

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL DEAN SCOTT

Petitioner,

-v-

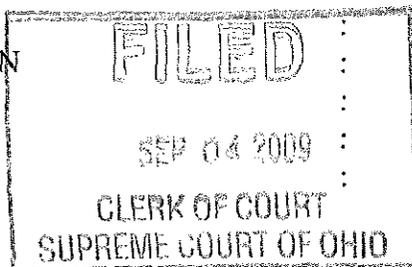
MARK HOUK, WARDEN

Respondent.

Case No. 2009-1369

On Review of the 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



MOTION TO STRIKE DISTRICT COURT ORDER
CERTIFYING QUESTION OF STATE LAW, FILED JULY 29, 2009

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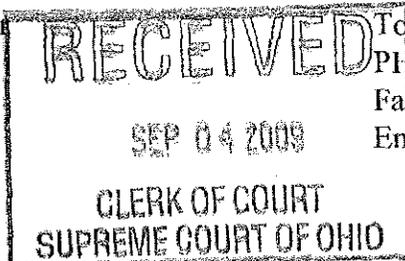
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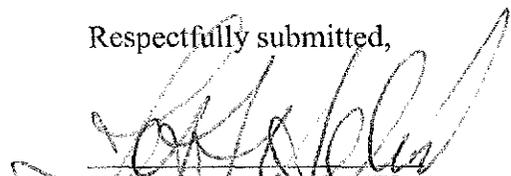
Petitioner, Michael Dean Scott, by and through his counsel, moves this Honorable Court to strike the order from the United States District Court from the Northern District of Ohio, filed with this Court on July 29, 2009, as the district court's order failed to comply with S.Ct. R. XVIII, Section 3. As a result, Petitioner Scott filed a motion with the district court on August 27, 2009, requesting that the district court order the district court clerk to re-submit a certified copy of its certification question to this Court in compliance with this Court's rules. On September 1, 2009, the district court granted Scott's request, and ordered the clerk to issue the certified question in compliance with the service requirements of this Court's rules. That same day, the clerk of the district court entered upon its docket a entry reflecting the re-submission of the question to this Court. The Clerk of this Court filed the re-submitted order on September 3, 2009.

Scott also notes that Respondent Warden has filed both a preliminary memorandum regarding the initially-submitted order from the district court and a motion to dismiss this action for want of prosecution. Because of the district court's failure to comply with this Court's rules,

the Warden's memorandum and motion are, at best, premature.

These arguments will be more fully addressed in the attached memorandum.

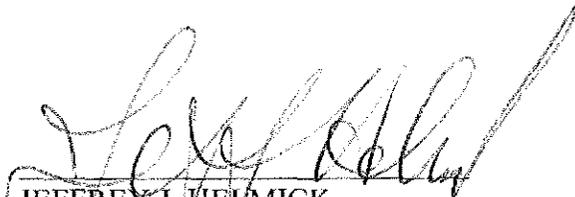
Respectfully submitted,


JEFFREY J. HELMICK
DAVID L. DOUGHTEN (ETA)

Counsel for Appellant

Proof of Service

A copy of the foregoing was served by regular U.S. mail upon Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 3rd day of September, 2009.


JEFFREY J. HELMICK
Counsel For Appellant

MEMORANDUM IN SUPPORT

Procedural Background

On July 21, 2009, Judge John Adams of the United States District Court for the Northern District of Ohio granted Petitioner Michael Dean Scott's request to certify a question to this Court. *Michael Dean Scott v. Mark Houk, Warden*, U.S. Dist. Ct. E.D. Ohio, case no. 4:07-CV-0753. The certification request was made to clarify for the federal courts what forum a capital defendant must use to raise and develop an Eighth Amendment challenge to Ohio's lethal execution protocol.

The allowance of and procedure for certification of questions to this Court is set forth in Rule XVIII¹ of the Rules of Practice of the Supreme Court of Ohio. Of particular relevance to this memorandum is this provision:

Section 3. Preparation of Certification Order; Notice of Filing.

The certification order shall be signed by any justice or judge presiding over the cause or by a magistrate judge presiding over the cause pursuant to 28 U.S.C. Section 636(c). *The clerk of the certifying court shall serve copies of the certification order upon all parties or their counsel of record and file with the Supreme Court the certification order under seal of the certifying court, along with certificate of service.*

(Emphasis added.)

The federal clerk did not comply with this rule's requirements. After the district court granted Petitioner's motion to certify the question on July 21, 2009, some days later the district court clerk did in fact submitted a certified copy of the district court's order certifying the question, but neglected to send copies of the submitted order to counsel, nor did the clerk attach

¹In his motion to dismiss filed August 19, 2009, the Warden erroneously cited to S.Ct. R. XVII, which is reserved. The correct and relevant rule is S.Ct. R. XVIII.

to the order the required certificate of service. Further, the district court clerk did not even note on the docket in the district court that the order had been submitted to this Court, in compliance with Judge Adams's order, nor was there any entry acknowledging any proof of receipt by this Court.

As noted above, and unbeknownst to Scott and his counsel, the district court clerk did send the certification order, and the Clerk of the Supreme Court of Ohio filed the order and commenced this action on July 29, 2009. Michael Dean Scott v. Mark Houk, Warden, 2009-1369. Under S.Ct. R. XVIII, Section 6, Petitioner and Respondent have twenty days within which to file a memorandum in support of or in opposition to a certified question. The Warden filed a memorandum on the twentieth and final day, August 18, 2009, urging this Court to accept the certified question and answer it, a reversal of his position in the district court.

The following day, August 19, 2009, one day after the twenty-day window expired, the Warden moved to dismiss the action for want of prosecution because Scott failed to file a memorandum within the twenty-day window as set forth in S.Ct. R. XVIII, Section 6.

As noted previously, Scott did not receive notice of the district court clerk's attempted compliance with the district court's order to submit the certified question. Having learned of the submission of the certified question from the Warden's filings in this Court, on August 27, 2009, Petitioner filed a motion in the district court requesting that the court order the clerk to re-issue the certified question, and comply fully with this Court's rules for service of process on the parties and for inclusion of a certificate of service. On September 1, 2009, Judge Adams granted Petitioner's motion, noting the error by the district court or the clerk of the district court, or both, and ordered the clerk to re-submit the question in compliance with this Court's rules.

Significantly, in so doing, the district court stated: "Furthermore, the Court respectfully

requests that the Supreme Court of Ohio not hold its inadvertent error against Petitioner when considering the request for certification.”

Also on September 1, 2009, the clerk of the district court entered upon the docket confirmation of compliance with the district court’s latest order regarding service and confirmation of re-submission of the certified question to this Court. On September 3, 2009, the re-submitted order was filed with this Court, which included a certificate of service.

Because Clerk of this Court of the Supreme Court of Ohio received this newly, and properly, submitted question from the district court clerk, Scott moves this Court to strike the earlier order from the district court, filed July 29, 2009. This will allow the proper commencement from the September 1, 2009 filing date of the twenty days for the filing of memoranda pursuant to S.Ct. R. XVIII, Section 6.

Likewise, Petitioner submits that the preliminary memorandum and motion to dismiss for want of prosecution filed by the Warden are both premature, as further detailed in the argument below.

In addition, and significantly, *both* parties seek clarification as to the proper forum for a capital defendant to raise or develop an Eighth Amendment challenge to Ohio’s lethal injection protocol. In his Memorandum, the Warden strongly *urged* this Court to accept and answer the question. Scott concurs with the Warden’s position on the importance of an answer.

Surprisingly, after stating the importance of this Court’s answering the certified question, the Warden took the very first opportunity to move to dismiss this action for want of prosecution. This is surprising because it is the Warden who would most benefit from this Court’s addressing the issue. Without this Court’s clarification, it is unlikely that any federal court will find that an Ohio court’s application of *res judicata* or any other procedural bar to be a firmly established bar

to federal litigation. Thus, the federal courts will be permitted to address the merits of the issue if a petitioner attempted to raised the matter in any of the five different forums that have been suggested by Ohio court decisions.

Ohio Requires Strict Adherence to Service Provisions of Procedural Rules

This Court has recognized the importance of notice to a litigant. This includes notice provisions to the parties as may be required by federal rules of procedure. In Atkinson v. Grumman (1988), 37 Ohio St.3d 80, a party was not provided notice of a filing of a final trial court judgment entry. The appellee argued that the plaintiff missed a filing deadline for the filing of a Notice of Appeal. The appellant argued that he did not have received notice because he was not served with the final entry as was required by the federal rule in question. The appellee argued that because the plaintiff had oral notice that a decision had been made, they could have filed the notice timely.

This Court rejected the suggestion that once a party is placed on notice that a ruling will sometime in the future be filed, that the burden is then placed upon that party to constantly check with the court to determine if the entry had been completed and filed properly. The due diligence question was decided in favor of requiring strict adherence to the service requirement of the procedural rule in question.

Appellees also claim that appellants failed to exercise due diligence and, therefore, should not receive the protection of the *Moldovan* holding. Appellees argue that appellants should either have filed a notice of appeal immediately or have been more diligent in checking the case status with the trial judge. To follow appellees' argument, an appellant, to be diligent, would have to file a notice of appeal immediately after a trial court announces its decision. Without an entry, however, there would be no way to fully or accurately comply with App. R. 3(C), which states that the notice of appeal "shall designate the judgment * * * appealed from * * *." The other way for appellants to demonstrate diligence would be to call the trial court each day to see if and when the judge signed the entry. This is not only impractical and unnecessarily burdensome, but it should also be apparent

that such a course of action might also be against an appellant's best interests.

Id., p. 83

As addressed by the above passage, this Court noted that because the rules of appellate procedure required a journal entry of the order, the notice could not have been properly filed until the entry had been filed by the clerk. The party was required to wait until the clerk filed the entry in full compliance with the rule before a notice could be filed.

More importantly, Atkinson did not receive notice of the entry's filing as was required by the rule. He missed the filing date because of the failure to serve him with notice of the judgment filing. This Court found that one may not be deprived of the right of redress without proper notice. Specifically, this Court held in its syllabus that:

SYLLABUS: 1. The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law.

In summation, Ohio law requires that parties to a judgment be given reasonable notice of a final appealable order. Where is not provided, a litigant may not be denied his right of redress. This rule "insures that the judicial process, which depends upon the active participation of adversarial lawyers and litigants, will have their full participation in most cases." Id., p. 86.

Request Made for Filing in Compliance with Rule

To that end, and as described above, on August 27, 2009, in order to further the federal court's request for an answer to the certified question, Scott filed a request with that court to order the clerk of the district court to re-submit the certified question to the Clerk of this Court. It was requested that the question be filed in full compliance with this Court's rules, including service upon the parties of the order upon its submission and inclusion of a certificate of service attesting to said service. Since the district court has acknowledged the error and ordered re-

submission, the twenty day filing requirement will commence upon the proper filing of the question.

Importance of Question in Relation to Procedural Bars

The answer to the certified question is important to the Warden, the courts and capital defendants. All factions have a need to know where and how a lethal injection protocol issue must be litigated. This would seem to be of particular importance to the Warden. Without a definitive answer from this Court, there is no effective procedural bar to the issue in federal court. Currently, as long a capital defendant raises the claim at some level in state court, federal courts may address the issue. This is precisely why Judge Adams certified the question.

A federal court is generally barred from considering an issue of federal law arising from the judgment of a state court if the state judgment "rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the [state] court's decision." Harris v. Reed (1989), 489 U.S. 255, 260. The adequate-and-independent-state-ground doctrine has been applied in refusing to address the merits of a federal claim because of violations of state procedural rules, such as the failure to make a timely objection at trial. Id. at 261. An adequate and independent finding of procedural default will preclude habeas corpus relief, unless the petitioner can show cause for the default and actual prejudice as a result of the alleged violation of federal law. Coleman v. Thompson (1991), 501 U.S. 722, 749-50.

In determining whether a procedural default has occurred and, if so, what effect the default will have on federal review of a state conviction, the district court must consider whether (1) a state procedural rule exists that applies to the petitioner's claim, (2) the petitioner failed to comply with the rule, (3) the state court actually applied the state rule in rejecting the petitioner's claim, and (4) the state procedural rule is an adequate and independent ground upon which the

state can rely to deny relief. Reynolds v. Berry, (6th Cir. 1998) 146 F.3d 345, 347.

It is this last rule that applies to the certified question. The rule precluding federal habeas corpus review of claims rejected by the state courts on state procedural grounds applies only in cases where the state rule relied upon by the state courts involves a "firmly established and regularly followed state practice." Ford v. Georgia, (1991) 498 U.S. 411, 423-24. If a state is not clear and even-handed in its application of the rule, the bar is not firmly established.

Confusion in Ohio Courts as to Proper Lethal Injection Forum

The Supreme Court of the United States addressed Eighth Amendment challenge to lethal injection 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 this Court 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 in relation to the protocol or the manner in which the protocol was administered.

In fact, this Court rejected lethal injection challenges without any substantive Eighth Amendment analysis whatsoever. The refusal to engage in such analysis was based upon the

non-existence of any reported Supreme Court or federal case authority finding lethal injection procedures to be unconstitutional. See e.g., State v. Carter (2000), 89 Ohio St.3d 593, 608, 734 N.E.2d 345 (“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.”).

Four years after Carter, this Court of Ohio again rejected summarily the claim, citing to Carter. State v. Stanley Adams (2004), 103 Ohio St.3d 508, 535, 817 N.E.2d 29. (This is the same defendant whose case was just remanded to the district court by the Sixth Circuit as noted below.) Most recently, this Court summarily rejected a merits discussion on lethal injection protocol in State v. Craig (2006), 110 Ohio St.3d 306, 327, 853 N.E.2d 621, 643 (“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 decisions 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 Ohio Eleventh District Court of Appeals 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, 110 Ohio St. 3d 1407, 2006 Ohio 3306, 850 N.E.2d 69, 2006 Ohio LEXIS 2047 (2006), Discretionary appeal not allowed, 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 judgment* 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 this Court has never suggested either declaratory judgment or state habeas corpus procedures as being available to a similarly situated petitioner. This Court refused to accept jurisdiction on the discretionary appeal of 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 Judge 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. Obviously, no Ohio appellate court has addressed the question of whether Judge Burge had jurisdiction to address the issue pre-trial.

The bar in this state is not currently “firmly established” in relation to the challenge to the lethal injection protocol because the federal courts and defendant do know where to file the constitutional challenge. If Ohio does not clarify the issue so that litigants know how to file the claim, federal courts may not determine that Ohio has a firmly established law in this regard.

Sixth Circuit Will Not Honor State Bar if Not Firmly Established

The Sixth Circuit has found other Ohio procedures to be inadequate. For example, in Franklin v. Anderson (6th Cir. 2006), 434 F.3d 412, the court chronicled the “fluctuating treatment of Rule 26(B) applications by the Ohio Supreme Court” Id. at 421 (collecting cases). At times, the Ohio Supreme Court has rigidly enforced the time deadline set forth in Rule 26(B). Id. at 420. Yet the Ohio Supreme Court has also had periods in which it relaxed its adherence to the Rule 26(B) deadline. Id. at 420-21. Because of this “erratic” approach to Rule 26(B) applications, the Sixth Circuit concluded that “Rule 26(B) is not an adequate and independent state rule that can preclude consideration of [an] ineffective assistance of appellate counsel claim.” Id.

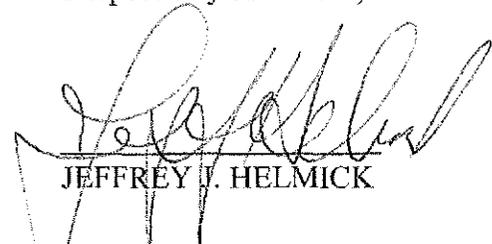
Since 2004, this Court has enforced the Murnhan bar consistently. The Sixth Circuit has so recognized. The failure to timely file an Application to Re-Open is now found to be an adequate procedural bar. Faunttenberry v. Mitchell (6th Cir. 2008), 515 F.3d 614.

Similarly, in Hartman v. Bagley (6th Cir 2007), 492 F.3d 347, the Sixth Circuit reaffirmed that a *res judicata* default ruling by an Ohio state post-conviction court is not adequate to sustain a procedural default, and will not be enforced on federal habeas review when the claim is based and supported on evidence *de hors* the record. This is because of the uncertainty in Ohio law as to when an issue must be raised on direct appeal as opposed to being raised in postconviction litigation. The court supported the ruling citing to Hill v. Mitchell (6th Cir. 2005), 400 F.3d

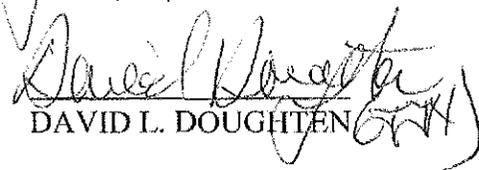
It should be noted that the Sixth Circuit has remanded two capital habeas cases to the United States District Court for the Northern District to determine this very issue. In both Odraye Jones v. Bradshaw, Case No. 07-3766, and in Stanley Adams v. Bradshaw, Case No. 07-3688, the Sixth Circuit granted 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.

WHEREFORE, Scott requests this Court strike the order of the district court certifying the question, filed July 29, 2009, in light of the recent filing on September 3, 2009, of the district court’s revised order, in apparent compliance with S.Ct. R. XVIII. Scott will file his Memorandum within the twenty day period permitted, suggesting the best forum for litigation of a challenge to the constitutionality of Ohio’s lethal injection protocol.

Respectfully submitted,



JEFFREY J. HELMICK



DAVID L. DOUGHTEN

Counsel for Petitioner Scott