Tibbetts v. Warden Chillicothe Correctional Institution Doc. 38

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

RAYMOND TIBBETTS,

Petitioner, : Case No. 1:14-cv-602

- vs - District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe
Correctional Institution,
:
Respondent.

DECISION AND ORDER

This capital habeas corpus case is before the Court on Petitioner's Renewed Motion for Leave to File an Amended Petition (ECF No. 33). The Motion is ripe on the Warden's Response in Opposition, (ECF No. 36) and Petitioner's Reply in support (ECF No. 37).

The Court granted permission to move to amend on two conditions:

> In any renewed motion, Tibbetts must show clearly how any proposed new claims differ from claims made or proposed to be made in the *In re Ohio Execution Protocol Litig.* case and relate them to Ohio's lethal injection protocol as amended June 29, 2015.
>
> . . .
>
> For the reasons given in *Landrum, supra*., in any renewed motion to amend, Tibbetts must restate his position on why this case is not a second or successive application under 28 U.S.C. § 2244(b).

(Order, ECF No. 31, PageID 539.)

The first of these conditions requires Petitioner to address the cognizability of any proposed claims in habeas in light of *Glossip v. Gross,* 576 U.S. ___, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015). The second requires him to justify proceeding on this second-in-time habeas

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petition without prior approval of the Sixth Circuit under 28 U.S.C. § 2244(b).

The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.
>
> -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. In considering whether to grant motions to amend under Rule 15, a court should consider whether the amendment would be futile, i.e., if it could withstand a motion to dismiss under Rule 12(b)(6). *Hoover v. Langston Equip. Assocs.,* 958 F.2d 742, 745 (6th Cir. 1992); *Martin v. Associated Truck Lines, Inc.,* 801 F.2d 246, 248 (6th Cir. 1986); *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984); *Communications Systems, Inc., v. City of Danville*, 880 F.2d 887 (6th Cir. 1989). *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983); *Neighborhood Development Corp. v. Advisory Council*, 632 F.2d 21, 23 (6th Cir. 1980). Denial of a motion for leave to amend the complaint generally is reviewed for abuse of discretion, but denial on the basis of futility is reviewed de novo. *Evans v. Pearson Enters., Inc.,* 434 F.3d 839, 853 (6th Cir. 2006).

Cognizability

Petitioner proposes to file an amended petition pleading the following four grounds for

relief:

> **FIRST GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Tibbetts because the only means available for execution violate the Eighth Amendment.
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> **SECOND GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Tibbetts because the only means available for execution violate the Due Process Clause of the Fourteenth Amendment.
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> **THIRD GROUND FOR RELIEF:** The State of Ohio cannot constitutionally execute Tibbetts because the only means available for execution violate the Equal Protection Clause of the Fourteenth Amendment.
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> **FOURTH GROUND FOR RELIEF**: The State of Ohio cannot constitutionally execute Tibbetts because the only means available for execution depend on state execution laws that are preempted by federal law.

(Proposed Amended Grounds for Relief, ECF No. 33-1.)

Petitioner spends only two pages attempting to distinguish his proposed new claims in this case from the claims he has made in the parallel § 1983 case, *In Re: Ohio Execution Protocol Litigation,* Case No. 2:11-cv-1016 (Motion, ECF No. 33, PageID 547-49; Reply, ECF No. 37, PageID 669-70). He does not quote those claims, but merely asserts in conclusory fashion that they are different because they "assume that Ohio may actually be capable of executing him through the use of lethal injection without committing a constitutional violation. In contrast, Tibbetts's habeas claims flatly reject that possibility." *Id.* at PageID 547. In other words, Petitioner's counsel make no effort to compare the underlying constitutional theories for his claims in this case and in the § 1983 action, but merely asserts they are different because the remedy sought is different, presumably permanent injunctive relief against any execution by any form of lethal injection versus an unconditional writ of habeas corpus declaring that any execution by any form of lethal injection is invalid.

Petitioner concedes the United States Supreme Court has never held that execution by lethal injection is per se unconstitutional. *Id.* at PageID 548, citing *Glossip* and *Baze v. Reese,* 553 U.S. 35 (2008). Instead of making that claim, Tibbetts claims his own death sentence is invalid. *Id.* He also concedes that if he made that claim in the § 1983 case, "his complaint would be recharacterized as a habeas corpus petition . . . ." *Id.* at PageID 548-49, citing *Hill v. McDonough*, 547 U.S. 573, 579-80 (2006). His error comes in the very next sentence: "It necessarily follows that Tibbetts's claims are properly raised in a habeas corpus proceeding. *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011)." *Id.* at PageID 549. Logically, the fact that a claim is not cognizable in a § 1983 action does not imply that it must be cognizable in habeas.

While this Court in the past has read *Adams* broadly enough to allow claims attacking the method of execution to proceed in habeas corpus, *Glossip* makes that broad reading of *Adams* untenable. *Glossip* was a § 1983 action seeking to enjoin the use of midazolam as the first drug to be administered in a three-drug lethal injection protocol in Oklahoma. Oklahoma had previously used the three-drug protocol found constitutional by a plurality of the Supreme Court in *Baze*, but sodium thiopental, one of the three drugs, had become unavailable. The Supreme Court affirmed the lower courts' denial of preliminary injunctive relief and made this interpretation of *Hill*:

> In *Hill*, the issue was whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983. *Id.*, at 576, 126 S. Ct. 2096, 165 L. Ed. 2d 44. We held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence. *Id.*, at 579-580, 126 S. Ct. 2096, 165 L. Ed. 2d 44.

135 S. Ct. at 2738.

The Warden reads *Glossip* broadly to mean that any method of execution claim must be brought in a § 1983 action (Memo in Opp., ECF No. 36, PageID 658-59). The Magistrate Judge disagrees with the breadth of that reading. Suppose, for example, that a State, frustrated by its inability to obtain lethal injection drugs, adopted burning at the stake as a method of execution for all death-sentenced inmates. A very plausible case could be made that such a method of execution is a per se violation of the Cruel and Unusual Punishments Clause, based on historical evidence of the intent of the Framers that would be acceptable even to Justice Scalia.[1] The Magistrate Judge believes that case would be cognizable in habeas corpus under both *Glossip* and *Adams*. In fact, the *Glossip* majority appeared to be of the same mind. See *Glossip*, 135 S. Ct. at 2746, and *Henderson v. Collins,* 2015 U.S. Dist. LEXIS 134120 (S.D. Ohio Sept. 30, 2015)(Frost, J.). The burning-at-the-stake Eighth Amendment claim would also be cognizable in § 1983, provided the plaintiff-petitioner pled an alternative less painful method of execution, e.g., the three-drug protocol from *Baze*.

But that hypothetical case is not this case. In the first place, Tibbetts is attempting to proceed simultaneously in § 1983 and in habeas. *Adams* does not discuss that situation. Interpreting *Adams* to permit that mode of proceeding produces a situation where a death-row inmate must plead in the § 1983 action that there is a constitutional alternative and in the habeas action that there is not while seeking essentially the same relief in both cases, a permanent injunction in § 1983 and an unconditional writ in habeas. Supposing either alternative could provide complete relief, Petitioner provides no argument about why he should not be required to elect one of the two remedies.

[1] As an alternative hypothetical Petitioner suggests execution by injection of potassium chloride alone would be unconstitutional (Reply, ECF No. 37, PageID 666). Given descriptions of the likely effect of potassium chloride, this would present at least a colorable Eighth Amendment habeas claim. However, it would not have the historical pedigree of burning at the stake.

In the second place, aside from whether Tibbetts can proceed simultaneously in § 1983 and habeas, the Motion *sub judice* would require the Court to decide whether Petitioner's proposed claims are in fact cognizable in habeas at all, in light of *Glossip*. That is, regardless of the label Petitioner puts on them or his conclusory claim that, if successful, they would invalidate his death sentence, are they in substance method-of-execution claims that can only be brought in habeas? The Court declines to undertake that analysis at this point in time because this case is clearly a second-or-successive habeas corpus application within the meaning of 28 U.S.C. § 2244(b).

Second or Successive

28 U.S.C. § 2244(b) provides in pertinent part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)
> >
> > > (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> > >
> > > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

> convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.
>
> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The section was adopted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"). Its effect was to transfer from the district court to the court of appeals the screening process previously performed by the district court under Rule 9(b) of the Rules Governing § 2254 Cases. *Felker v. Turpin,* 518 U.S. 651, 664 (1996). The statute codified some of the pre-existing limits on successive petitions and further restricted the relief available to habeas petitioners. The new restrictions constitute a modified *res judicata* rule, and restraint known as "an abuse of the writ." *Id*. Traditionally, *res judicata* has not been available as a defense in habeas corpus. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 1072 (1963), citing *Frank v. Mangum*, 237 U.S. 309, 334 (1915); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924); *Waley v. Johnston*, 316 U.S. 101 (1942); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 263, n.4 (1954). See also, *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968).

Petitioner is under a sentence of death imposed by a Hamilton County, Ohio, judge after his conviction for aggravated murder in the death of James Hicks. He sought relief from that conviction and sentence in this Court in Case No. 1:03-cv-114, filed February 12, 2003, well after the adoption of the AEDPA. As his Fourteenth Ground for Relief, he asserted his execution by lethal injection would be unconstitutional. The Magistrate Judge concluded the claim was preserved for merits review but rejected it, concluding “Tibbetts does not provide this court with

any citation to case law in which lethal injection was found to be cruel and unusual punishment. No court has found this method of execution to be constitutionally impermissible." (Report, ECF No. 44, PageID 428). Tibbetts lodged no objection to this conclusion and the District Judge adopted it (ECF No. 51). Tibbetts sought a certificate of appealability on other claims, but not on this one (ECF No. 55). The Sixth Circuit affirmed this Court's denial of habeas corpus relief. *Tibbetts v. Bradshaw*, 633 F.3d 436 (6th Cir. 2011), *cert den. sub nom. Tibbetts v. Bobby,* 132 S. Ct. 238 (2011). Tibbetts remains subject to the same conviction and sentence upheld in the prior case.

As noted above, in granting permission to file a new motion to amend, the Magistrate Judge required Petitioner to address the second-or-successive question in light of the decision in *Landrum v. Anderson*, No. 2:12-cv-859, 2015 U.S. Dist. LEXIS 116914 (S.D. Ohio Sept. 2, 2015). In doing so, Petitioner asserts

> [his] amended petition is not second or successive because the amended protocol [Ohio's June 29, 2015, lethal injection protocol. ECF No. 33-2, PageID 622-40] represents a new factual predicate that provides additional support for Tibbetts's claims, and the amended protocol did not exist at the time Tibbetts filed his initial petition. The fact that lethal injection was Ohio's exclusive method of execution at the time Tibbetts filed his initial petition does not mean that Tibbetts would have had a full and fair opportunity to litigate his claims during the course of the original proceeding.

(Motion, ECF No. 33, PageID 549-50, citing *Panetti v. Quarterman*, 551 U.S. 930, 943-46 (2007)). The new factual predicate on which Tibbetts relies is that the "amended protocol [of June 29, 2015] did not exist at the time Tibbetts filed his initial petition." *Id.* at PageID 549.

In opposing dismissal when the second-or-successive objection was first raised by the Warden, Tibbetts relied on *Sheppard v. Warden*, 2013 U.S. Dist. LEXIS 5560 (S.D. Ohio Jan.

14, 2013)(Frost, D.J.); *Raglin v. Mitchell,* No. 1:00-cv-767, 2013 U.S. Dist. LEXIS 141199, at 94 (S.D. Ohio Sep. 29, 2013)(Barrett, J.); *Smith v. Pineda,* No. 1:12-cv-196, 2012 U.S. Dist. LEXIS 121019, at 13-14 (S.D. Ohio Aug. 27, 2012)(Merz, M.J.), supplemented by 2012 U.S. Dist. LEXIS 154037, at 2-4 (S.D. Ohio Oct. 26, 2012), then adopted by 2012 U.S. Dist. LEXIS 171759, at 2 (S.D. Ohio Dec. 4, 2012) (Rose, J.); *Chinn v. Bradshaw*, No. 3:02-cv-512, 2012U.S. Dist. LEXIS 93083, at 8-9 (S.D. Ohio July 5, 2012) (Sargus, J.)" (ECF No. 8, PageID 110). On the basis of stare decisis and in "the absence of supervening authority," the Magistrate Judge concluded in December 2014 that this case was not a second-or-successive application. *Glossip*, however, provides that supervening authority. It deepens the distinction between method of execution claims which must be brought in a § 1983 action and those which can be brought in habeas, upending[2] or at least undermining this Court's broad reading of *Adams*.

As the Supreme Court noted in *Cullen v. Pinholster,* 563 U.S. 170 (2011), habeas corpus as configured by the AEDPA in 28 U.S.C. § 2254(d)(1) is a "backward-looking" remedy. "Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." *Id.* at 181-82.

Petitioner's proposed new claims do not look back to the judgment entered against him by the Ohio courts, but look forward to challenge an execution on the basis of a new lethal injection protocol. That challenge can readily be made by Tibbetts in the § 1983 action and is properly read as a method-of-execution claim required to be made in § 1983 by *Glossip*.

Not every second-in-time habeas petition counts as second-or-successive under § 2244(b). As the Sixth Circuit has explained,

[2] See *Henderson v. Collins*, 2015 U.S. Dist. LEXIS 134120, *9 (S.D. Ohio Sept. 30, 2015)(Frost, D.J.).

> The Supreme Court has made clear that not every numerically second petition is "second or successive" for purposes of AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 487, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (a petition filed after a mixed petition has been dismissed before the district court has adjudicated any claim is not a second or successive petition); *Martinez-Villareal v. Stewart*, 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998) (a numerically second petition alleging a claim that was contained in a first petition, but dismissed as unripe, is not second or successive); see also *Carlson v. Pitcher*, 137 F.3d 416, 419 (6th Cir. 1998) (same).

In re Bowen, 436 F.3d 699, 704 (2006). More recently the court interpreted *Panetti* on which Petitioner relies:

> The statutory phrase "second or successive petition," the Court has emphasized, is a "term of art given substance" in the Court's prior habeas cases. *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). So in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849, the Court held that a capital prisoner's claim that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), was not barred even though a prior petition raising the same claim had been dismissed because the claim was unripe. *See* 523 U.S. at 644-45. And in *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), the Court removed any implication that *Martinez-Villareal* applied only to a claim raised in a prisoner's initial petition. There, the prisoner's numerically second petition asserted a *Ford* claim that had been omitted from his initial petition. The Court held that the claim was not successive, rejecting "[a]n empty formality requiring prisoners to file unripe *Ford* claims" in an initial habeas petition in order to be able to pursue them in a subsequent petition. *Id.* at 946. In doing so, the Court relied on pragmatic concerns, observing that "[i]nstructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources" or vindicate any other policy of federal habeas law. *Id.*

In re: Curtis Jones, 652 F.3d 603, 605 (6th Cir. 2010). Tibbetts' claim in his first petition that his death sentence was invalid because lethal injection is unconstitutional was dismissed on the merits, and not because it was unripe or unexhausted. Neither the Supreme Court nor the Sixth

Circuit has ever held that a habeas petitioner has a newly-arising claim when a State adopts a new lethal injection protocol, so the application of § 2244(b) is not certain. However, a district court cannot make a forward pass of that question to the circuit court, but must decide the question itself in the first instance. *In re: Sheppard*, 2012 U.S. App. LEXIS 13709 (6th Cir. May 25, 2012); *In re: Kenneth W. Smith*, 690 F.3d 809 (6th Cir. 2012). And once the District Court decides the petition is second or successive, it lacks subject matter jurisdiction to consider the case without approval of the circuit court. *Burton v. Stewart*, 549 U.S. 147 (2007). The Court concludes this case is a second or successive application for habeas corpus relief in light of the prior judgment in Case No. 1:03-cv-114.

Conclusion

Based on the foregoing analysis, this case is ordered TRANSFERRED by the Clerk to the United States Court of Appeals for the Sixth Circuit for a determination under 28 U.S.C. § 2244(b) whether it may proceed. Petitioner's motion to amend is DENIED without prejudice to its renewal after a decision by the Sixth Circuit on the § 2244(b) question.

December 21, 2015.

s/ *Michael R. Merz*
United States Magistrate Judge