

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL DEAN SCOTT	:	Case No. 2009-1369
	:	
Petitioner,	:	On Review of the Certified Question
	:	from The United States District
	:	Court for the Northern District of
-v-	:	Ohio
	:	
	:	
MARK HOUK, WARDEN	:	U.S. District Court Case
	:	No. 4:07-cv-00753-JRA
	:	
Respondent.	:	

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PETITIONER'S PRELIMINARY MEMORANDUM IN SUPPORT OF  
ACCEPTANCE OF CERTIFICATION REQUEST

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## 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. Certification Order, Scott v. Houk (N.D. Ohio, July 21, 2009), 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 execution protocol.

The Warden filed a motion to dismiss the certification question for lack of prosecution. The original filing of the district court's order, however, did not include notice of service or indeed even actual service to Petitioner and Respondent. Therefore, Petitioner Scott filed a motion with the district court on August 27, 2009, requesting that the federal district court judge 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 an entry reflecting the re-submission of the question to this Court, and compliance with the service requirement. The Clerk of this Court filed the re-submitted order on September 3, 2009.

Upon re-submission of the question by the federal district clerk, the Warden filed a request to withdraw his motion to dismiss and to treat his previously filed preliminary

memorandum as re-submitted. Petitioner Scott did not oppose the Warden's motion. On September 11, 2009, this Court granted the Warden's motion in its entirety.

### **Proposition of Law One**

**Challenges to constitutionality of Ohio's lethal injection protocol shall be made at the completion of the capital defendant's substantive appeals through Ohio's declaratory judgment process, R.C. §2721.02.**

#### **A. Reasons In Support of Answering Certified Question**

As noted above, the Warden has submitted his Preliminary Memorandum to this Court on this matter. In many respects, Scott agrees with the position of the Warden. Scott agrees that this is an important question that currently pervades all capital litigation. Almost every petition in both the state and federal courts includes a discussion of whether the capital petitioner properly raised a lethal injection challenge.

Scott disagrees with the Warden, however, that two distinct Eighth Amendment challenges are available and must be raised and preserved as separate challenges. The Warden has determined that there is currently a "*per se*" constitutional challenge and a "*method-of-execution*" challenge. Scott's disagreement is based upon the Warden's erroneous assessment that Baze v. Rees (2008), 553 U.S. \_\_\_, 128 S.Ct. 1520, created the two distinct challenges. For all intents-and-purposes, after Baze, the protocol challenge *is* the lethal injection challenge.

It is clear that the Warden is modeling his approach after Kentucky's in Baze. Baze was the appeal from a declaratory judgment procedure in Kentucky. Kentucky's declaratory judgment procedure permitted full civil discovery and an evidentiary hearing. It is unclear at this juncture whether Ohio's declaratory judgment statute, R.C. §2721.02(A), permits such expansive discovery. This discovery, which would include depositions, production of documents and an

evidentiary hearing, is necessary to fairly present the issue, as evidenced by the §1983 action in Cooney v. Strickland, (*Cooney III*), (6<sup>th</sup> Cir. 2008), 544 F.3d 588, 589.

The current statutory scheme appears to allow such development. R.C. §2721.10.

Determination of issues of fact, mandates that:

When an action or proceeding in which declaratory relief is sought under this chapter involves the determination of an issue of fact, that issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the action or proceeding is pending.

If this Court were to adopt this expansive nature of declaratory judgment proceedings, the Warden is correct that protocol litigation should proceed in this manner. Under current Ohio law, declaratory judgment is best suited to effectively litigate protocol challenges.

#### **B. Potential Problems With Declaratory Judgment Scheme**

Because the protocol is subject to change, declaratory judgment procedures would best enable the courts to address the challenge when it is “ripe.” But there are problems associated with the procedure that would need to be addressed. It is not clear when the Warden proposes that the right to this procedure would commence. It is nonsensical to make a defendant wait until the completion of his federal “*per se*” challenge. Perhaps the Warden is arguing that the procedure must begin after the completion of all other state substantive means of relief, including appeals, but before filing a federal habeas corpus petition. Traditionally, the state substantive challenges and appeals would be the direct appeal of right, an application to re-open pursuant to Appellate Rule 26(B) and Ohio’s postconviction procedure under R.C. §2953.21. This latter approach would probably create a concurrent jurisdiction problem with the federal courts. A declaratory judgment action, with its full civil discovery and related procedures, might easily require a year or more until completion. A death-sentenced defendant must file his or her 28

U.S.C. §2254 petition for habeas corpus within a year from the completion of the last state action, usually the appeal of the state postconviction remedy. 28 U.S.C. §2244(d)(1)(D); Lawrence v. Florida (2007), 549 U.S. 327. This conflict might be remedied by this Court declaring the declaratory judgment process a postconviction procedure, thus tolling the period for the running of the federal statute of limitations. See, e.g., Eads v. Morgan, 104 Ohio St. 3d 142; 2004 Ohio 6110.

Another problem may be legal representation. Ohio currently has no procedure, or funding, for the appointment of postconviction counsel. The failure to file timely Murnahan Applications is often because defendants do not have a right to counsel since the application has been characterized as a postconviction procedure. The Ohio Public Defender Office currently is representing most capital defendants in postconviction procedures, as there is no money to pay private counsel. Conflicts will inevitably arise among some defendants represented in that office. This would be the third collateral procedure in this state in which capital defendants are not entitled to counsel and in which the state legislature has not approved funding for appointment of counsel. Equal protection issues are sure to arise from the lack of legal representation in this critical area.

**C. The Warden's *Res Judicata* Suggestion is Inadequate and Unacceptable**

The remaining issue to be determined is the application of *res judicata*. It appears the Warden wants it both ways. If Scott understands the Warden's argument, both the "*per se*" and "method-of-execution" Eighth Amendment arguments must be made at the trial level. This seems a bit irregular, because the "method-of-execution" challenges "are not ripe for pre-trial consideration." Warden's Preliminary Memorandum, p. 9. Thus, a capital defendant must raise

and develop an argument that cannot be properly addressed by the courts at the time of its filing because the argument is not yet ripe. If he does not raise and develop the issue when it is not ripe, he will be precluded from addressing it when it is ripe; therefore, the courts may properly avoid addressing the issue. If this seems confusing, it is only because it is confusing.

The Warden argues that both lethal injection challenges must be argued at the trial court to preserve the ability to argue the “method” many years later. This is inherently inconsistent. How can a pre-trial capital defendant raise an issue that he or she has no ability to develop? Unless this Court or the legislature, or both, makes an exception or amends the rules of criminal procedure relating to discovery, a challenge to the method or protocol of the lethal injection process will always be incomplete at the time of trial and obsolete by the time of the execution.

The issue is incapable of being developed in the trial court because Ohio’s criminal rules permit only limited discovery. The Warden is advocating filing a perfunctory method challenge to preserve a protocol challenge that may be entirely different by the time that issue is ripe, five to ten years, or more, in the future.

The Warden’s suggestion is inadequate and unacceptable because the method challenge filed pretrial would be subject to the doctrine of *res judicata*. If a perfunctory method challenge is made up front in the trial court, and raised on appeal, does not *res judicata* bar a declaratory judgment challenge? This Court would be required to announce a specific exception to the lethal injection challenge for the Warden’s proposed scheme to work.

This problem is exemplified in Scott’s own case. The Warden correctly noted that on appeal from the denial of the Eighth Amendment challenge in his R.C. §2953.21 postconviction action, the Fifth District Court of Appeals found that challenge was barred because it “was

available on direct appeal and as such, did not require matters dehors the record that were not available at trial.” State v. Scott, 2006 Ohio-257 at 59. Again, this reveals the inherent inconsistencies and unfairness with the *res judicata* finding. Scott cannot raise a method challenge because that challenge is not yet ripe. Nevertheless, he must raise an issue that is not yet ripe because the evidence needed was “available at trial.” The very acknowledgment that the issue was not ripe is an argument that the issue could not have been fully developed at trial because the evidence (relating to the method utilized in the lethal injection process) is not yet available.

Practically, this Court should acknowledge that Baze does not create two distinct issues. Where lethal injection is concerned, the Eighth Amendment is violated when or because the method-of-execution is faulty. A capital defendant should not be required to attempt to challenge a protocol years before he or anyone else is aware of what particular protocol will be used in the lethal injection process. Execution protocols are constantly amended, and undoubtedly will be amended again after the recent botched execution of Romell Broom on September 15, 2009.

Thus, the Warden’s idea to use declaratory judgment as the vehicle to challenge lethal injection protocol, although imperfect, is not without merit. A criminal defendant should not be required to make that challenge until he has failed to convince the Ohio courts that his sentence should be voided. A declaratory judgment action, as argued above, made at the completion of the substantive appeals (the direct appeal and all postconviction procedures), and before entering federal court, would enable the challenge to be perfected before federal review and in much closer proximity to the execution. This procedure would relieve the trial and appellate courts of the burden of trying to address an inadequately raised challenge, including the confusing and

unevenly applied *res judicata* doctrine. The issue may never become ripe, as it may be mooted by a reversal on a substantive matter or this Court's independent re-weighing. See, e.g., State v. Tenace (2006), 109 Ohio St.3d 255, 2006-Ohio-2417.

#### **D. Importance of Question in Relation to Procedural Bars**

As the Warden argued, 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 an Ohio court, federal courts may address the issue. This is because of the varied court opinions as to where and how the lethal injection challenge must be raised by a defendant.

As discussed above, The Supreme Court of the United States addressed Eight Amendment challenges to lethal injection in the context of a Kentucky declaratory judgement 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. Baze established that the determination of the constitutionality of a state's lethal injection protocol would be decided on a state by state basis.

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 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.

#### **E. Inconsistency in Ohio Courts**

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 have not 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 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 above.) 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 judgement* or filing for a writ under state habeas corpus procedures.

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.”

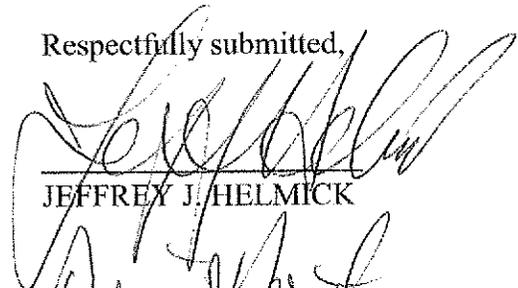
Yet another forum in Ohio procedure emerged recently. In State v. Ruben Rivera, Case Nos. 04-CR-65940 and 05-CR-68067, Judge James Burge of the Lorain County Common Pleas Court conducted a hearing on the constitutionality of lethal injection as part of pre-trial motions in a capital trial. A hearing 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 not 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.

**F. Conclusion**

The Baze plurality opinion reflects a dramatic change to the Eighth Amendment landscape. Baze created a 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. Currently, in Ohio, only the declaratory judgment procedure allows for this type of factual development.

Respectfully submitted,



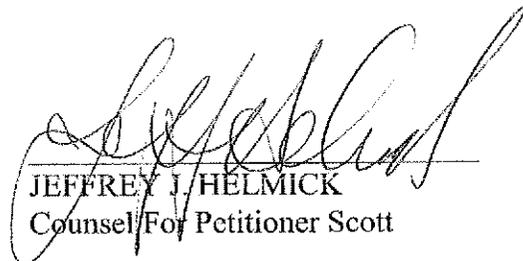
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**Proof of Service**

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



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