

No. 17-6449

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

RAYMOND TIBBETTS,

Petitioner,

v.

**CHARLOTTE JENKINS, WARDEN, CHILLICOTHE CORRECTIONAL
INSTITUTION**

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI

CAPITAL CASE: EXECUTION DATE FEBRUARY 13, 2018

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PETITIONER'S REPLY

The Warden's arguments in opposition to certiorari lack merit. Tibbetts's lethal injection claims are cognizable under 28 U.S.C. § 2254, and his habeas corpus petition is not "second or successive" under 28 U.S.C. § 2244(b). This Court should grant certiorari and reverse the determination of the Sixth Circuit to the contrary.

I. Tibbetts's claims are appropriately raised in a habeas corpus proceeding rather than in a civil rights proceeding under 42 U.S.C. § 1983.

The Warden argues that a method of execution claim must be raised under 42 U.S.C. § 1983 in all cases, even if no alternative method of execution is available at the present time. (Brief in Opposition at 9-12.) The Warden alleges that because Tibbetts is seeking only a *temporary* form of relief—because Ohio would simply have to adjust its execution protocol to remedy the constitutional problems in it, and then be free to use the new protocol on Tibbetts—his claims cannot sound in habeas, which the Warden claims requires *permanent* relief. (*See id.*)

The Warden's position is wrong on multiple fronts. First, this Court has not ruled that, if relief can be revisited upon changed relevant facts, habeas jurisdiction does not lie. In fact, this Court has said just the opposite: there is no dispute that an inmate who alleges that he is incompetent to be executed can raise his claim under § 2254, *Panetti v. Quarterman*, 551 U.S. 930 (2007), and if a petitioner obtains relief under *Panetti*, the federal courts can retain jurisdiction over the case, and may revisit the earlier decision if the petitioner's competence is subsequently restored, *see Billot v. Epps*, No. 1:86CV659TSL, 2010 WL 1490298, at *2 (S.D. Miss. Apr. 13, 2010). The "temporary" nature of such relief is nevertheless consistent with the cognizability of such claims in habeas proceedings.

Tibbetts's case presents analogous circumstances. If he obtains relief under § 2254 and Ohio subsequently adopts a completely different method of execution, the State can seek relief

from judgment, *see Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (citing *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987)), although Tibbetts makes no concession that relief from judgment would be warranted in such circumstances. That possibility does not alter the appropriateness of the habeas forum for his claims.

Further, the flawed reasoning in the Sixth Circuit’s subsequent decision in *In Re Campbell* does not support the Warden’s argument. The Sixth Circuit concluded that no challenge to the State’s lethal injection methods could be cognizable in habeas because “the Ohio legislature could, tomorrow, enact a statute reinstating the firing squad as an alternative method of execution.” *In Re Campbell*, 874 F.3d 454, 465 (6th Cir. 2017). But such a possibility is hardly sufficient to destroy habeas jurisdiction. A similar possibility also exists that a State could abolish the death penalty entirely, yet that potential future development does not make all inmates’ present habeas challenges to their death sentences invalid.

Finally, the Warden’s suggestion that habeas and § 1983 claims are mutually exclusive ignores precedent demonstrating the opposite. Until recently, the government routinely argued that *habeas corpus* proceedings were the exclusive forum for raising lethal injection claims. *See, e.g., Nelson v. Campbell*, 541 U.S. 637, 642-43 (2004). In rejecting that position, this Court explained that only claims that fall “within the ‘core’ of habeas corpus”—that is, claims that “challeng[e] the fact of [an inmate’s] conviction or the duration of his sentence”—are “not cognizable when brought pursuant to § 1983” and instead sound only in habeas. *Id.* at 643 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). As this Court has explained, “[a] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the ‘fact’ or ‘validity’ of the sentence itself” if, “by simply altering its method of execution, the State can go forward with the sentence.” *Id.* at 644. But, under circumstances

where a State’s “legislature has established lethal injection as the preferred method of execution . . . a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself.” *Id.* at 644. Thus, where, “as a legal matter,” an inmate challenges “statutorily mandated part[s] of the lethal injection protocol, or if as a factual matter” he is “unable or unwilling to concede acceptable alternatives” to his lethal-injection challenges, the case would be strengthened for exclusive habeas jurisdiction because then, “success on the merits, coupled with injunctive relief, would call into question the death sentence itself.” *Id.* at 645.

In other words, habeas corpus *is* a proper forum when the inmate’s suit seeks to invalidate the sentence itself. *See Hill v. McDonough*, 547 U.S. 573, 583 (2006). As Tibbetts has explained in his petition, his claims are cognizable in habeas corpus proceedings because they qualify as an attack on his death sentence. Further, they are not second or successive because they are based on factual predicates that did not exist when his first petition was being litigated. (See Petition at 17-20.) This Court should accordingly reject the Warden’s arguments to the contrary.

II. The restrictions on habeas review for state prisoners set out in 28 U.S.C. § 2254 have no applicability because there is no available corrective process in state court, and Tibbetts’s claims were not considered on the merits in state court.

The Warden argues that Tibbetts should have exhausted his lethal injection claims in state court. (Brief in Opposition at 15-16.) This argument lacks merit because there is no corrective process in state court. *Scott v. Houk*, 939 N.E.2d 835, 836, ¶4 (Ohio 2010). In *Scott*, the petitioner raised lethal injection claims in his federal habeas corpus proceedings; the district court certified a question of state law to the Ohio Supreme Court to determine if any corrective process for the claims existed in the Ohio state courts. *Id.* at ¶1. The Ohio Supreme Court

answered the question in the negative: “There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, or under Ohio law.” *Id.* at ¶4. Because the state courts refuse to provide a corrective process, the exhaustion requirement is inapplicable, and the federal courts can consider the claims *de novo*. See 28 U.S.C. § 2254(b)(1)(B)(i); see also *Boykin v. Webb*, 541 F.3d 638, 647-48 (6th Cir. 2008).¹ Further, the Ohio Supreme Court cited the availability of federal habeas corpus review as one of the reasons why it was unnecessary to provide a corrective process in state court. See *Scott*, 939 N.E.2d at 836, ¶4.

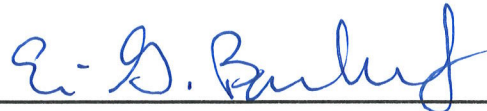
The Warden also repeatedly invokes the deferential standards set out in § 2254(d). (Brief in Opposition at 13-14, 17-18.) “The language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was ‘adjudicated *on the merits* in State court.’” *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) (emphasis in original). Tibbetts’s lethal injection claims have not been considered “on the merits” in state court, and as a result § 2254(d) does not apply. See *id.* The Warden’s reliance on this statutory provision is therefore misplaced.

CONCLUSION

The Warden’s arguments lack merit, and this Court should grant certiorari.

¹ As the Warden notes, the Ohio Supreme Court subsequently suggested in *State v. Belton*, 74 N.E.3d 319, 338-39, ¶70-77 (Ohio 2016), that some type of review for lethal injection claims does exist in Ohio state court, although it is not entirely clear from the opinion exactly what type of review would be available to Tibbetts for the specific claims he has raised. This Court should alternatively grant certiorari and certify the issue to the Ohio Supreme Court for clarification. *C.f. Fiore v. White*, 528 U.S. 23, 25, 29-30 (1999).

Respectfully submitted,



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November 30, 2017

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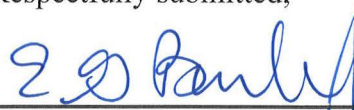
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CERTIFICATE OF SERVICE

I certify that on this 30th day of November, 2017, in accordance with Sup. Ct. R. 29, copies of Petitioner's Reply In Support Of Petition For Certiorari were served by third party commercial carrier for delivery within three days upon Eric E. Murphy, State Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

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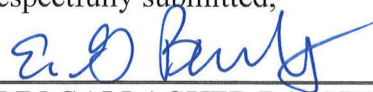
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DECLARATION VERIFYING TIMELY FILING

Petitioner, Raymond Tibbetts, through undersigned counsel and pursuant to Sup. Ct. R. 29.2 and 28 U.S.C. § 1746, declares that the Petitioner's Reply In Support Of Petition For Certiorari filed in the above-styled matter was sent in an envelope via third party commercial carrier for delivery within three days, addressed to the Clerk of the Supreme Court of the United States, on the 30th day of November, 2017, which is timely pursuant to the rules of this Court.

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