

ORIGINAL

In the
Supreme Court of Ohio

MICHAEL DEAN SCOTT,

Petitioner,

v.

MARK HOUK, WARDEN

Respondent.

Case No. 2009-1369

On Review of Certified Question from
The United States District Court
for the Northern District of Ohio

U.S. District Court Case
No. 4:07-cv-00753-JRA

**PRELIMINARY MEMORANDUM OF RESPONDENT MARK HOUK, WARDEN,
IN SUPPORT OF ANSWERING THE CERTIFIED QUESTION**

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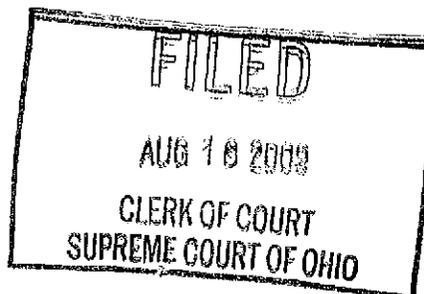


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INTRODUCTION

A federal district court has asked this Court to identify the proper forum in Ohio for challenging the constitutionality of Ohio's lethal injection protocol. Respondent Warden urges the Court to accept the certified question in order to resolve confusion created by Ohio's lower courts about this issue. The question of when to challenge lethal injection protocol arises in countless state and federal actions and courts have taken different approaches to these claims. It is essential for this Court to give the federal courts clear guidance about Ohio's procedural requirements for capital punishment challenges to ensure that federal courts will act in accord with two key principles of federal habeas review: comity and federalism.

The certified question arises in the context of evaluating whether Petitioner Michael Dean Scott has fully exhausted available state court remedies—a threshold determination required in every habeas case. When a petitioner fails to raise a claim in accord with state procedural requirements, the claim is procedurally defaulted and foreclosed from federal habeas review. *Wainwright v. Sykes* (1977), 433 U.S. 72, 87. Here Scott, like many habeas petitioners, challenged the constitutionality of Ohio's lethal injection protocol in federal habeas review. But the federal court was unclear about Ohio's procedural requirements for raising lethal injection challenges and consequently could not “discern whether Scott's lethal injection claim is procedurally defaulted or whether avenues to pursue this claim in state court remain available to him.” Certification Order in *Scott v. Houk* (N. D. Ohio, July 21, 2009), Case No. 4:07-CV-0753 (“Certification Order”) (also filed in this Court, docketed July 29, 2009), at 6.

It is imperative that this Court address the federal court's question for three reasons. First, the answer to this question will affect countless capital cases, as lethal injection challenges are common. Second, as the federal court noted, this Court has never expressly ruled on when a lethal injection challenge should be raised in Ohio. The lower courts have recognized lethal

injection challenges in very different procedural contexts and will likely continue to do so until this Court offers clear guidance. Third, if the Court does not answer this question, federal courts will not be in a position to defer to Ohio's procedural law regulating lethal injection challenges, thereby disrupting the principles of comity and federalism that underlie federal habeas review. State and federal courts will continue to have inconsistent approaches to the proper forum for lethal injection claims in Ohio, leading to unpredictable results, until this Court addresses the issue head-on.

For these reasons, the Court should accept and answer the question certified by the federal court: "Is there a post-conviction or other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under *Baze v. Rees*, or under Ohio law?" Certification Order at 7 (internal citation omitted). In answering the question, the Court should explain that, under Ohio law, *per se* challenges to capital punishment should be raised prior to trial, while method-of-execution challenges are properly raised in declaratory judgment actions following conviction. In doing so, the Court should take care to reiterate that Ohio's well-established law of res judicata applies to lethal injection challenges, just as it does to other claims. When an Ohio inmate actually loses a method-of-execution challenge at trial and fails to appeal the claim, claim preclusion bars the inmate from again seeking relief by restyling the same claim in a declaratory judgment action.

STATEMENT OF THE CASE AND FACTS

Michael Dean Scott was convicted for the 1999 murder of Ryan Stoffer and sentenced to death. *State v. Scott*, 101 Ohio St. 3d 31, 2004-Ohio-10, ¶¶ 24-25. Scott arranged to test-drive a car Stoffer was selling. *Id.* at ¶¶ 9-12. During the test drive, Scott sat behind Stoffer, under the guise of having his girlfriend learn to drive a stick shift. *Id.* at ¶ 12. Scott then shot Stoffer in the back of the head six times and dumped his body in the woods. *Id.* at ¶¶ 13, 14.

Prior to his criminal trial, Scott moved the trial court to declare unconstitutional all death sentences, specifically death by electrocution and lethal injection, and Ohio's statutes and procedures for capital cases. Constitutional Motion to Dismiss [Mot. No. 33], *State v. Scott*, Stark County C.P., Case No. 1999 CR 1154, Nov. 24, 1999. The trial court overruled his motion. Judgment Entry, Stark County C.P., Case No. 1999 CR 1154, Dec. 16, 1999. Scott did not appeal the trial court's judgment, and this Court affirmed his conviction and sentence. *Scott*, 2004-Ohio-10 at ¶ 1.

Scott filed a petition for postconviction relief, again raising a constitutional challenge to capital punishment. The trial court ruled the claim was res judicata, and the Fifth District Court of Appeals affirmed. *State v. Scott* (5th Dist.), 2006 Ohio App. Lexis 203, 2006-Ohio-257, ¶¶ 53-54, 59-60, *discretionary appeal denied*, 109 Ohio St. 3d 1506, 2006-Ohio-2998.

Scott sought habeas corpus relief in the United States District Court for the Northern District of Ohio, once again challenging the constitutionality of Ohio's lethal injection protocol. Certification Order at 2. The Warden argued that Scott's challenge to Ohio's lethal injection protocol could not be brought in federal habeas because it was unexhausted and procedurally defaulted. *Id.* at 4-5. The federal court was unsure whether Scott had any available remedies under Ohio law, however, and therefore was unable to determine whether Scott's claim was procedurally defaulted. Accordingly, the federal court certified the following question to this Court: "Is there a post-conviction or other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under *Baze v. Rees*, or under Ohio law?" *Id.* at 7 (internal citation omitted).

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION

The Warden urges this Court to answer the certified question. Initially, the Warden discouraged the federal court from certifying the question, arguing that Scott's motion for

certification was moot because his lethal injection claim is procedurally defaulted. It is now apparent, however, that the federal court is unsure whether Scott's claim is procedurally defaulted under Ohio law or, alternatively, whether other avenues remain available for Scott to pursue the claim in state court. This issue affects countless capital cases and capital habeas petitions filed by Ohio prisoners. And, because this Court has yet to clarify the proper forum for lethal injection challenges, Ohio courts have taken different approaches. The unclear procedural requirements for lethal injection challenges will produce inconsistent results in Ohio cases and federal habeas cases, undermining the principles of comity and federalism entrenched in the system of federal habeas review. Accordingly, it is imperative for the Court to accept and answer the certified question.

The question of how and when to properly challenge Ohio's lethal injection procedures affects countless capital cases. Although it is impossible to quantify the precise number of cases this Court would affect by answering the certified question, the Court's ruling would affect every future capital trial in Ohio. Moreover, it would apply to every federal habeas petition involving a capital case in Ohio as the federal courts apply the doctrines of exhaustion and procedural default.

As the federal court observed in its certification order, this Court has not directly ruled on when a defendant must raise a lethal injection challenge and Ohio's lower courts have recognized such challenges at different procedural junctures. Certification Order at 5. For example, in *State v. Rivera*, Nos. 04-CR-65940, 05-CR-68067, Lorain County C.P., June 10, 2008, a trial court conducted a hearing on the constitutionality of Ohio's lethal injection protocol in conjunction with a *pretrial* motion in a capital trial. *Id.* at 1-2; see *State v. Rivera* (9th Dist.), 2009 Ohio App. Lexis 1245, 2009-Ohio-1428 (dismissing appeal because the trial court ruling

was not a final appealable order). This suggests “that a pre-trial motion can be an appropriate juncture at which to raise the lethal injection protocol issue.” Certification Order at 6. By contrast, in *State v. Jackson* (11th Dist.), 2006 Ohio App. Lexis 2512, 2006-Ohio-2651, the Eleventh District concluded that postconviction proceedings are not the proper forum for challenging the constitutionality of Ohio’s lethal injection protocol, as the “claim does not raise an issue pertaining to the propriety of appellant’s criminal trial.” *Id.* at ¶ 149. “[I]nstead, this type of issue should be raised in a declaratory judgment or habeas corpus action.” *Id.* And this Court’s decisions in *State v. Adams*, 103 Ohio St. 3d 508, 2004-Ohio-5845, and other cases suggest that a lethal injection claim should be raised on direct appeal. *Id.* at ¶ 131 (summarily rejecting defendant’s lethal injection challenge on direct appeal). As the federal court noted, “[a]lthough it appears [Scott] could have raised [the lethal injection] issue on direct appeal to the Supreme Court of Ohio based on the *Adams* decision, it appears equally plausible that Scott may still raise this issue in a state habeas corpus action under the *Jackson* holding.” Certification Order at 6.

The Ohio courts’ diverse approaches to the proper forum for a lethal injection challenge necessarily undermine the principles of comity and federalism preserved by the federal system of habeas review. The United States Supreme Court has long recognized, and Congress has codified, the doctrine of exhaustion in federal habeas cases. See *Rose v. Lundy* (1982), 455 U.S. 509, 518; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(b)(1)(A). Prisoners cannot pursue federal habeas relief unless they first exhaust all available state court remedies because “the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner’s claims.” *Rhines v. Weber* (2005), 544 U.S. 269, 273 (citing *Lundy*, 455 U.S. at 518-19); see *Coleman v. Thompson* (1991), 501

U.S. 722, 731 (“This Court has long held that a state prisoner’s federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights.”) (internal citations omitted).

To properly apply the principles of exhaustion and procedural default, federal courts must have a clear understanding of the procedural rules that Ohio applies to each claim raised in a habeas petition. When a state’s procedural rules are unclear, federal courts are likely to reach different conclusions about whether similar claims are procedurally defaulted, leading to inconsistent handling of similar federal habeas petitions. This uncertainty undermines the principles of federalism and comity enshrined in the system of federal habeas review. By answering the certified question, this Court will enable federal courts to act with appropriate deference to Ohio courts.

In sum, this Court should accept the certified question because its answer will bear on countless capital cases and capital habeas proceedings, eliminate confusion among Ohio’s lower courts and federal habeas courts, and respect the vital principles of comity and federalism.

ARGUMENT

Respondent Warden’s Proposition of Law:

A constitutional challenge to Ohio’s lethal injection protocol may be brought in a declaratory judgment action under R.C. 2721.02 if the challenge is not otherwise barred by the doctrine of res judicata.

At this stage, the only issue before the Court is whether to accept the certified question and agree to answer it. The Warden urges the Court to do so. As to the merits of the certified question, the Court should hold that *per se* challenges to capital punishment may be brought before trial, but method-of-execution challenges must be brought in a declaratory judgment

action following conviction. The Warden also encourages the Court to reiterate that the doctrine of res judicata will bar a lethal injection challenge at any procedural juncture, if the party has failed to appeal directly an adverse ruling on the same issue.

A. Challenges to capital punishment *per se* may be raised before trial, but method-of-execution challenges must be brought through a declaratory judgment action.

In Ohio, there are effectively two types of challenges to capital punishment: “*per se*” challenges and “method-of-execution” challenges. Procedurally, Ohio handles each challenge differently. On the one hand, *per se* challenges are ripe for adjudication before trial, and therefore should be raised during the criminal proceedings. On the other hand, method-of-execution challenges are not ripe before trial, and should be brought in declaratory judgment actions following conviction.¹

A *per se* challenge essentially asserts that Ohio cannot constitutionally execute a prisoner. In other words, a *per se* challenge is a facial challenge to the death penalty. For example, a defendant could challenge all death sentences as unconstitutional. Alternatively, a defendant could challenge a specific state statute. See, e.g., *Kennedy v. Louisiana* (2008), ___ U.S. ___, 128 S.Ct. 2641 (a capital trial on a state court charge of child rape would be unconstitutional under any circumstances). These challenges are purely legal and do not require reference to the facts of a particular case. If successful, a *per se* challenge would remove all possibility of even *imposing* a death sentence.

By contrast, method-of-execution challenges seek to invalidate the protocol or implementation of a chosen form of execution. For example, a defendant might argue that the use of certain drugs in a lethal injection is unconstitutional or, more narrowly, that the

¹ This distinction is consistent with the United States Supreme Court’s treatment of method-of-execution and *per se* challenges in the federal system. Method-of-execution challenges should be raised under 42 U.S.C. § 1983, while *per se* challenges are properly raised in habeas. *Hill v. McDonough* (2006), 547 U.S. 573, 576.

defendant's personal characteristics make it unconstitutional to apply specific procedures to him. These claims turn on the facts of a particular case. While they might prevent the carrying out of a death sentence by a particular method, these challenges do not stop a court from imposing a death sentence or prevent a State from using an alternate method of execution. In other words, a method-of-execution challenge cannot invalidate a death sentence; it only asserts that a *particular method* of execution is unconstitutional.

Because *per se* and method-of-execution challenges differ in the remedies they seek, they ripen at different times. "Ripeness 'is peculiarly a question of timing.' The ripeness doctrine is motivated in part by the desire 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . .'" *State ex rel. Elyria Foundry Co. v. Indus. Comm'n* (1998), 82 Ohio St. 3d 88, 89 (internal citations omitted). In Ohio, a *per se* challenge ripens before trial because it implicates trial procedure—the number of jurors and manner of selecting them, the "death qualification" of jurors, whether a three-judge panel is required, and the bifurcation of guilt and sentencing phases—and therefore *should* be raised before trial. See *United States v. Quinones* (2d Cir. 2002), 313 F.3d 49, 58-59 (a facial challenge to a particular punishment ripens where it turns a purely legal question and where the defendant would suffer procedural hardships in a capital trial that could be avoided if the death penalty were not an option). But method-of-execution challenges are not ripe for pre-trial consideration because they do not change the dynamics of a trial or undermine the legitimacy of a verdict or sentence. Method-of-execution challenges ask only "If I am convicted, can my sentence be constitutionally executed?" And courts obviously need not answer this question unless conviction occurs.

Because method-of-execution challenges are not ripe for pre-trial consideration, they should be raised under Ohio’s broad declaratory judgment statute. R.C. 2721.02(A) provides that “courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed.” See *State ex rel. Erie County Democratic Executive Comm. v. Brown* (1966), 6 Ohio St. 2d 136, 138. A method-of-execution claimant seeks the precise relief that the declaratory judgment statute is designed to give: injunctive relief that prevents execution by a particular method.

Method-of-execution claims are ill-suited for post-conviction relief because a successful method-of-execution challenge would not render a death sentence void or voidable. Postconviction relief is designed to remedy claims “that there was such a denial or infringement of the person’s rights *as to render the judgment void or voidable* under the Ohio Constitution or the Constitution of the United States” R.C. 2953.21(A)(1)(a) (emphasis added). Moreover, method-of-execution claims are not justiciable under Ohio’s postconviction relief statute, which is narrowly read to permit attacks against the sentencing court’s jurisdiction. Since a sentencing court does not dictate the method of execution—which is defined by statute—a method-of-execution challenge cannot be used to attack a sentencing court’s jurisdiction.

In short, the Court should articulate a simple rule that will provide consistent guidance to Ohio’s lower courts and to federal habeas courts: A challenge that seeks to vacate a judgment must be raised in a petition for postconviction relief, while a challenge that, if successful, would leave an underlying sentence of death intact must be raised in a declaratory judgment action.

B. When a defendant fails to appeal directly the denial of a pre-trial motion challenging the constitutionality of a punishment, the claim is res judicata for all further proceedings.

Regardless of the appropriate forum for a particular lethal injection challenge, an inmate can never raise a claim that is barred by res judicata. In Ohio, if a losing party fails to appeal

directly an adverse judgment, the prevailing party can invoke the res judicata bar in all later proceedings. Accordingly, where a party loses on a method-of-execution challenge in a trial court and does not directly appeal the issue, as happened here, the res judicata doctrine bars the party from raising another method-of-execution challenge again in the future, leaving the party with no remaining remedies as to that claim.

The doctrine of res judicata encompasses two related concepts: claim preclusion and issue preclusion. “Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.” *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 6. In other words, a final judgment on the merits of an issue “is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.” *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 1995-Ohio-331 (internal quotation and citation omitted). “[A] final judgment of conviction bars a convicted defendant . . . from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment.” *State v. Perry* (1967), 10 Ohio St. 2d 175, syllabus ¶ 9 (emphasis in original); see *State v. Saxon*, 109 Ohio St. 3d 176, 2006-Ohio-1245, ¶ 18 (“[T]he doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue.”). *Perry* specifically held that the doctrine of res judicata is applicable to petitions for postconviction relief. 10 Ohio St. 2d at syllabus ¶ 8.

As the Fifth District correctly determined when affirming the denial of Scott’s petition for postconviction relief, *Perry* means that a method-of-execution challenge is res judicata when a

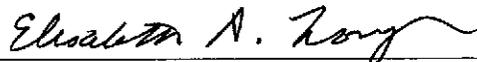
petitioner had a full opportunity to litigate the challenge before trial and chose not to appeal the adverse decision. See *Scott*, 2006-Ohio-257 at ¶ 59 (explaining that the claim “was available on direct appeal and as such did not require matters dehors the record that were not available at trial”). By rigorously enforcing the res judicata bar with respect to capital punishment claims, this Court can curb the erratic treatment that capital punishment claims have received in lower courts. As elsewhere, application of the res judicata doctrine in these situations will “promote[] the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.” *Saxon*, 2006-Ohio-1245 at ¶ 18 (citing *State ex rel. Willys-Overland Co. v. Clark* (1925), 112 Ohio St. 263, 268).

CONCLUSION

For the foregoing reasons, this Court should accept the certified question and hold that a constitutional challenge to Ohio's lethal injection protocol should be brought in a declaratory judgment action under R.C. 2721.02 if the challenge is not otherwise barred by the doctrine of res judicata.

Respectfully submitted,

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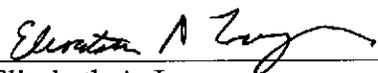
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Preliminary Memorandum of Respondent Mark Houk, Warden, In Support of Answering the Certified Question was served by U.S. mail this 18th day of August, 2009, upon the following counsel:

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