

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

MICHAEL DEAN SCOTT,)	CASE NO. 4:07-CV-00753-JRA
)	
Petitioner,)	JUDGE JOHN R. ADAMS
)	
-vs-)	
)	
MARC HOUK, WARDEN,)	
)	
Respondent.)	
)	

**PETITIONER MICHAEL DEAN SCOTT'S MOTION
FOR CERTIFICATION OF QUESTION TO THE SUPREME COURT
OF OHIO ON ISSUE OF LETHAL INJECTION**

Petitioner Michael Dean Scott respectfully moves this Honorable Court to certify the question of whether there exists a postconviction forum to litigate the issue of Ohio's lethal injection protocol.

Mr. Scott is filing contemporaneously with this Motion a request for this Court, should the Court deny the certification of the question requested herein, to either stay any further action on his pending *habeas corpus* petition to allow the Sixth Circuit to decide the issue of the constitutionality of Ohio's lethal injection scheme, or in the alternative to grant him discovery and an evidentiary hearing on that issue, as initially requested in his petition for habeas corpus relief, and pursuant to the Eighth Amendment standards set forth in Baze v. Rees, 553 U.S. ____,

128 S.Ct. 1520.

The Supreme Court in Baze v. Rees did not find that lethal injection was *per se* unconstitutional, but the Court did recognize the implementation of the method of execution could implicate the Eighth Amendment prohibition against cruel and unusual punishment. Therefore, an analysis of Ohio's lethal injection protocol under the rubric of Eighth Amendment jurisprudence is valid. As discussed in this filing and Scott's contemporaneous filing, this Court has three options available: (1) certify a question to the Ohio Supreme Court as to whether there exists a post conviction forum to litigate this issue; (2) grant a stay of Scott's pending petition until the Sixth Circuit decides two cases currently on remand to the district court on this issue; or (3) permit discovery and fact development with an evidentiary hearing before this Court.

In filing this motion, Scott recognizes the Sixth Circuit's remand of two capital habeas cases to the Northern District to determine this very issue. As is explained in Scott's contemporaneous filing, in both Odraye Jones v. Bradshaw, Case No. 07-3766, and then in Stanley Adams v. Bradshaw, Case No. 07-3688, the Sixth Circuit granted a certificate of appealability on the constitutionality of lethal injection and remanded both cases for discovery and factual development. As the Jones panel recognized in granting the certificate of appealability on this issue, "both sides [need] the opportunity to investigate the important questions of whether Ohio's safeguards are materially different than Kentucky's." Jones Order at 4. There are serious questions about the constitutionality of the lethal injection protocol in Ohio. The question at this point, and the subject of this motion, is where the issue should be litigated initially.

Ohio courts have posed at least five different opinions as to how and where this issue

should be litigated: pre-trial, direct appeal, postconviction, state habeas litigation and/or the seeking of a declaratory judgment. There is no consensus on the proper state forum or procedure to litigate this Eighth Amendment issue. To meet the federal court's deference to state courts finding and comity, the better approach would be to certify this issue for Ohio to determine its own standards.

The above argument will be more fully addressed in the attached Memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2009, a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully submitted,

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Jeffrey J. Helmick

Counsel for Petitioner

MEMORANDUM IN SUPPORT

Argument and Authorities

Petitioner Michael Dean Scott, Jr., raised the issue of Ohio's lethal injection protocol being violative of the Eighth Amendment in what was incorrectly numbered as his "Sixteenth" Claim for Relief, at page 45, paragraph 124 of his habeas corpus petition. **(Dkt. No. 12)** Scott also requested discovery and an evidentiary hearing to develop the claim in his petition.

As noted above, the Supreme Court recently addressed the issue in the context of a §1983 action in Baze v. Rees (2008), 553 U.S. ___, 128 S.Ct. 1520. In Baze, the plurality concluded that an execution method can be viewed as "'cruel and unusual' under the Eighth Amendment" where the petitioner can demonstrate a "substantial risk of serious harm," and a "feasible, readily implemented" alternative that will "significantly reduce" that risk. Baze v. Rees, at 1532. The Baze plurality opinion reflects a dramatic change to the Eighth Amendment landscape. Prior to Baze, there was no binding constitutional precedent holding that a death sentenced prisoner could potentially prove, through discovery and a hearing, that a state's lethal injection protocol violated the Eighth Amendment. Baze, 128 S.Ct. at 1526.

Prior to Baze, both the Supreme Court of Ohio and Ohio's appellate district courts had routinely and summarily upheld the constitutionality of Ohio's lethal injection practice. In summarily denying Eighth Amendment challenges to Ohio's lethal injection practices on the merits, the Ohio courts never suggested the claims failed for any lack of factual development, particularly as to the protocol or the manner in which the protocol was administered.

In fact, the Supreme Court of Ohio rejected lethal injection challenges without any substantive Eighth Amendment analysis whatsoever. This abject refusal to engage in such

analysis was based upon there being no reported Supreme Court or federal case authority finding lethal injection procedures to be unconstitutional. See e.g., State v. Carter, 89 Ohio St.3d 593, 608, 734 N.E.2d 345 (2000) (“Carter fails to cite any case in which lethal injection has been found to be cruel or unusual punishment. This proposition of law is overruled.”) The Ohio Court has not provided an explanation why it would not itself undertake a substantive Eighth Amendment review.

Four years after Carter, the Supreme Court of Ohio again rejected summarily the claim, citing to Carter. State v. Stanley Adams, 103 Ohio St.3d 508, 535, 817 N.E.2d 29 (2004). This is the same defendant whose case was just remanded to the district court by the Sixth Circuit as noted above. Most recently, the Supreme Court of Ohio summarily rejected a merits discussion on lethal injection protocol in State v. Craig, 110 Ohio St.3d 306, 327, 853 N.E.2d 621, 643 (2006) (“Craig also disputes the constitutionality of lethal injection as a means to carry out the death penalty. We reject this claim. See Adams, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 131; Carter, 89 Ohio St.3d at 608, 734 N.E.2d 345.”).

Ohio appellate districts have subsequently cited Carter as authority to summarily reject the question of the constitutionality of lethal injection under the Eighth Amendment. See State v. Fitzpatrick, 2004 WL 2367987 (Ohio App. 1 Dist.) at *12 (unreported). In Fitzgerald, the appellate court affirmed the convictions on postconviction, noting that on direct appeal, the Supreme Court of Ohio overruled Fitzgerald’s Eighth Amendment attack on Ohio’s statutes governing capital punishment. The court specifically cited the finding in State v. Carter that execution by lethal injection does not run afoul of the Eighth Amendment’s proscription against cruel and unusual punishment. All of the following Ohio Appellate decision rejected the Eighth

Amendment challenge to Ohio's lethal injection protocol, without a hearing and without discovery. None of the defendants were afforded the opportunity to develop the challenge. All the cases below cited Carter as the authority for denying the claim.

1. State v. Hanna, 2002 WL 4529 (Ohio App. 12 Dist.) at *8 (unreported); 2001 Ohio 8623.
2. State v. Phillips, 2002 WL 274637 (Ohio App. 9 Dist.) at *4 (unreported); 2002 Ohio 823; 2002 Ohio App. LEXIS 788, February 27, 2002, Decided , Appeal denied by State v. Phillips, 95 Ohio St. 3d 1488, 2002 Ohio 2625, 769 N.E.2d 403, 2002 Ohio LEXIS 1487 (2002) Habeas corpus proceeding at Phillips v. Bradshaw, 2004 U.S. Dist. LEXIS 29553 (N.D. Ohio, Apr. 30, 2004).
3. State v. Skatze, 2003 WL 24196406 (Ohio App. 2 Dist.) at *62 (unreported); 2003 Ohio 516.
4. State v. Williams, 149 Ohio App.3d 434, 442, 777 N.E.2d 892, 897(Ohio App. 6 Distr.), 2002 Ohio 4831.
5. State v. Foust, 2005 WL 2462048 (Ohio App. 8 Dist.), at *9; 2005 Ohio 5331; 2005 Ohio App. LEXIS 4854, October 6, 2005, Date of Announcement of Decision , Discretionary appeal not allowed by State v. Foust, 108 Ohio St. 3d 1509, 2006 Ohio 1329, 844 N.E.2d 855, 2006 Ohio LEXIS 792 (2006)US Supreme Court certiorari denied by Foust v. Ohio, 2006 U.S. LEXIS 7048 (U.S., Oct. 2, 2006).
6. State v. Conway, 2005 WL 3220243 (Ohio App. 10 Dist.) at *10 (unreported); 2005 Ohio 6377; 2005 Ohio App. LEXIS 5704, December 1, 2005, Rendered , Discretionary appeal not allowed by State v. Conway, 109 Ohio St. 3d 1456, 2006 Ohio 2226, 847 N.E.2d 5, 2006 Ohio LEXIS 1292 (2006)US Supreme Court certiorari denied by Conway v. Ohio, 2006 U.S. LEXIS 7613 (U.S., Oct. 10, 2006).

The same Ohio Eleventh District Court of Appeals that decided Odraye Jones's postconviction appeal has only relatively recently specifically addressed the issue and ruled that the claim is not addressable in state postconviction in the unrelated case of State v. Jackson, 2006 WL 1459757 at * 25 (Ohio Ct. App. 11th Dist. Trumbull County 2006) (unreported), 2006 Ohio 2651; Stay denied by, Moot, Cause dismissed by State v. Jackson, 110 Ohio St. 3d 1407, 2006

Ohio 3306, 850 N.E.2d 69, 2006 Ohio LEXIS 2047 (2006) Discretionary appeal not allowed by State v. Jackson, 2006 Ohio 5625, 2006 Ohio LEXIS 3183 (Ohio, Nov. 1, 2006).

The Jackson decision specifically held that postconviction was the forum for litigation for a capital defendant on the issue of lethal injection protocol. The court suggested that the procedure could only be addressed by extraordinary writ in Ohio; by seeking a declaratory judgement or filing for a writ under state habeas corpus procedures.

Under his thirteenth cause of action, appellant contends that the trial court erred when it rejected his claim that the state's use of a lethal injection in the imposition of the death penalty constitutes cruel and unusual punishment. In regard to this point, we would first indicate that this claim does not raise an issue pertaining to the propriety of appellant's criminal trial. To this extent, a postconviction proceeding is not the proper legal context in which to litigate this issue; instead, this type of issue *should be raised in a **declaratory judgment or habeas corpus action***.

Id., Para. 149. (Emphasis added)

This decision is significant as the Supreme Court of Ohio has never suggested either of those processes are available to a similarly situated petitioner. The court refused to accept jurisdiction on the issue. Jackson is strong evidence of the Ohio courts confusion as to how this issue should be developed under Ohio law. Moreover, the Jackson court noted “as to the substance of this argument, our review of the relevant case law shows that the basic assertions raised in the evidentiary materials relating to this point have previously been rejected as insufficient to establish that Ohio's use of the lethal-injection method is unconstitutional.”

Yet another forum in Ohio procedure emerged recently. In State v. Ruben Rivera, Case Nos. 04-CR-65940 and 05-CR-68067, Judge James Burge of the Lorain County Common Pleas Court conducted a hearing on the constitutionality as part of pre-trial motions in a capital trial. A

hearing was conducted over prosecution objection. The prosecution argued that Burge did not have jurisdiction to hear the matter, as Mr. Rivera had not been convicted of a capital offense, let alone sentenced to death. That matter will be moot if Rivera, who has yet to be tried, is acquitted, not convicted of death specifications or not sentenced to death. Obviously, no Ohio appellate court has addressed the question of whether Judge Burge had jurisdiction to address the issue pre-trial. Judge Burge's order requiring a single-drug protocol is attached hereto as Exhibit A.

Authority for Certification of Question

There appears to be there is no viable forum in Ohio courts within which a capital defendant can present a Baze or Eighth Amendment challenge against lethal injection. Thus, certification of the question is appropriate as there is no manner in which this claim either could have been or can be exhausted.

The exhaustion requirement is based on principles of comity and federalism. It provides state courts an opportunity to address alleged flaws in their criminal procedures. However, the requirement is based on the presumption that states maintain adequate and effective remedies to vindicate federal constitutional rights. Workman v. Tate, 957 F.2d 1339, 1344 (6th Cir.1992) Workman noted that "the principle that federal courts should defer to state courts in the interest of comity assumes that the state courts will give prompt consideration to claims of violation of constitutional rights." As noted above, attempts in Ohio to litigate the Eighth Amendment challenge to lethal injection are subject to summary dismissal.

As a result, given the Ohio courts' consistent refusal to address this issue, it is appropriate

to certify the question to the Ohio Supreme Court to consider to the proper procedure for litigating this Eight Amendment Claim.

This Court has inherent authority to certify questions of state law to Ohio for consideration. Although this practice has been in existence for some time, it was recently exercised by the Sixth Circuit in Planned Parenthood of Cincinnati Region v. Strickland, 531 F.3d 406 (CA 6, 2008). Recognizing that “state sovereignty is unquestionably implicated when federal courts construe state law”, the Circuit Court certified two questions to the Supreme Court of Ohio, *sua sponte*. *Id.*, at 410, citing Scott v. Bank One Trust Co., N.A., 62 Ohio St.3d 39, 577 N.E.2d 1077, 1080 (1991). The U.S. Supreme Court has also recognized the wisdom of such certification, noting that certification of “novel or unsettled questions of state law for authoritative answers by a State’s highest court . . . may save time, energy, and resources and help build a cooperative judicial federalism.” Arizonans for Official English v. Arizona, 520 U.S. 43, 77, 117 S.Ct. 1055, 137 L.Ed2d 170 (1997)(internal quotations and alterations omitted). Ohio law, and specifically Rule XVIII of the Rules of the Supreme Court of Ohio, specifically provides for a procedure for receiving those certified questions from a federal court.

Baze’s novel analyses and reliance on case-by-case factual development represent the very sort of refinement to the legal landscape that justifies certifying a question to Ohio’s Supreme Court, pursuant Rule XVIII of the Rules of the Supreme Court of Ohio. The certified question would be whether a viable claim under Baze would be addressed adequately and fully in the Ohio courts after full discovery.

CONCLUSION

The Supreme Court in Baze v. Rees did not find that lethal injection was *per se* unconstitutional, but the Court did recognize the implementation of the method of execution could implicate the Eighth Amendment prohibition against cruel and unusual punishment. Therefore, an analysis of Ohio's lethal injection protocol under the rubric of the Eighth Amendment jurisprudence is valid.

Petitioner urges this Court to certify the question to the Supreme Court of Ohio for guidance on this crucial issues. Should the Court deem such a certification inappropriate, Petitioner respectfully requests this Court consider one of the alternate requests for relief in Petitioner's contemporaneous filings: either stay these proceeding pending review of the constitutionality of Ohio's lethal injection scheme in the Sixth Circuit, or grant discovery and an evidentiary hearing as initially requested in Petitioner's claim for relief.

Respectfully submitted,

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