

ORIGINAL

IN THE SUPREME COURT OF OHIO

Michael Dean Scott,

Petitioner,

v.

Mark Houk, Warden.

Respondent.

CASE NO. 2009-1369

CAPITAL CASE

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MERIT BRIEF OF PETITIONER MICHAEL DEAN SCOTT

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STATEMENT OF THE CASE

A Stark County, Ohio grand jury capitally-indicted the petitioner Michael Dean Scott, for the deaths of two individuals. The deaths occurred approximately 19 days apart. The death of one of the victims was alleged to have occurred during the course of a felony, R. C. 2903.01(B). The death of the second victim resulted from a homicide committed with prior calculation and design, R. C. 2903.01(A). Both counts included three specifications. The first two specifications of each Aggravated Murder offense alleged that Mr. Scott was the principal offender in the Aggravated Murder and that the victim was killed during a Kidnaping, R. C. 2905.01 and an Aggravated Robbery, R. C. 2911.01, in violation of R. C. 2929.04(A)(7). The third specification alleged that the two victims were killed in a continuous course-of-conduct in violation of R. C. 2929.04(A)(5).

The indictment also charged the Petitioner with the offenses of Murder, R. C. 2903.02, the principle charges of Kidnaping and Aggravated Robbery, and two counts of having a weapon while under a disability.

Petitioner Scott tried his case to a jury. Jury selection began on March 21, 2000. The jury returned a verdict of guilty as to all counts and specifications. The penalty phase began on April 4, 2000. The jury recommended a death sentence at the penalty stage of trial. The trial court adopted that recommendation on April 10, 2000.

Direct Appeal History

Scott appealed timely his convictions and sentences to this Court. On January 14, 2004, this Court affirmed the convictions and sentence of death. Ohio v. Scott, 101 Ohio St.3d 31.

Scott filed for a writ of certiorari in the Supreme Court of the United States. The

Supreme Court denied the request on June 14, 2004.

State Postconviction Procedures

On January 26, 2001, Scott filed a petition to vacate his convictions or sentence, or both, pursuant to R.C. 2953.21. An amended petition was filed on February 5, 2001. The trial court dismissed the petition on December 21, 2004. Scott appealed the denial to the Ohio Fifth District Court of Appeals. The Fifth District affirmed the trial court's denial of the petition on January 23, 2006. State v. Scott, 2006-Ohio-257.

Scott timely filed an appeal to this Court on March 9, 2006. This Court denied jurisdiction of the matter on June 21, 2006.

Scott filed a petition for the issuance of a writ of certiorari to the United States Supreme Court on his postconviction issues. The Supreme Court denied the request on November 21, 2006.

Application to Re-Open Direct Appeal

Scott also filed an Application to Re-Open his Direct Appeal pursuant to App. R. 26(B) in this Court on April 13, 2004. Scott alleged the ineffective assistance of direct appeal counsel in this application. This Court denied this application on July 14, 2004. Ohio v. Scott, 101 Ohio St.3d 31, 2004-Ohio-10.

Federal Procedure

Scott filed timely a petition for habeas corpus relief pursuant to Title 28, U.S. Code, Section 2254, in the Northern District of Ohio on March 15, 2007. On February 27, 2009, Scott moved the district court to certify to this Court the question of the proper forum for a lethal injection constitutional challenge. On July 21, 2009, Judge John Adams of the United States

District Court for the Northern District of Ohio granted Scott's request to certify the question. 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.

Petitioner subsequently timely filed his preliminary memorandum on September 18, 2009. On October 14, 2009, this Court agreed to decide the following question:

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*, 533 U.S. - - , 128 S.Ct 1520 (2008), or under Ohio law?

This Brief on the Merits follows.

STATEMENT OF THE FACTS

In the early morning hours of August 24, 1999, Dallas Green was found dead in Canton. He had been shot four times. On September 12, 1999, Ryan Stoffer disappeared after last being seen taking Michael Scott and Kerry Vadasz, Scott's girlfriend, out for a test drive in his Ford Probe. Three days later Vadasz led police to Stoffer's body and to the missing car. Stoffer had been shot repeatedly in the back of the head. Ballistics established that the same gun was used in both crimes.

Police arrested Petitioner Michael Dean Scott, who subsequently made statements confessing to both crimes. Scott indicated that Dallas Green had been killed after exchanging words with the Petitioner and that Ryan Stoffer had been shot during a theft of the vehicle Stoffer had offered for sale.

At trial, defense counsel did not contest any of the elements of the offenses except as to whether the state had proved that these two deaths were part of a course of conduct. The jury found Michael Dean Scott guilty of all the counts and specifications.

Penalty Phase

At the penalty phase of the trial, the defense presented mitigating evidence demonstrating that Michael Dean Scott had been seriously abused as a child, and, as a result, shuttled off to foster homes and eventually adopted. Scott's mother had given up one child by the time Scott was born. She later gave birth to two more children, Scott's brothers.

Scott's mother had little to no interest in her children except to verbally and physically abuse them. Kathleen Thompson, a caseworker for the Stark County Department of Human Services, testified that Scott was neglected, beaten with a belt and fists until his kidneys and hearing were damaged, and that his basic needs for food and shelter were not being met.

Dr. Robert Smith testified about Scott's addiction to marijuana and alcohol. Complicating the addiction was the presence of attention deficit hyperactivity disorder ("ADHD"), dysthymia and borderline personality disorder. Scott was first diagnosed with ADHD as a child, receiving medications at that time to control his behavior. The dysthymia is a long-term depression impairing Scott's ability to see the world accurately, and in combination with the borderline personality disorder, led to Scott's feelings of hopelessness and despair over the future. His despair was so overwhelming that he twice tried to kill himself.

The jury found that the statutory aggravating factors outweighed the available mitigation and recommended the death penalty. The trial judge agreed and sentenced Scott to death.

OVERVIEW

The question addressed here, “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, 533 U.S. ___, 128 S. Ct. 1520 (2008), or under Ohio law?” is currently the subject of intense litigation due to the alleged inadequacies in the current Ohio protocol for administering lethal injection. The unique nature of this issue stems from the fact that under Ohio criminal law, there is no procedure which allows a capital-convicted defendant to fully develop a constitutional challenge to the lethal injection protocol. Because the method of execution in place at the time of a defendant’s trial and imposition of sentence is very unlikely to be the method of execution in place years down the line, a capital defendant has no ability to effectively develop a challenge to his method of execution.

Also perhaps may be unique in this litigation is that the parties may not differ greatly in their respective positions. Both parties are requesting clarity of the remedy. Litigation in this area is fluid in that the protocol in question is not a constant. As noted above, a challenge at the time of trial may be based upon facts or procedures which are not being implemented at the time of the execution. Therefore, Scott asks that this Court adopt a procedure for challenging the lethal injection protocol, or any method of execution protocol, which would allow all parties to fully develop the record of the procedure in use at the time of the execution; thereby allowing the reviewing court to fully and fairly assess all aspects of this very complex issue.

It should be noted that the certified question specifically requested the forum for deciding the constitutionality of the lethal injection procedure under both federal and Ohio law. Currently, Ohio’s traditional means of challenging a capital sentence, direct appeal and postconviction, do not allow a capital defendant to challenge the protocol in use *at the time of his execution*. The statute

of limitations on these procedures do not allow the filing of challenge contemporaneously with the scheduling of his execution.

Ohio needs to develop a procedure to challenge the lethal injection protocol that is independent of any federal challenge, such as a challenge pursuant to 42 U.S.C. §1983. Ohio is bound by R.C. 2949.22(A), the so-called “Quick and Painless” statute, stating that the means of execution must be administered “quickly and painlessly.” This statute’s requirements may be over and above that required by the Eighth Amendment to the United States Constitution.

The solution should be simple and straightforward. Challenges to lethal injection as a *means* of execution must be raised at trial and direct appeal. Challenges to the *administration of the method of death*, in this case the lethal injection protocol, are not ripe until the conclusion of the attack on the sentence of death on direct appeal, state postconviction or federal habeas proceedings. At that time, the condemned should be able to challenge the constitutionality of the protocol in a civil declaratory judgment procedure. Whether the protocol was challenged in the criminal process should be irrelevant and form no bar to the later, timely civil challenge.

ARGUMENT

Proposition of Law I:

Challenges to the 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.

Petitioner Scott acknowledges that the United States Supreme Court has never found the death penalty in general to be unconstitutional. Recent challenges that have gained attention from the Court have been to the administration of the means of execution. Here, it is the administration of, or protocol for lethal injection as the means execution that is being challenged.

The Supreme Court of the United States addressed an Eight Amendment challenge to lethal injection in the context of a state 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, 128 S.Ct. 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.

The issue to be decided here is in what forum may a capital convicted person develop and present an attack on the lethal injection protocol (or any other method-of-death scheme that

may be implemented in the future in this state).

Petitioner Scott will here address the five procedures for a lethal injection constitutional challenge suggested by Ohio courts and an additional procedure that has not yet been directly addressed in appellate review. Those five possibilities under state law are 1) pretrial; 2) direct appeal; 3) postconviction; 4) habeas proceedings; and 5) declaratory judgment. The sixth possibility is a second postconviction petition filed pursuant to R.C. 2953.23, as successor petition. The foreseeable inadequacies of each procedure will be explored. The proper conclusion is that Ohio's declaratory judgment process seems best suited to efficiently handle the need for a contemporaneous challenge and the fluid nature of the lethal injection or any other means-of-death protocol.

The Supreme Court of the United States in Baze v. Rees did not review whether lethal injection as a means of execution violated of the Eighth Amendment. Instead, the Court reviewed a challenge to the Kentucky lethal injection protocol. The Court found that the protocol did not violate Eighth Amendment protections.

For all intents-and-purposes, after Baze, the protocol challenge *is* the constitutional lethal injection challenge. Baze established that each state's protocol must be challenged on a state-by-state basis.

Thus, based on Baze, this state must establish the proper forum for challenging both the death penalty in general, and the method of execution implemented to carry-out a death sentence. It seems well-established that a general challenge must be filed pre-trial in this state. What is not clear is where and when a capital defendant may mount a challenge to the method-of-execution.

A. POSSIBLE PROCEDURES AVAILABLE

1. Pre-Trial Proceedings

In State v. Ruben Rivera, Case Nos. 04-CR-65940 and 05-CR-68067, a trial judge in the Common Pleas Court of Lorain County, Ohio 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 the judge did not have jurisdiction to hear the matter, as Rivera had not yet been convicted of a capital offense, let alone sentenced to death. The court found that the current method of lethal injection was unconstitutional.

The prosecution filed an appeal to the Ninth District Court of Appeals. The state argued that the judge's finding was in reality a declaratory judgment. In State v. Rivera, 2009 Ohio 1428; 2009 Ohio App. LEXIS 1245, the Ninth District held that the trial court's decision on the matter was not a final appealable order and dismissed the state's appeal. The court noted that Rivera did not ask to find that lethal injection in and of itself was unconstitutional, but rather that the death penalty itself should be dismissed because of the failing of the lethal injection protocol. (Id. at ¶ 15) Finally, the Rivera court, citing this Court in Mid-American Fire and Cas. Co. v. Heasley, 113 Ohio St. 3d 133, 2007-Ohio-1248, at ¶9, 863 N.E.2d 142, found that the appeal was not proper because there was no issue in controversy as is required for litigation under the declaratory judgment statute.

As Rivera later pled and was not sentenced to death, the issue itself did not proceed to the appellate court on its merits.

The trial court in Rivera attempted to create a procedure which would allow the lethal injection protocol challenge to be developed more fully than by the mere filing of a motion. By

granting an evidentiary hearing, the judge allowed the issue to be developed by testimony and documentation. The problem with the judge's solution was ripeness. Even had the constitutional challenge been allowed pretrial, the protocol may have later changed, and in fact did change, since the date of the hearing. Therefore, a trial judge's ruling at trial would have no practical legal effect on an execution involving a different protocol scheduled a decade later.

2. Direct Appeal

If this Court were to adopt the above approach, there would be some record to review on direct appeal. This would not, however, alleviate the ripeness issue. This Court's direct appeal decision may be five years or more before the actual method-of-execution, in this case the protocol for lethal injection, is known.

This Court has rejected lethal injection challenges with little substantive Eighth Amendment analysis. The obvious reason for this is that without full development of the facts and issues, there is little that can be analyzed. In addition to the lack of any factual development in the lower courts, until Baze there had been few if any reported United States Supreme Court or federal cases addressing whether lethal injection procedures were 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 claim, citing to Carter. State v. Stanley Adams (2004), 103 Ohio St.3d 508, 535, 817 N.E.2d 29. (On appeal from this Court, 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 to the district court for discovery and factual development.) Most recently, this Court rejected summarily 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.”).

3. State Postconviction Petition, R.C. 2953.21

Capitally-convicted defendants have attempted to develop the protocol challenge on postconviction pursuant to R.C. 2953.21. This statute does enable the trial court, in its discretion, to grant discovery. State v. Carter (2004), 157 Ohio App.3d 689. The trial court may also conduct an evidentiary hearing which would allow further development of the issue. R.C. 2953.21(E). In reality, discovery in postconviction cases is rarely granted, with some jurisdictions believing that discovery is not available under the postconviction statute. State v. Dean (2002), 149 Ohio App.3d 93. In addition, trial courts rarely grant evidentiary hearings.

In a postconviction proceeding, a defendant must file the petition within 180 days of the filing of the record on appeal. R.C. 2953.21(A)(2). This emphasizes the ripeness problem. By the time the case has been litigated in the remainder of the defendant’s state court appeals and in federal habeas corpus, the protocol mostly likely will have changed.

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, this Court 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. Accordingly, none of the defendants were afforded the opportunity to develop their 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), certiorari denied, 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), certiorari denied,

Conway v. Ohio, 2006 U.S. LEXIS 7613 (U.S., Oct. 10, 2006).

If this Court were to designate R.C. 2953.21 as the proper procedure for challenging the protocol, it is clear the state courts would afford little in the way of factual development. If issue development were permitted, the resultant facts would be stale by the likely date of execution.

4. Successor Postconviction Petition, R.C. 2953.23

Ohio's postconviction statutory scheme allows a second petition to be filed where a defendant did not have access to the facts on which he is basing his claim until after the running of the 180 day statutory limitation. R.C. 2953.23. The statute does not allow, however, for a constitutional challenge to a capital specification or procedure not based upon a recent United States Supreme Court decision. This may preclude usage of the statute. Nevertheless, the present case presents a good example of how this statute might be utilized.

R.C. 2953.23(A) holds in relevant part:

A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for

constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, *but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.*

(Emphasis added)

Scott previously filed a postconviction petition pursuant to R.C. 2953.21. Thus, he would be barred from filing a successor petition unless he meets the requirements of R.C. 2953.23(A). Unless Scott can establish that he meets the gateway requirements of a successor petition, the merits of the case are moot as far as an attack under a postconviction procedure is concerned, as the trial court lacks jurisdiction to consider either an untimely or a second or successive petition for post-conviction relief. R.C. 2953.23(A)(1)(a); State v. Carter, Clark App. No. 03CA-11, 2003-Ohio-4838, citing State v. Beuke (1998), 130 Ohio App.3d 633, and State v. Owens (1997), 121 Ohio App.3d 34; State v. McGee, Lorain App. No. 01CA007952, 2002-Ohio-4249, appeal not allowed, 98 Ohio St. 3d 1409, 2003 Ohio 60.

Theoretically, Scott may meet the requirements. Because the protocol to be used in his execution may not be known until a time close in proximity to his execution, he “*was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief. . .*” R.C. 2953.23(A)(1)(a)(emphasis added). Clearly, Scott could not have developed the facts to challenge the protocol at the filing of his original petition.

The second part of the requirement is more problematical. Scott must show that “*but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence. . .*” R.C. 2953.23(A)(1)(b)(emphasis added). Because the jury does not consider the constitutionality of the death protocol, it would appear that this

statute does could not apply.

A vague aspect of R.C. 2953.23(A)(1)(b) is the term “eligible.” If it could be successfully argued that the term “factfinder” refers to the trial judge and that the term “eligible” encompasses the constitutionality of the lethal injection protocol, that statute could be a viable forum for this litigation. This does not appear to be the intent of the legislature, however. The plain meaning of the term “factfinder” would appear to be the jury, or in the case of a jury waiver, the three-judge panel. Therefore, that statute must be referring to the capital specifications. Factfinders do not find a defendant “eligible” for the death penalty, except for finding proof beyond a reasonable doubt on the capital specification required by R.C. 2929.04(A). As such, a protocol challenge would not seem to be appropriate under R.C. 2953.23(A).

In addition, if R.C. 2953.23(A) were deemed to be the appropriate forum, by the time the appeals process from a trial court ruling were completed, the protocol may have changed.

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) (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 not the forum for litigation for a capital defendant on the issue of lethal injection protocol. The Eleventh District Court of Appeals 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.

5. State Habeas Proceeding

The state habeas procedure also appears inadequate for addressing a method-of-execution challenge. The statute governing habeas relief in Ohio states as follows:

R.C. 2725.01. Persons entitled to writ of habeas corpus

Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

The right is protected by the Art. I, Sec. 8 of the Ohio Constitution. To fit within this statute, this Court must hold that for Scott and others similarly situated, an execution, or the taking of his life, constitutes a restraint of his liberty.

Ordinarily, habeas corpus is not the proper mode of redress for trial errors where the petitioner has been convicted of a criminal offense, and sentenced to imprisonment by a court of competent jurisdiction. A direct appeal on questions of law is the proper remedy. Ex parte Van Hagan (1874), 25 Ohio St. 426, modified, In re Copley (1972), 29 Ohio St. 2d 35, 278 N.E.2d 358.

It is thus clear that habeas corpus would not lie for alleged denial of constitutional trial rights during trial. Mack v. Maxwell (1963), 174 Ohio St. 275, 189 N.E.2d 156, (claimed denial of the constitutional right of a speedy trial could not be brought in habeas corpus after the accused had pled guilty to or been convicted of the crime charged); McConnaughy v. Alvis (1956), 165 Ohio St. 102, 133 N.E.2d 133, (ineffective assistance of trial counsel is a nonjurisdictional claim that must be raised by appeal); Cf. State ex rel. Dotson v. Rogers (1993), 66 Ohio St. 3d 25, 607 N.E.2d 453.

Constitutional challenges are normally considered to constitute a question of law. In Yutze v. Copelan (1923), 109 Ohio St. 171, 142 N.E. 33, in the syllabus, this Court held: "A writ of *habeas corpus* will not lie, to test the constitutionality of a statute or ordinance, in favor of one who has been convicted, where the criminal court wherein the conviction was obtained had jurisdiction or power to determine the question of constitutionality. In such case the writ cannot be made a substitute for proceedings in error." See, also, State ex rel. Tomajko v. Warden Cleveland House of Corrections (Apr. 3, 2000), Cuyahoga App. No. 77580, 2000 Ohio App. LEXIS 1561. Because it is not clear where the Eighth Amendment challenge to protocol is to be filed, habeas consideration may be precluded by this alone if a pre-trial hearing is determined to be the proper forum.

Because the claimed constitutional error in the form of the protocol was not a trial error, however, perhaps there is room to argue habeas as a forum. But this Court has applied a more general application to habeas as a forum for all constitutional attacks. In Rodgers v. Kapots, 67 Ohio St.3d 435, 436, 1993-Ohio-65, 619 N.E.2d 685, this Court ruled that testing the constitutionality of the statute controlling parole eligibility is not the function of the state writ of habeas corpus. This is indicative that all such questions are precluded from consideration in a habeas proceeding.

There is also some question as to the extent that state habeas permits factual development, including discovery. This Court has previously determined that the "due course of law" guarantee of Section 16, Article I of the Ohio Constitution is fully applicable in habeas corpus proceedings originating in the appellate courts of this state. This Court has further determined that the failure to conduct a meaningful hearing in the course of such proceedings is a

denial of this guarantee. In re Martin (1942), 139 Ohio St. 609.

Because the "due course of law" provision of the Ohio Constitution is virtually the same as the "due process" clause of the Fourteenth Amendment to the United States Constitution, this Court has cited opinions of the United States Supreme Court decided under the Fourteenth Amendment in defining the parameters of rights guaranteed under Article I of the Ohio Constitution. State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6. This would seem to allow for full evidentiary hearings and factual development, if this Court were to find state habeas a proper forum for method of execution challenges. Nevertheless, the prohibition against constitutional issues being addressed in state habeas would required an exception to be made by this Court in method of execution challenges.

6. Declaratory Judgment

The procedure for declaratory judgments is set out in Chapter 2721 of the Ohio Revised Code. Under R.C. 2721.02(A), "courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . ." This Court has held that "[t]he purpose of the Uniform Declaratory Judgments Act is to provide procedural means to settle controversies and to afford relief from uncertainty with respect to rights, status and other legal relations." Travelers Indem. Co. v. Cochrane (1951), 155 Ohio St. 305, 312, 98 N.E.2d 840. A declaratory judgment is a civil action. State v. Brooks (1999), 133 Ohio App. 3d 521, 524, 728 N.E.2d 1119. It is filed by one party against another to obtain a declaration of their rights, status, or relations.

A court cannot enter a declaratory judgment in a criminal case because the indictment invokes the trial court's jurisdiction over a criminal matter, but not to issue a declaratory

judgment. Not surprisingly, the parties have not cited any case that has considered whether a trial court, sitting in a criminal case, could grant a declaratory judgment. The closest decisions have held that a "declaratory judgment action is simply not part of the criminal appellate process." Moore v. Mason, 8th Dist. No. 84821, 2005 Ohio 1188, ¶14; Brooks, 133 Ohio App. 3d at 525.

Baze v. Rees was the appeal from a declaratory judgment procedure in Kentucky. Kentucky's declaratory judgment procedure permitted full civil discovery and an evidentiary hearing.

It appears that Ohio's declaratory judgment statute, R.C. 2721.02(A), permits such expansive discovery as is required for proper issue development. This discovery, which would include depositions, production of documents and an evidentiary hearing, is necessary to fairly present the issue, as evidenced by the Title 42, U.S. Code, Section 1983 action in Cooey v. Strickland, (*Cooey II*), (6th Cir. 2008), 479 F.3d 412.

R.C.2721.10 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.

R.C. 2721.13 allows the remedy afforded by the declaratory judgments act to be liberally construed and freely applied. Sessions v. Skelton (1955), 163 Ohio St. 409, 127 N.E.2d 378.

Thus, the hearing court would possess the flexibility to allow full development and consideration of the relevant facts.

Under current Ohio law, declaratory judgment, although far from perfect, is best suited to effectively litigate protocol challenges.

B. POTENTIAL PROBLEMS WITH DECLARATORY JUDGMENT SCHEME

1. When to Initiate Procedure.

Because the lethal injection protocol is subject to change, declaratory judgment procedures would best enable the courts to address the challenge when it is “ripe.” But there are issues associated with the procedure that would need to be addressed.

The Sixth Circuit in Cooley v. Strickland, *supra*, set a two-year statute of limitations from the close of the state direct appeal process for the filing of a Section 1983 action challenging lethal injection protocol. The court noted that since the “date” the lethal injection protocol is imposed is infeasible, “it stands to reason that the next most appropriate accrual date should mirror that found in the AEDPA: upon conclusion of direct review in the state court or the expiration of time for seeking such review. See 28 U.S.C. § 2244(d)(1)(A) (1996).” *Id.*, 421- 422.

The reasoning for the setting of the starting date for the statute of limitations is federal comity with the states. Cooley cited Hill v. McDonough (2006), 547 U.S. 573 and Nelson v. Campbell (2004), 541 U.S. 637, as reflecting the Supreme Court of the United States’ core concern that federal habeas should not displace a state’s authority to execute its judgments. In Nelson, the Supreme Court stated that “method-of-execution” challenges should be “brought at such a time as to allow consideration of the merits, without requiring the entry of a stay.” 541 U.S. at 650.

Needless to say, Ohio is not bound by the above comity considerations. This Court is free to set the time necessary to start declaratory judgment proceedings at any time. In view of the ripeness issue, and in order to minimize the chances of protocol changes, the running of whatever time period for filing should start with the scheduling of the execution date by this Court at the

close of federal habeas proceedings.

There should be no prerequisite for filing a protocol challenge in the trial court. In Baze, there was no mention in the opinion of a requirement of the matter first being litigated in a criminal forum to preserve the matter for civil review under Kentucky's declaratory judgment statute.

2. Ohio's Separate Consideration

As was noted above, the certified question specifically requested the forum for deciding the constitutionality of the lethal injection procedure under *both* federal and Ohio law. It is essential to note again that the federal litigation under 42 U.S.C. §1983 does not address Ohio's independent requirement that a condemned person be executed in a manner which quickly and painlessly causes death. Ohio's statute may provide greater protection than that afforded by the Eighth Amendment.

Specifically, the statute reads as follows in relevant part:

R.C. 2949.22. Execution of death sentence

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to *quickly and painlessly cause death*. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

* * *

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the

application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to *quickly and painlessly cause death*, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

3. Other Issues

As in all death penalty litigation, funding of the litigation will become an issue. As the declaratory judgment system is civil in nature, the current system does not have a means for funding litigation in this fashion. It would appear that the State Public Defender Office would have to carry the load in this litigation, but the legislature would have to fund the office so that it may properly litigate this complicated issue. In addition, there is the problem of conflicts presented by clients being represented by the same counsel. A means of funding would necessarily be required to fund non-defender counsel. Finally, the court of origin for filing such actions would need to be addressed.

These considerations, however, are not directly in front of the Court and should perhaps be addressed upon the answering of the forum issue by this Court.

C. SUMMARY OF ARGUMENT

Currently, there are two separate and distinct challenges to death penalty as it is presently constituted in this case. First, there is a challenge to the death penalty in general as an Eighth Amendment violation. In Ohio, this can and must be raised in the first instance in the trial court. The second challenge is the method of execution, or protocol of the actual implementation of the death penalty. Because of the fluidity of the protocol, there is no criminal procedure available

that allows for the necessary factual development of the issue at the time the matter becomes ripe. Thus, the challenge must be conducted in a civil proceeding filed at the completion of federal habeas proceedings, and triggered by the scheduling of an execution date by this Court.

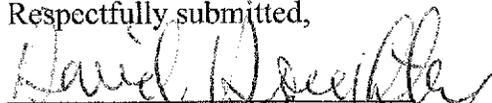
The two constitutional challenges are not interdependent. While the failure to raise a constitutional challenge in the first instance will result in a waiver of the general death penalty challenge, it should not bar the civil challenge to the protocol of execution. To require a method of execution challenge, in this case to the lethal injection protocol, to be filed to preserve the ability to seek a civil remedy at a later time is illegal and a waste of time and resources.

Currently, the declaratory judgment procedure is best suited for handling method of execution challenges. It best allows a capital defendant to challenge the protocol at a time when that defendant becomes aware of the protocol that will be used in his execution. Although not perfect, the procedure has the flexibility to allow the parties to fully and fairly present the issue to the designated court.

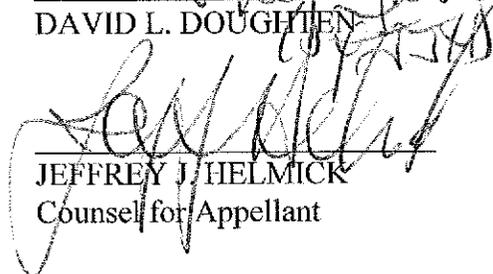
CONCLUSION

Pursuant to the preceding Proposition of Law, petitioner Michael Dean Scott respectfully requests that this Honorable Court determine the forum and procedure to allow capital defendants to challenge the protocol and practice for the method of execution in Ohio, currently lethal injection.

Respectfully submitted,



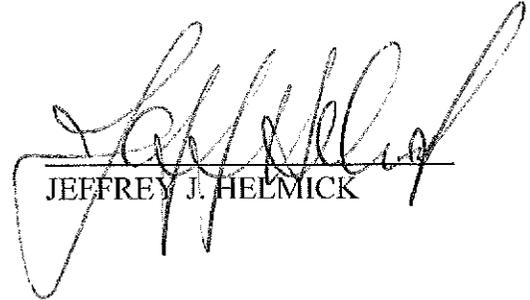
DAVID L. DOUGHIEN



JEFFREY J. HELMICK
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Petitioner by Regular U.S. Mail on this 19th day of November, 2009 to Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43214.



JEFFREY J. HELMICK

APPENDIX

ORIGINAL

ADAMS, J.

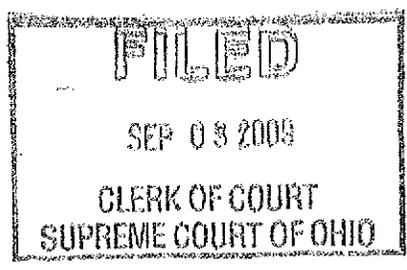
09-1369

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL DEAN SCOTT,)	Case No. 4:07-CV-0753
)	
Petitioner,)	
)	JUDGE JOHN R. ADAMS
vs.)	
)	<u>MEMORANDUM OF OPINION</u>
MARK HOUK, Warden,)	<u>AND ORDER</u>
)	
Respondent.)	(Resolves Doc. 55)

On July 21, 2009, this Court granted Petitioner's motion to certify a question to the Supreme Court of Ohio. In so doing, the parties were provided electronic notice of the Court's order. However, the Court inadvertently failed to place copies of the Court's certification order in the mail to counsel to signal to them that the Supreme Court of Ohio would shortly be in receipt of the order. As a result, Petitioner now requests that the Court re-submit the question it previously certified to the Ohio Supreme Court regarding the correct forum in which to litigate a lethal injection claim in the Ohio courts. The motion is GRANTED. Furthermore, the Court respectfully requests that the Supreme Court of Ohio not hold its inadvertent error against Petitioner when considering the request for certification.

The Court hereby directs the District Court Clerk to re-issue the below certification order to the Ohio Supreme Court and place this order on the docket, including a certificate of service.



The Court hereby incorporates its legal analysis from the original order granting the motion for certification. The Court provides the following information pursuant to Supreme Court Practice Rule XVIII:

1. Question of Law to be Answered

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*, 533 U.S. —, 128 S.Ct. 1520 (2008), or under Ohio law?

2. Names of Parties and Counsel

Petitioner: Michael Dean Scott

Counsel for Petitioner: David L. Doughten
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125
(216) 361-1112

Jeffrey J. Helmick
1119 Adams Street
Second Floor
Toledo, Ohio 43604
(419) 243-3800

Respondent: Mark Houk, Warden

Counsel for Respondent: Laurence R. Snyder
Assistant Attorney General
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113
(216) 787-3030

3. Designation of Moving Party: Michael Dean Scott is designated as the moving party.

4. Directions to the Clerk: In accordance with Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Northern District of Ohio is hereby directed to serve copies of this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

September 1, 2009
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing **Order of Certification** was served by regular mail upon all counsel, on this 1st day of September, 2009 as follows:

Counsel for Petitioner:

David L. Doughten
4403 St. Clair Avenue
Cleveland, Ohio 44103-1125

Jeffrey J. Helmick
1119 Adams Street
Second Floor
Toledo, Ohio 43604

Counsel for Respondent:

Laurence R. Snyder
Assistant Attorney General
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113

s/Christin M. Kestner
Courtroom Clerk to the
Honorable John R. Adams
(330) 252-6070

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: Geni M. Smith, Clerk
U.S. District Court
Northern District of Ohio
By: [Signature]
Deputy Clerk

(A) Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

(B) A plaintiff who is not an insured under a particular policy of liability insurance may not commence against the insurer that issued the policy an action or proceeding under this chapter that seeks a declaratory judgment or decree as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property that a particular insured under the policy allegedly tortiously caused the plaintiff to sustain or caused another person for whom the plaintiff is a legal representative to sustain, until a court of record enters in a distinct civil action for damages between the plaintiff and that insured as a tortfeasor a final judgment awarding the plaintiff damages for the injury, death, or loss to person or property involved.

(C) In an action or proceeding for declaratory relief that a judgment creditor commences in accordance with divisions (A) and (B) of this section against an insurer that issued a particular policy of liability insurance, the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy in an action or proceeding under this chapter between the holder and the insurer.

If, prior to the judgment creditor's commencement of the action or proceeding for declaratory relief, the holder of the policy commences a similar action or proceeding against the insurer for a determination as to whether the policy's coverage provisions extend to the injury, death, or loss to person or property underlying the judgment creditor's judgment, and if the court involved in that action or proceeding enters a final judgment with respect to the policy's coverage or noncoverage of that injury, death, or loss, that final judgment shall be deemed to also have binding legal effect upon the judgment creditor for purposes of the judgment creditor's action or proceeding for declaratory relief against the insurer. This division shall apply notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

R.C. § 2721.10

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.

R.C. § 2721.13

The provisions of this chapter are remedial and shall be liberally construed and administered.

R.C. § 2725.01

Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the

offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in the warden's absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

(D) No change in the law made by the amendment to this section that took effect on October 1, 1993, or by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who 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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of

the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those

appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

(a) 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 violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim 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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Constitution

§ 1.08 Writ of habeas corpus (1851)

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

Ohio Constitution

§ 1.16 Redress in courts (1851, amended 1912)

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)