No. 17-6688 / 17-A505

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

ALVA CAMPBELL,
Petitioner,

v.

CHARLOTTE JENKINS, WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION
Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE: EXECUTION DATE NOVEMBER 15, 2017

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The State of Ohio intends to execute Alva Campbell on November 15, 2017, notwithstanding the medical assessments of its own professionals, which indicate that Campbell has an allergy to the very drugs Ohio proposes to use, and that Campbell's veins are unsuitable for IV access. This latter concern is especially troubling in light of Ohio's "long, problematic history with IV catheters in lethal-injection procedures," *State v. Broom*, 51 N.E.3d 620, 635 (Ohio 2016) (French, J., dissenting).

Despite these grave concerns, Campbell has been frustrated in his every attempt to invoke the protection of the federal courts. First, because these and other serious medical issues would render his death sentence effectively invalid, since Ohio authorizes no other means of execution besides lethal injection, Campbell had sought to raise his claim in habeas corpus. Since 2011, the Sixth Circuit had instructed Campbell that he could bring such claims, *see Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011), following this Court's invitation in *Nelson v. Campbell*, that "method-of-execution challenges [ ] fall at the margins of habeas," 541 U.S. 637, 646 (2004). This Sixth Circuit reaffirmed this understanding as recently as mid-2016. *See Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016). Yet on October 25, 2017, a panel of the Sixth Circuit, in the *per curiam* opinion under review here, gratuitously reexamined this previously settled question and concluded that Campbell's challenge was *not* cognizable in habeas, and could properly be

raised only in a challenge under 42 U.S.C. § 1983. *In re Campbell*, No. 17-3855, __ F.3d __, 2017 WL 4800122, at *4 (6th Cir. Oct. 25, 2017).

The very next day, accordingly, Campbell sought to amend and supplement his pending complaint under § 1983, to expand upon the allegations he had earlier made related to issues of vein access, and to the adverse, paradoxical reaction to Ohio's execution drugs that he is likely to suffer. He sought specifically to supplement his complaint to include details of the vein-access concerns that had been disclosed to him by the Department of Rehabilitation and Correction only on October 24, two days prior.

He was again rebuffed. *See* Decision & Order, *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, R. 1356, PageID 50501 (S.D. Ohio Nov. 7, 2017) (hereinafter "Amend. Denial"). The district court concluded that Campbell was too late in raising these concerns, despite his earlier pleading of claims embracing precisely these issues; and that his attempted amendment would be futile, since he had pleaded an alternative—firing squad—that is not presently permitted under Ohio law. Amend. Denial at PageID 50499–500.

Campbell has been left without a forum to consider the evidence he has offered to show that Ohio's implementation of the death penalty is, as to him, unconstitutional. In light of the significant constitutional question posed to the federal courts, and in the interests of justice, certiorari is warranted, and stay of execution is appropriate.

ARGUMENT

Several factors weigh in favor of granting certiorari in this case, and militate in favor of a stay of execution. Campbell concurs with Respondents that this Court is presented with a simple question: "May a condemned prisoner challenge his capital sentence under 28 U.S.C. § 2254 by attacking the method by which it will be carried out?" Br. in Opp. at i. But Campbell proposes an addition: May a condemned prisoner mount such a challenge when success would render his own, individual death sentence invalid? Further, the Court should consider that, absent relief, no avenues exist for hearing Campbell's challenge to the validity of his death sentence. This Court should act to forestall Ohio's rush to put to death this ailing man, the constitutional execution of whom has been called into doubt by only recently-disclosed evaluations from the State's own medical personnel. Campbell's ominous yet seemingly ignored medical problems, combined with his substantial legal challenges presenting serious unresolved constitutional questions, and his frustrated efforts to obtain relief, should give this Court pause.

As explained in his Petition for certiorari, Campbell's second-in-time habeas petition, alleging that Ohio is incapable of constitutionally executing Campbell through the use of lethal injection, was rejected by the Sixth Circuit, on the basis that Campbell's method-of-execution challenge is not cognizable in habeas. *In re Campbell*, No. 17-3855, ___ F.3d ___, 2017 WL 4800122 (6th Cir. Oct. 25, 2017). This Court has recognized that a habeas corpus petition is not second or successive under 28 U.S.C. § 2244(b) if it raises claims that were not ripe when the first

petition was being litigated. *See Panetti v. Quarterman*, 551 U.S. 930, 944–45 (2007). Indeed, the panel majority in Campbell's case agreed that Campbell's claims were newly ripe. *Campbell*, ___ F.3d ___, 2017 WL 4800122, at *6–7. The court nevertheless dismissed Campbell's case by reaching the unnecessary conclusion that, under *Glossip v. Gross*, 135 S. Ct. 2726 (2015), his claims simply are not cognizable in habeas corpus and can instead only be raised in a civil rights proceeding under 42 U.S.C. § 1983, reversing its long-standing holdings to the contrary. *Campbell*, ___ F.3d ___, 2017 WL 4800122, at *4–5, 8.

As Judge Moore described in dissent, however, Campbell has detailed an "extraordinary list of ailments," *id.* at *9 (Moore, J., dissenting), and there is no dispute that lethal injection is the *only* method of execution that is prescribed under Ohio law. Under these circumstances, Campbell has made a *prima facie* showing that Ohio simply cannot execute him because the only available method would violate the Eighth Amendment. As Judge Moore explained:

> There are situations in which killing a person whose mental biology has deteriorated would be an exercise in mindless vengeance, and there are situations in which killing a person whose physical biology has deteriorated would be an exercise in mindless vengeance. Whether the biological facts asserted here are *ultimately* adequate to justify relief is, of course, for the district court to decide in the first instance—perhaps they are not. But because Campbell has directed us to sufficiently specific and recent biological facts that make his petition newly ripe and that could potentially make his personal death sentence unconstitutional, I would remand for further proceedings to assess whether Campbell's assertions in fact rise to that level. I therefore respectfully dissent.

Id. at *10 (Moore, J. dissenting) (emphasis in original).

At the same time, Campbell's attempts to have his claim heard by other means have also been thwarted. As explained above, the day after the Sixth Circuit's novel conclusion that Campbell cannot bring his claim in habeas, Campbell sought to amend his complaint in his § 1983 litigation to present the full extent of his medical deterioration, to expand upon the pending medical claims that were still under consideration by the court in that case. He sought leave particularly to supplement his complaint to present evidence detailing the newly-revealed medical assessments by medical professionals employed by the Ohio Department of Rehabilitation and Correction. These assessments expressed solemn concerns over Campbell's possible allergy to midazolam, the first drug in Ohio's execution protocol. Furthermore, Campbell's medical records document extreme difficulties in obtaining vein access. The recent assessments show no suitable IV insertion sites in either arm or leg, with possible sites located in only one leg after extensive searching, the aid of ultra-violet light, and the application of tourniquets.

In moving to amend and supplement his § 1983 complaint, Campbell specifically sought to take up the Sixth Circuit's directive, where it instructed that challenges to Ohio's method of execution cannot be brought in habeas, but must instead proceed under § 1983. The Sixth Circuit worried that even a successful assault on Ohio's only currently-prescribed method of execution could be vitiated by a simple amendment to Ohio's statutes: "The fact that Ohio currently permits execution only by lethal injection does not change that fact. The Ohio legislature

could, tomorrow, enact a statute reinstating the firing squad as an alternative method of execution." *In re Campbell*, __ F.3d __, 2017 WL 4800122, at *6.

To be sure, in an action under § 1983, Campbell must plead and prove a reasonably available alternative method of execution. *See Glossip*, 135 S. Ct. at 2739. Under Ohio's current execution statute, only lethal injection is provided for as a method of execution. Ohio Rev. Code § 2949.22. Given the unsuitability of any injection-based method of execution as to Campbell specifically because of his problems with vein access, Campbell explained to the district court in his § 1983 case that he must necessarily offer a non-IV alternative method of execution. He did so, alleging firing squad in his proposed amendment and supplement.

The district court rejected as futile Campbell's request to add such an "unlawful" alternative. Campbell sought leave for interlocutory appeal under 28 U.S.C. § 1292(b), but the court also denied this entreaty. The court announced that, because of the imminence of Campbell's execution, "[c]ertifying an interlocutory appeal on this question would [ ] commandeer appellate time," and, "[u]nless the Court of Appeals stayed the execution *pendente lite*, Mr. Campbell's execution would render the appeal moot." Decision & Order, *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, R. 1366, PageID 51690–91 (S.D. Ohio Nov. 7, 2017).

Campbell now asks this Court for the time needed, and for the chance for some court to address the discord created by the district court's rejection of Campbell's firing-squad alternative and the Sixth Circuit's holding in *In re Campbell* recognizing that any method of execution that the Ohio legislature could

enact is effectively "available." Absent resolution of this conflict, owing to his particular, acute medical issues, Campbell will be denied any forum to litigate his method-of-execution claim.

Critically, Campbell's claim does not ask this Court to invalidate Ohio's entire death penalty scheme. *Cf.* Br. in Opp. at 23–24. Rather, as Judge Moore noted in her dissent from the Sixth Circuit's denial of Campbell's application for stay of execution, Campbell, "by contrast, is challenging only the validity of his death sentence, which would have no effect whatsoever on the overall operation of the death penalty in Ohio or elsewhere. That individualized challenge to particulars affecting Campbell's punishment, as I see it, is distinguishable from *Glossip* and cannot logically be barred from habeas." *In re Campbell*, No. 17-3855, Slip Op. at 9 (6th Cir. Nov. 9, 2017) (Moore, J., dissenting) (internal citations and quotation marks omitted).

Indeed, this Court's decision in *Glossip* did not consider the situation where the inmate's cause of action alleges that there is *no* reasonably available alternative. *See* 135 S. Ct. at 2738 (noting that the inmates argued for a single-drug barbiturate execution in their § 1983 complaint); *see also id. at* 2795 (Sotomayor, J., dissenting).[1] In such circumstances, habeas proceedings are

[1] As Justice Sotomayor explained, "[U]nder the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: because petitioners failed to prove the availability of sodium thiopental or pentobarbital, the State could execute them using whatever means it designated . . . The Eighth Amendment cannot possibly countenance such a result."

appropriate, because the inmate is essentially alleging that the impending execution will be unconstitutional, and that there is no way of providing a remedy short of vacating his death sentence. Because "a grant of relief to the inmate would necessarily bar the execution," *Hill v. McDonough*, 547 U.S. 573, 583 (2006), habeas corpus is the proper forum for litigating the inmate's claims.

This result harmonizes with this Court's logic in *Panetti* and *Ford v. Wainwright*, 477 U.S. 399 (1986). As Judge Moore further explained,

> [a]fter all, a *Ford–Panetti* claim is also a challenge to the particulars of one's death sentence: it asserts that the defendant may not constitutionally be executed in any way, requires no theoretical alternative method, is plainly available in habeas, and in no way undermines the operation of the death penalty as an institution. *Glossip*, meanwhile, did nothing to undermine *Ford*. *See, e.g.*, *Dunn v. Madison*, No. 17-193, 2017 WL 5076050, at *1–3 (2017) (*per curiam*) (reversing federal court of appeals's grant of habeas petition on a *Ford–Panetti* claim but taking as a given the underlying doctrine). It is thus one thing, as in *Glossip*, to challenge the state's entire system of execution without presenting an alternative, and quite another to challenge its applicability to you alone. And Campbell's claim, as discussed in my dissent to this court's October 25 order, is fairly analogized to a *Ford–Panetti* claim.

In re Campbell, No. 17-3855, Slip Op. at 9–10 (6th Cir. Nov. 9, 2017) (Moore, J., dissenting) (some internal citations omitted).

This is precisely the type of situation Justice Sotomayor warned of in her dissent in *Glossip*. *See* 135 S. Ct. at 2795 (Sotomayor, J., dissenting). If Campbell's claims cannot be raised in habeas corpus proceedings, the State will be free to execute him irrespective of whether or not the use of lethal injection will cause

severe pain in violation of the Constitution. "The Eighth Amendment cannot possibly countenance such a result." *Id.*

The State of Ohio's rush to execute Campbell while these legal challenges remain pending and unresolved is particularly troubling in light of the multitude of medical issues from which Campbell suffers. As explained in his Petition, Campbell suffers from lung cancer, COPD, respiratory failure, prostate cancer, hip replacement, and severe pneumonia. Campbell must take oxygen treatments four times a day in order to function, and he relies on a walker for very limited mobility. These conditions only further heighten, for Campbell specifically, the risk that Ohio's Execution Protocol "is sure or very likely to cause serious pain and needless suffering," in comparison with an "available" and "feasible" alternative method of execution that can be "readily implemented." *In re Ohio Execution Protocol*, 860 F.3d 881, 886, 890 (6th Cir. 2017) (*en banc*), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238.

Campbell's attempt to raise his newly revealed medical concerns has been impeded by every court to which he has applied. The Sixth Circuit ruled he cannot challenge Ohio's method of execution in habeas. In his § 1983 litigation, he has been denied leave to amend and supplement his complaint to address these newly arising concerns, because he is medically unable to offer an alternative method of execution that is presently prescribed under Ohio law. This Court should enter a stay to prevent the unconstitutional execution of an inmate who has been unjustly

denied the ability to litigate his concerns in any forum. And this Court should resolve the conflict created by the lower court's incompatible rulings.

CONCLUSION

This Court should grant Campbell's Petition for Certiorari, and Application for stay of execution.

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CERTIFICATE OF SERVICE

I certify that on this 13th day of November, 2017, in accordance with Sup. Ct. R. 29, copies of the Reply in Support of Petition for Certiorari and Application for Stay of Execution were filed electronically and were served by third party commercial carrier for delivery within three days upon the following individuals:

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