir. 1997) (stating that the "[r]ecent amendments for 28 U.S.C. § 2244(b) . . . replace the doctrine of the 'abuse of the writ'" that was announced in *Gomez*).

successive habeas petitions.¹⁹⁶ Under the AEDPA, as mentioned above, a claim can be raised in a subsequent petition only if it involves a new rule or relates to actual innocence.¹⁹⁷ A question presented by the *Vickers* litigation was whether the restrictions placed on the filing of subsequent habeas petitions by 28 U.S.C. § 2244 should somehow be grafted on to 28 U.S.C. § 1983 when a death row inmate attempts to file suit under that latter statute. It would indeed be extraordinary to hold that death row inmates are prevented from seeking judicial redress for constitutional violations as a consequence of their residence on death row.¹⁹⁸

Vickers filed his action under § 1983 because the relief he was requesting cannot form the basis of an action under 28 U.S.C. § 2254. He filed it when he did because the standards of decency had evolved to such an extent that the Eighth Amendment argument was colorable, and because the Supreme Court's grant of certiorari in the *Nelson* case in December 2003 had breathed life into § 1983 as a procedural vehicle. Even, however, if § 1983 and § 2254 are to be read to require all death row inmates to use habeas actions for any complaint they wish to lodge, Vickers should still not have been required to pass through the § 2244 gate-keeping provisions. Some court should have addressed the merits of his claim. It is to the issue of § 2244 that we now turn.

B. Second or Successive Petitions and § 2244

If the federal courts correctly concluded that a lawsuit challenging the chemical mixture to be used in carrying out a lethal injection must be brought as a habeas action, and if an inmate seeking to challenge the chemical mixture has already filed an original habeas petition, then the question is whether a new habeas petition, challenging the chemical mixture, must pass through the gate-keeping provisions of § 2244.¹⁹⁹ In Vickers's case, the additional question was whether the claims that were based on the events that occurred on December 9, 2003, also had to pass through the § 2244 gateway. The question arises more frequently than one might expect. For example, a death row inmate whose mental condition significantly deteriorates while confined to death row, and who therefore becomes incompetent,²⁰⁰ will need to raise this competency question subsequent to his original habeas application. Defining the types of claims that must pass through the § 2244 gate-keeping provision is therefore a matter of some importance. Prior to the enactment of the AEDPA, there was no statutory bar to filing second or successive habeas

¹⁹⁶ See *supra* notes 162–69 and accompanying text.

¹⁹⁷ See *supra* notes 164–65 and accompanying text.

¹⁹⁸ On the contrary, in *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996), the Court emphasized that courts are not to abandon the normal “statutes, rules, precedents and practices” in capital cases, but rather are to adhere to them.

¹⁹⁹ See *supra* text accompanying notes 43–47.

²⁰⁰ *Ford v. Wainwright*, 477 U.S. 399 (1986).

petitions.²⁰¹ A death row inmate who had pursued habeas relief without success could file another habeas petition.²⁰² Judicially crafted rules made it somewhere between exceedingly difficult and utterly impossible for an inmate to prevail on a subsequent writ, but the federal courts did have jurisdiction to entertain them.²⁰³ That is no longer the case.²⁰⁴ 28 U.S.C. § 2244 provides that a federal district court lacks jurisdiction to entertain a second or successive habeas petition, unless a three-judge panel of the relevant court of appeals authorizes the filing of the petition.²⁰⁵ Section 2244 therefore serves as a gateway to the filing of second or successive habeas petitions; a death row inmate who cannot satisfy those gate-keeping provisions will not be able to vest a federal court with jurisdiction to entertain his writ.

Under the plain language of § 2244(b)(2), the AEDPA's gate-keeping provisions only apply to "second or successive" habeas petitions. The statute does not define that phrase. In several post-AEDPA cases, however, the Supreme Court has emphasized that Congress did not write upon a clean slate when it enacted the AEDPA and that Congress intended to codify the Supreme Court's jurisprudence governing successive petitions. Consequently, the Court has interpreted the AEDPA's provisions governing "second or successive" habeas applications by looking to the pre-AEDPA abuse-of-the-writ doctrine.²⁰⁶

Whether a habeas petition is "second or successive" within the meaning of § 2244 depends on whether that same petition would have been deemed "second or successive" under the Court's pre-AEDPA abuse-of-the-writ doctrine. Relying on

²⁰¹ See generally Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty*, 30 AM. J. CRIM. L. 171, 180–84 (2003).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See generally 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (4th ed. 2001); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

²⁰⁵ 28 U.S.C. § 2244(b)(3)(B) (2000).

²⁰⁶ See, e.g., *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (noting that AEDPA's restrictions on successive petitions "constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (Quoting *Felker*'s "abuse of the writ" language, the Court noted that "[i]t is certain that respondent's *Ford* claim would not be barred under any form of res judicata" because "[r]espondent brought his claim in a timely fashion, and it has not been ripe for resolution until now."); *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (explaining that, "[b]ecause the question whether Slack's petition was second or successive implicates his right to relief in the trial court, pre-AEDPA law governs, . . . though we do not suggest the definition of second or successive would be different under AEDPA," and citing *Martinez-Villareal* for the proposition that courts must use "pre-AEDPA law to interpret AEDPA's provision governing 'second or successive habeas applications'") (citations omitted).

the Supreme Court's language in *Felker*,²⁰⁷ *Martinez-Villareal*,²⁰⁸ and *Slack*,²⁰⁹ a number of circuits have interpreted the concept embodied in the phrase "second or successive" in light of the pre-AEDPA equitable principles underlying the abuse-of-the-writ doctrine.²¹⁰ That is, if the petition filed by the death row inmate would not have been barred by the pre-AEDPA abuse-of-the-writ doctrine, then that petition is not second or successive within the meaning of § 2244.²¹¹

Under the abuse-of-the-writ doctrine, a subsequent petition is "second or successive" when it raises a claim that was, or could have been, raised in the initial petition.²¹² In the context of the lethal injection litigation, if the standards of decency upon which the inmates were relying had already evolved by the time they filed their original habeas application, then, if the action must indeed be brought in a habeas petition (as distinguished from § 1983), they would have been barred by the abuse-of-the-writ doctrine from subsequently raising this claim. That means that their habeas petition, if it was properly characterized as a habeas petition, had to pass through the § 2244 gateway. In contrast, if the claim did not become viable until various legislatures had banned pancuronium bromide in the carrying out of animal euthanasia, then the claim could not have been raised in the inmates' original habeas petitions, and was therefore not "second or successive" within the meaning of § 2244. Moreover, it should go without saying that the claims Vickers sought to raise based on the events of December 9, 2003, could not possibly have been raised

²⁰⁷ *Felker*, 518 U.S. 651.

²⁰⁸ *Martinez-Villareal*, 523 U.S. 637.

²⁰⁹ *McDaniel*, 529 U.S. 473.

²¹⁰ See, e.g., *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002); *Hill v. Alaska*, 297 F.3d 895, 897–98 (9th Cir. 2002); *Crouch v. Norris*, 251 F.3d 720, 723–25 (8th Cir. 2001); *United States v. Barrett*, 178 F.3d 34, 42–45 (1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000); *In re Taylor*, 171 F.3d 185, 187–88 (4th Cir. 1999); *In re Cain*, 137 F.3d 234, 235–37 (5th Cir. 1998); *Reeves v. Little*, 120 F.3d 1136, 1139 (10th Cir. 1997).

²¹¹ Only the Seventh Circuit has taken a contrary position:

The doctrine of abuse of the writ is defunct. The term derives from section 2244(b), now wholly superseded by the new law [i.e., AEDPA], which nowhere uses the term. There is no longer any statutory handle for the doctrine, and in any event its role seems wholly preempted by the detailed provisions of the new statute concerning successive petitions.

Burris v. Parke, 95 F.3d 465, 469 (7th Cir. 1996) (en banc), *cert. denied*, 522 U.S. 990 (1997).

²¹² See *McCleskey v. Zant*, 499 U.S. 467, 493–95 (1991). In addition, a claim raised in an earlier habeas petition, but dismissed as premature, is not subject to the gate-keeping provisions of § 2244(b)(2). See *Martinez-Villareal*, 523 U.S. at 643–45. Similarly, a petition filed after a mixed petition has been dismissed for failure to exhaust state remedies before the district court adjudicated any claims "is to be treated as 'any other first petition' and is not a second or successive petition." *Slack*, 529 U.S. at 487 (quoting *Martinez-Villareal*, 523 U.S. at 644).

or anticipated at the time of his original habeas petition, so it is difficult even to imagine the thinking that required those claims to pass through the § 2244 gateway.

The abuse-of-the-writ doctrine is sometimes viewed as a *res judicata* principle. Consequently, in cases where a death row inmate has filed a new habeas petition, and it would not make sense to view the new claims raised in that petition as barred by the doctrine of *res judicata*, the courts have declined to characterize the new petition as second or successive.²¹³ Perhaps the quintessential type of action that could not have been raised previously is one based on so-called conditions of confinement; an inmate who complains about the way he is being treated on death row is complaining about a fact that was not in existence when he initially pursued federal habeas relief. That challenge to conditions is therefore not "second or successive" within the meaning of § 2244.²¹⁴

Neither Vickers nor any of the other inmates in Texas or elsewhere who challenged the use of pancuronium bromide had a substantial Eighth Amendment challenge prior to the movement of many states to ban the use of the chemical in animal euthanasia. The litigants' claims, therefore, could not have been brought when they initially sought habeas relief because the claim simply did not yet exist;

²¹³ See, e.g., *James*, 308 F.3d at 168 ("[W]hen a subsequent habeas petition contains both a new claim that could not have been raised in a prior petition and a claim that was previously raised, we deem such petition 'first' as to the new claim and 'second' as to the old claim."); *Hill*, 297 F.3d at 899 ("The Supreme Court's teachings on § 2244, the well-reasoned decisions of our sister circuits, and the logical application of the 'second or successive' petition rule lead us to adopt the rule embraced by the Fifth and Eighth Circuits in *Cain* and *Crouch*."); *Crouch*, 251 F.3d at 725 (A "petition, which neither raises a claim challenging [petitioner's] conviction or sentence that was or could have been raised in his earlier petition, nor otherwise constitutes an abuse of the writ, is not 'second or successive' for purposes of § 2244(b)."). See also *Cain*, 137 F.3d 234.

Congress did not intend for the interpretation of the phrase 'second or successive' to preclude federal district courts from providing relief for an alleged procedural due process violation relating to the administration of a sentence of a prisoner who has previously filed a petition challenging the validity of his conviction or sentence, but is nevertheless not abusing the writ.

Id. at 236–37; RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (2d ed. Supp. 1997).

Applying the no-second-bite rule makes no sense when a prior petition gave the prisoner what amounts to *no* bite at the apple — because the prior petition involved a different apple, because no bite was taken when the apple previously was before the court, or because no bite *could have been taken* at that time because the claim had not yet come into existence or would not have been cognizable at the time of the earlier petition.

Id. § 28.3a, at 275 (emphasis in original).

²¹⁴ *Cain*, 137 F.3d at 236–37.

the standards of decency had not yet sufficiently evolved. Consequently, insofar as the lethal injection claim could not have been brought when the death row inmates initially sought habeas relief, their complaint, even if properly characterized as a habeas action, should not have had to pass through § 2244.²¹⁵ The Fifth Circuit invoked an inapplicable jurisdictional barrier to avoid addressing an issue of serious constitutional magnitude.

The Fifth Circuit's behavior in the lethal injection cases was even more stunning in Vickers's case, for even if one were to conclude that the lethal injection claim could have been brought sooner, that conclusion certainly could not have applied to Vickers's claims arising out of the events of December 9, 2003. To understand what was happening in this litigation, some sense of why Vickers was unable to obtain a ruling on the merits of those additional claims must be had. We reflect on that very issue in the following concluding section.

CONCLUSION: THE BANALITY OF DEATH

Like Bruce and Zimmerman and the inmates executed outside of Texas in December 2003 and January 2004, Vickers was a bad guy. He did not raise a factual innocence claim. He admitted that he committed the murder he was accused of committing. What his case finally illustrates is that when the courts confront a case brought by a death row inmate who raises no innocence claim, the courts tend to pay it little attention. This tendency is doubly ironic. The first layer of the irony is that in *Herrera v. Collins*,²¹⁶ the Supreme Court suggested that a naked claim of factual innocence — that is, a claim of innocence unaccompanied by an independent constitutional violation — is not even cognizable in habeas review. *Herrera*, in other words, states that innocence does *not* matter.²¹⁷ If innocence does not matter, there are two remaining possibilities. One is that violations of constitutional principles matter; the other is that nothing does.

The *Vickers* fiasco tends to suggest that the second alternative is the correct answer. In the final round of litigation prior to the Vickers execution, the State took the position that even though Vickers could not have complained prior to December 9 about the events that occurred on that day, he could nonetheless have complained

²¹⁵ One could perhaps take the position that a party with foresight could have discerned the developing standard of decency years earlier.

²¹⁶ 506 U.S. 390 (1993). *Herrera's* suggestion that a naked innocence claim would not support habeas relief represented a break from previous cases. *See, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 442–44 (1986); *Smith v. Murray*, 477 U.S. 527, 537 (1986).

²¹⁷ In yet a further irony, AEDPA *does* emphasize the salience of actual innocence by providing that successive petitions may be authorized if newly discovered facts establish innocence. However, AEDPA does not permit this innocence claim to stand alone; it must be tethered to an independent constitutional violation. 28 U.S.C. § 2244(b)(2)(B) (2000).

substantially sooner than he did.²¹⁸ That assertion seems plausible, until it is examined.

When Vickers was not executed on December 9, his lawyers had filed neither a stay motion nor a petition for writ of certiorari with the Supreme Court. Also, the Fifth Circuit denied the motion for rehearing that was pending the previous evening as Vickers's death warrant expired.²¹⁹ Consequently, there was a Fifth Circuit judgment that Vickers's lawyers could attempt to take to the Supreme Court, and indeed, on December 10, Vickers's lawyers informed the State that they intended to file a petition for writ of certiorari.²²⁰

Despite knowing of Vickers's intentions, the State nonetheless scheduled his execution for January 28, 2004. As recited above, Vickers was not the first Texas death row inmate to be scheduled to die in the new year. Ynobe Matthews was scheduled for January 6, Kenneth Bruce was scheduled for January 14, and Kevin Zimmerman was scheduled for January 21.²²¹ Matthews was not planning on filing any challenges to his execution; there was therefore no prospect that Vickers's lawyers could learn anything useful from observing his case. In contrast, Bruce and Zimmerman both planned to raise the lethal injection challenge in new litigation. The same group of lawyers represented each of these inmates. Rather than place the fates of all their clients on a single legal theory and litigate all three cases concurrently, the lawyers made the decision to litigate the cases serially, using lessons from earlier cases to alter or modify tactics in subsequent cases. In other words, they did what any prudent lawyer would do.

Once the calendar for the entire month of January is taken into account, it is apparent that the earliest date on which Vickers's lawyers could have filed an action on his behalf was January 22, the day after Zimmerman's execution, and the day on which the lawyers could have modified Vickers's claims based on what happened in the *Zimmerman* litigation. And in fact, Vickers filed his challenge on Friday January 23, less than two days after the *Zimmerman* execution. Vickers, however, elected to file his suit in state court, rather than in federal court. Having elected to do so, he was prevented by Texas law from seeking simultaneous review in federal court over the same claims he had raised in state court.

As discussed above, the Texas Court of Criminal Appeals adheres to the so-called "two forum rule."²²² Under this rule, also known as the *Powers* doctrine, the

²¹⁸ Brief of Defendants-Appellees at 6–9, *Hines v. Johnson*, 83 Fed. Appx. 592 (5th Cir. 2003) (No. 03–21173) (on file with authors).

²¹⁹ *Hines*, 83 Fed. Appx. 592.

²²⁰ *Id.*

²²¹ *Ynobe Katron Matthews*, at <http://www.clarkprosecutor.org/html/death/US/matthews886.htm>; *Kenneth Eugene Bruce*, at <http://www.clarkprosecutor.org/html/death/US/bruce891.htm>; *Kevin Lee Zimmerman*, at <http://www.clarkprosecutor.org/html/death/US/zimmerman892.htm>.

²²² See *supra* notes 87–90 and accompanying text.

CCA will decline to rule on any matter where a parallel action is pending in federal court.²²³ The CCA has applied this doctrine even where the pleadings filed in state court are not identical to the pleadings filed in federal court. At the time of the *Vickers* litigation, the CCA was considering modifying this doctrine in the context of subsequent habeas petitions filed after passage of the AEDPA, but the CCA had not yet done so.²²⁴ In other words, once Vickers opted to attempt to obtain review in state court, he was prevented from going to federal court until the state court resolved the case. The CCA ruled against Vickers on Tuesday, January 27, and Vickers filed his federal lawsuit that same day.

Thus, what actually prevented Vickers from getting to federal court any sooner than he did was his decision to return to state court, rather than to proceed immediately to federal court. The question that therefore arises is whether *that* decision — the decision to seek state court relief first and go to federal court second — was itself justified. The answer to this question seems easy. As recounted above, on the evening when Vickers was originally scheduled to be executed, the Fifth Circuit had chosen to do nothing, letting a motion for en banc reconsideration sit unresolved overnight despite the existence of a death warrant commanding the warden to carry out an execution. It is difficult to fathom such a dereliction of judicial duty. Then some three weeks later, the court refused to acknowledge a second motion for rehearing, directing the clerk to return all the material to Vickers's lawyers rather than addressing the merits of his claim. Vickers's lawyers had good reason to believe that the state court could not possibly treat their client any worse than the Fifth Circuit already had, and their judgment was only confirmed by the Fifth Circuit's subsequent behavior. When the district court ruled against Vickers on December 27, 2003, the Fifth Circuit affirmed the denial of relief before Vickers even filed his appeal or his appellate brief in that court.

Most death row inmates, it is probably safe to say, committed the crimes of which they were convicted and sentenced to death. Those who are called upon in our legal culture to interpret and apply the provisions of the Constitution that are applicable to criminal proceedings, therefore, rarely have the luxury of doing their work in a case that involves an inmate who is actually innocent. It cannot be easy

²²³ *Ex parte Soffar*, 120 S.W.3d 344, 345 (Tex. Crim. App. 2003) ("The long time practice of this Court is to automatically dismiss writ applications when the applicant also has a writ pending in federal court that relates to the same conviction.") (citing *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972); *Ex parte McNeil*, 588 S.W.2d 592 (Tex. Crim. App. 1979); *Ex parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977)). The CCA has since modified the doctrine somewhat, but not in a manner that would have had any impact on the lethal injection litigation. See *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004) (dismissing a writ of habeas corpus).

²²⁴ *Soffar*, 120 S.W.2d at 347–48. This rule is well-known to the federal courts that preside over Texas death penalty cases. See, e.g., *In re Gibbs*, 223 F.3d 308 (5th Cir. 2000); *Graham v. Johnson*, 168 F.3d 762, 779 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000).

to be a federal judge who is compelled by the Constitution to rule that an inmate, whom the judge believes to be guilty and perhaps even a despicable human being, must receive a new trial, or must be released from death row. Such difficulties, however, are the price of principle. They arise because this is a nation of laws, where the rule of law prevails over a particular sentiment. No matter how deeply the federal judges who presided over the case of Billy Vickers might have reviled him, their duty was to separate revulsion from their dedication to the enforcement of constitutional norms. Their duty was to enforce the law.

The *Vickers* litigation involved death row inmates who did not evoke much sympathy from the judges who ruled in their cases. Perhaps they did not deserve much sympathy, but neither we nor the presiding judges should need to be reminded that this is not the point. And although there are certainly degrees of evil, and the refusal to enforce the Constitution on behalf of an acknowledged murderer is probably not equivalent to the act of murder itself; such a refusal remains a failure of both legal and moral dimensions. Constitutional principles are not solely the possession of those death row residents whom a judge believes to be innocent or redeemed.

We do not need the *Vickers* case to teach us that there is murder and evil in our midst; that we sadly already know. We do need the *Vickers* case to illuminate a tragic phenomenon that we remain loathe to concede: federal post-conviction review of a death row inmate's claims has become perfunctory, and has therefore effectively ended, in cases where that death row inmate does not proclaim his innocence. The tragedy of the *Vickers* case is not simply that innocent victims were murdered; the further tragedy is that our constitutional principles have ceased to matter when a death row inmate does not contest his guilt.