NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

JOHN G. ROE,

Petitioner,

-vs-

ROBERT TAFT, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

EXECUTION SCHEDULED FOR FEBRUARY 3, 2004, AT 10:00 A.M.

DAVID H. BODIKER
Ohio Public Defender

GREGORY W. MEYERS (0014887)
Senior Assistant State Public Defender
and Member of the Bar of this Court
Counsel of Record

RUTH L. TKACZ (0061508)
Assistant State Public Defender
and Member of the Bar of this Court

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax: (614) 644-0708

COUNSEL FOR PETITIONER

CAPITAL CASE

QUESTIONS PRESENTED

I. WHEN AN INVALID GROUP OF APPELLATE JUDGES MANIPULATES EN BANC RULES TO TRUMP A VALID MAJORITY'S DECISIONS TO STAY AN EXECUTION AND TO HEAR AN APPEAL EN BANC, SHOULD THIS COURT CORRECT EN BANC ANTICS IN AN INFERIOR COURT; ENFORCE 28 U.S.C. § 46(c); AND NULLIFY THE VOTE OF A JUDGE WHO, ONCE RECUSED, REAPPEARS TO CAST A TIE-BREAKING VOTE THAT CORRUPTS THE INTEGRITY AND RELIABILITY OF A CAPITAL CASE?

II. WHETHER A COMPLAINT BROUGHT UNDER 42 U.S.C. § 1983 BY A DEATH-SENTENCED STATE PRISONER, WHO SOUGHT TO STAY HIS EXECUTION IN ORDER TO PURSUE A CHALLENGE TO THE PROCEDURES FOR CARRYING OUT HIS EXECUTION, IS PROPERLY RECHARACTERIZED AS A HABEAS CORPUS PETITION UNDER 28 U.S.C. § 2254?

III. WHERE A DEATH-SENTENCED INMATE HAS HIS CIVIL RIGHT COMPLAINT RECHARACTERIZED AND TRANSFERRED AS A SUCCESSOR HABEAS PETITION, 28 U.S.C. § 2244(b) DENIES THE INMATE A MEANINGFUL OPPORTUNITY FOR APPELLATE REVIEW OF BOTH THE DECISION TO CONVERT AND OF THE MERITS OF HIS 42 U.S.C. § 1983 COMPLAINT.

IV. IF A 42 U.S.C. § 1983 ACTION CHALLENGING EXECUTION PROCEDURES IS PROPERLY RECHARACTERIZED AS A HABEAS CORPUS PETITION, THEN DOES THE HOLDING OF STEWART V. MARTINEZ-VILLAREAL, 523 U.S. 637 (1998), PREVENT IT FROM BEING SUBJECTED TO THE RESTRICTIONS OF 28 U.S.C. § 2244(b) BECAUSE THE CAUSE OF ACTION IS NOT RIPE DURING EARLIER HABEAS PROCEEDINGS?

V. WHETHER THE EXECUTION OF A DEATH-SENTENCED INMATE BY MEANS OF LETHAL INJECTION IN WHICH THE INMATE IS RENDERED PARALYZED AND SUBJECT TO EXTREME PAIN AND SUFFERING CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE VIOLATES THE EIGHTH AMENDMENT.

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Petitioner John Glenn Roe is an Ohio capital inmate scheduled for execution on February 3, 2004, at 10:00 a.m. His constitutional rights to due process were violated when an invalid group of appellate judges manipulated en banc rules to trump a valid majority's decisions to stay his execution and hear his appeal en banc. This Court should accept certiorari to correct flagrantly unfair conduct in an inferior court; to require compliance with 28 U.S.C. § 46(c); and to nullify the vote of a judge who, once recused, reappeared to cast a tie-breaking vote that corrupted the integrity and reliability of a capital case.

Roe also seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, which dismissed his 42 U.S.C. § 1983 action by recharacterizing it as a habeas corpus petition, and then denying him the right to proceed, on the theory it constituted a successor habeas barred by 28 U.S.C. § 2244(b), even though he had neither filed nor sought permission to file a successor habeas.

OPINIONS BELOW

The four Opinions and Orders at issue below consist of (1) an Order by the district court dated January 7, 2004, whereby Roe's § 1983 civil rights complaint was recharacterized as a successor habeas petition; (2) an Order by the Sixth Circuit Court of Appeals dated January 13, 2004, whereby that court (a) granted Roe's motion for initial en banc review of his appeal of the district court's decision to treat his civil rights complaint as a successor habeas petition, but (2) denied his motion for a stay of execution on a tie vote that occurred only because two senior status judges cast invalid votes; (3) an Order by the Sixth Circuit Court of Appeals dated January 30, 2004, whereby that court rescinded its decision to hear the appeal en banc by a one-vote margin when a judge who had formerly recused herself cast the invalid tie-breaking vote to send Roe's appeal to a three-judge panel; and (4) an Order from a three-judge panel of the Sixth Circuit Court of appeals dated February 2, 2004, denying Roe relief.

These four Orders will be submitted as an Appendix to this petition.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its judgment on February 2, 2004. Jurisdiction is vested in this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 46(c) governs en banc procedures in the circuit courts of appeals:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

28 U.S.C. § 2244(b) pertains in pertinent part to successor habeas corpus petitions:

> (b) (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 factfinder 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.
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

42 U.S.C. § 1983 provides for civil action for deprivation of rights:

> 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.

STATEMENT OF THE CASE

On December 31, 2003, Petitioner filed a complaint under 42 U.S.C. § 1983 alleging that the state's plan to execute him through the current means of lethal injection violates his Due Process and Eighth Amendment rights to be free from cruel and unusual punishment. Petitioner offered evidence that supported his argument that Ohio's current method of execution could inflict excruciating pain and cause death in a manner that violates his constitutional rights. This evidence included the fact that veterinarians forbid using the same types of drugs for euthanizing pets to avoid inflicting pain on animals. Based on this evidence, Petitioner also filed a Motion for Preliminary Injunction to prevent the state from carrying out his scheduled execution (set for February 3, 2004) before he could adjudicate the merits of his civil rights claim.

Petitioner never tried to file or seek permission to file a successor habeas raising his civil rights claims against Ohio's method of execution. He realizes that his claim does not fit into the narrow exceptions for successor habeas petitions set forth in 28 U.S.C. 2244(b)(2) and that it instead sounds in § 1983 jurisprudence.

On January 7, 2004, the district court recharacterized the § 1983 action as a successor habeas petition and transferred it to the Sixth Circuit Court of Appeals, thereby effectively dismissing the claim on the merits.

On January 12, 2004, a panel of the United States Court of Appeals for the Sixth Circuit (acting under transfer Case No. 04-3014/3102) also recharacterized Petitioner's § 1983 complaint as a successor habeas corpus petition, denied him permission to file a successor habeas, and denied a stay of execution.

Since Petitioner had neither filed nor sought permission to file a successor habeas petition subject to transfer, he filed a notice of appeal on January 12, 2004, to challenge the district court's recharacterization of his § 1983 complaint as a successor habeas. Petitioner also filed a full brief; a motion for a stay of execution; and a petition for initial en banc review of his direct appeal. The state filed a motion to dismiss the appeal and opposed Roe's stay motion.

About 8:30 p.m. on January 13, 2004 (with co-appellant Lewis Williams scheduled for execution at 10:00 a.m. on January 14, 2004), the Sixth Circuit issued an Order that (1) granted the request for initial en banc review, but (2) denied both the stay motion and the state's dismissal motion for want of a majority in favor of either motion – the lower court locked into a six to six tie on these two motions. But for the fact that two senior status judges cast votes in violation of 28 U.S.C. § 46(c), Roe's stay motion would have been granted by a six to four vote.

On January 23, 2004, Roe filed three motions in the Sixth Circuit in Case No. 04-3044/3066 (1) asking for expedited appellate proceedings; (2) seeking compliance with 28 U.S.C. § 46 (c), arguing that the two senior judges could not sit on the en banc court; and (3) renewing his stay motion. The state then renewed its motion to dismiss, to which Roe replied.

On January 30, 2004, the Sixth Circuit issued an Order rescinding that court's January 13, 2004 decision to grant initial en banc appellate review and referred all pending matters to Roe's assigned panel. As revealed by the dissent, the Sixth Circuit's active, non-recused judges cast a six to four vote in favor of en banc review on January 13, 2004. But on January 30, 2004, that decision was rescinded by a six to five vote when one additional judge "came out of recusal" to cast a tie-breaking vote in favor of rescinding en banc review, and another judge switched his vote. But for the invalid vote cast by the judge who should have remained recused, a five-to-five tie vote in the lower court would have maintained the en banc status of Roe's appeal.

REASONS WHY THE WRIT SHOULD BE GRANTED

The lower court's en banc antics demand correction by this Court.

Death-sentenced state prisoners must have a viable means of seeking federal review of claims that the state's method of execution violates their constitutional right not to suffer cruel and unusual punishment. Simply converting § 1983 complaints and then dismissing them as successor habeas petitions elevates form over substance and calls into question the integrity of capital punishment in such a way as to needlessly cause fair-minded citizens to doubt our justice system's ability to uniformly impose its most severe sanction.

The concern about having non-arbitrary uniformity in the enforcement of capital punishment is all the more compelling given the state of flux surrounding the question whether death-sentenced state prisoners are at least entitled to a stay of execution pending the resolution of the certiorari question accepted by this Court in Nelson v. Campbell, No. 03-6821, 2003 WL 22327593 (Cert. Granted Dec. 1, 2002):

> Whether a complaint brought under 42 U.S.C. sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out his execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. sec 2254?

Recent litigation by death-sentenced state prisoners challenging the method of execution through § 1983 actions has yielded conflicting results that, on balance, counsel strongly in favor of granting certiorari in this case and stopping Ohio from executing Mr. Roe until this Court answers the relevant question in Nelson.

Also, the issue presented in Petitioner's § 1983 action should be addressed on the merits by this Court. Although there will be some supporters of the death penalty who will not be offended by a condemned inmate's suffering as he is put to death (some may even hope for it), the Constitution compels our government to preserve human decency in the administration of capital punishment. And that means condemned inmates, such as Petitioner, should not be made to suffer unnecessary pain. Our Constitution requires us to rise above visceral blood vengeance and simplistic "eye for an eye" retaliation. Evolving standards of decency should spare Petitioner from the unacceptable risk of a painful and torturous death at the hands of Ohio's executioner.

I. When an invalid group of appellate judges manipulates en banc rules to trump a valid majority's decisions to stay an execution and hear an appeal en banc, this Court must correct flagrantly unfair conduct in an inferior court; enforce 28 U.S.C. § 46(c); and nullify the vote of a judge who, once recused, reappears to cast a tie-breaking vote that corrupted the integrity and reliability of a capital case.

Roe faces execution in less than twenty-four hours because en banc rules were manipulated and basic principles of impartiality were violated. But for improprieties regarding en banc procedures and a vote cast by a judge who should have remained recused, a valid majority of the regular judges sitting on the lower court would have stayed Petitioner's execution and heard his appeal on en banc.

A. Invalid en banc votes cast by two senior status judges.

On January 13, 2004, a valid majority of the regular judges of the lower court voted to hear Roe's appeal en banc; but two invalid votes cast by senior status judges locked the court into a tie on Roe's stay motion. Roe petitioned the court for a hearing en banc under Fed. R. App. P. 35 and 6 Cir. R. 35. Senior judges cannot vote on either the initial en banc decision nor, once granted, on the merits unless they sat on a panel decision being reviewed en banc. Having requested an initial hearing en banc, there was no original panel decision under review; therefor, no senior judge could properly participate in any aspect of Petitioner's en banc proceedings. 28 U.S.C. § 46(c); F.R.A.P. 35; 6 Cir. I.O.P. 35(a); see Williams and Roe v. Taft, Case No. 04-3044 (6th Cir. Jan. 13, 2004) (Clay, J., dissenting).

When two senior status judges cast votes to thwart the valid majority's decision to grant the stay motion, they violated Petitioner's procedural and substantive due process rights. This Court should grant certiorari to remedy this violation of Petitioner's constitutional rights. In the alternative, this Court should exercise its supervisory powers with an Order that grants Petitioner's stay motion, vacates the lower court's invalid decisions, and remands this case for further proceedings in compliance with 28 U.S.C. § 46(c).

This Court has disallowed judicial tampering with express provisions of section 46(c) in two decisions construing the statute. The Court vacated an en banc decision of the Second Circuit because that court permitted a senior judge to sit on the en banc court. United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960). The definition of "regular active service" unambiguously excludes senior judges, and circuit court discretion stops short of clear violations of the statutory limits on en banc procedure. Id. at 688-89. The Court took notice of a Judicial Conference proposal to enable senior judges to sit on en banc rehearings where the

senior judge was a member of the original panel, but concluded that this observation strengthened its holding that any amendment of the statute be left to Congress. Id. at 690-91.

In Moody v. Albemarle Paper, Co., 417 U.S. 622 (1974), this Court found that a senior judge was not a judge in regular active service vested with authority to vote on whether to grant en banc rehearing. Though Congress revised section 46(c) after American-Foreign Steamship to allow senior judge to participate in en banc rehearings, it did not broaden participation in the vote to convene en banc, and the Court remained powerless to effect such an amendment. Id. at 627.

In exercising the general power to supervise the administration of justice in federal courts, responsibility lies with this Court to clarify the requirements to be observed by appellate courts in dealing with the power of the circuit court to hear a case en banc. Western P. R.R. Corp. v. Western P. R.R. Co., 345 U.S. 247 (1953). This Court, in its supervisory role, should grant Petitioner's stay motion and remand this matter for further proceedings conducted in compliance with 28 U.S.C. § 46(c).

B. Improper vote cast by a once-recused judge tipped balance in a highly dubious call for another vote on a previously decided en banc question.

On January 30, 2004, the lower court stood ready to hear Roe's appeal en banc. Behind the scenes, disgruntled judges on the losing side of the January 13, 2004, en banc vote orchestrated a rescission vote that they should have lost again. But a judge came out of recusal to cast a vote which resulted in the rescission of the en banc decision. The Order directed the case to a three-judge panel, which consisted of two judges who sided with the group that managed to thwart en banc review and a stay of execution. This maneuver sealed Petitioner's fate.

The dissenting opinion to the Sixth Circuit's January 30, 2004 Order exposes the impropriety and unfairness of this maneuver:

> Let us be clear on what has just transpired. This Court extricated the appeal relating to Petitioner John Roe's claim under 42 U.S.C. § 1983 from Case No. 04-3044 in which *en banc* review had already been granted on January 13, 2004; assigned it a new case number; and conducted a vote on whether to rescind the January 13 decision to hear the appeal *en banc*. The adoption of this procedure, and the ensuing vote to grant the rescission by a six to five vote, has nullified the votes of the non-recused active judges cast on January 13 and has created the appearance of manipulation and impropriety. Accordingly, I dissent.
>
> * * * * *
>
> Even assuming it was technically proper for this Court to have voted on whether to rescind its action of January 13, I have grave concerns about this Court's decision to permit Judge Cook to participate in the instant vote. As noted, on her own initiative, Judge Cook recused herself from the January 13 vote concerning Williams' and Roe's joint request for *en banc* review. After Williams was executed, however, Judge Cook indicated that she should participate in an *en banc* Court concerning Roe's appeal because she had not previously considered any matters concerning Roe [when she was a member of the Ohio Supreme Court]. I beg to differ. Judge Cook's basis for recusal survived Williams' execution because Williams' and Roe's appeals were intertwined. Most of the pleadings and briefs pertaining to Roe were joint efforts with Williams. [Note: all pleadings were filed jointly before Williams' execution.] Judge Cook necessarily read and considered these papers in considering her vote on the rescission. In addition, Judge Cook was privy to the intra-Court communications and deliberations concerning Williams' appeal. Had this Court been aware that Judge Cook was going to "un-recuse" herself after Williams' death, precautions would have been (or should have been) taken to preclude her receipt of any pleadings or communications concerning Williams. This was not done either. Needless to say, Judge Cook's consideration of how she should vote in *Roe* was necessarily influenced and impacted by the Court's deliberations in *Williams* from which Judge Cook recused herself. The entire situation suggests impropriety.
>
> Without Judge Cook's vote, the vote to rescind would have failed on a tie vote and the *en banc* Court would have considered Roe's appeal. Thus, the decision of this Court to conduct another vote on whether to hear Roe's appeal *en banc*, combined with Judge Cook's participation in that vote, has created the perception that certain members of this Court have manipulated the process to avoid, what is in their view, the unfavorable result of the January 13th poll. This outcome unfortunately conveys the impression of a result-oriented process rather than an orderly process which seeks to preserve the appearance and reality of due process.

Roe v. Taft, Case No. 04-3044/3066, *2, 4-5 (6th Cir. Jan. 30, 2004) (Clay, J., dissenting).

Judge Clay's cogent dissent (joined by three other judges) lays out the compelling reasons why this Court should accept certiorari to correct what is at best a striking appearance of impropriety, and, at worst, a flagrant manipulation of rules by a disgruntled group of judges whose machinations corrupted the integrity and reliability of a capital case.

II. This Court should accept review of Petitioner's case because it presents the same procedural question accepted for appellate review in Nelson v. Campbell, and it presents the same substantive issue underlying the stay upheld by this Court in Johnson v. Reid, 504 U.S. ___, 2003 U.S. Lexis 9338 (Dec. 18, 2003).

Last October, this Court issued a last-minute stay in a case from the Eleventh Circuit in connection with a § 1983 challenge to Alabama's intended use of a "cut down" procedure to access a deep vein for lethal injection. Nelson v.Campbell, 124 S. Ct. 383, 2003 US Lexis 7420 (Oct. 9, 2003). Then, on December 1, 2003, this Court granted certiorari on the procedural question relevant to Petitioner Roe's case:

> Whether a complaint brought under 42 U.S.C. sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out his execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. sec 2254?

Nelson v. Campbell, No. 03-6821, 2003 WL 22327593, 72 USLW 3363 (Dec. 1, 2003).

Although Roe's substantive issue here differs, it raises the same procedural question. And the substantive issue—a challenge to the types of drugs used for lethal injection—parallels the facts in a Virginia case where this Court recently upheld a stay of execution by denying the state's motion to vacate the stay unanimously granted by the Fourth Circuit Court of Appeals. Johnson v. Reid, 504 U.S. ___, 2003 U.S. Lexis 9338 (Dec. 18, 2003).

Petitioner Roe recognizes that, after Reid, this Court took a different tack in similar cases when it reversed stays granted by the Fourth Circuit (Beck v. Rowsey, 2004 U.S. Lexis 4 (Jan. 8, 2004)) and the Tenth Circuit (Ward v. Darks, 2004 U.S. Lexis 661 (Jan. 13, 2004)). See also Zimmerman v. Johnson, 2004 U.S. Lexis 821 (Jan. 21, 2004).

Despite adverse rulings in some similar cases, Reid and Nelson standing alone give strong reason to grant Petitioner certiorari and to stay his execution. As Judge Moore recognized in then-co-plaintiff Lewis Williams Jr.'s Sixth Circuit case, "[i]t would be inappropriate and unjust to permit Williams's execution to occur when the Supreme Court has yet to decide whether Williams has a right to present his claim as a § 1983 action .... It would be a cause for great regret if Williams were executed on Wednesday [1-14-04] morning only to have the Supreme Court determine several months later that Williams in fact deserved a chance to pursue his action in federal district court." In re Lewis Williams, Jr., Case No. 04-3014, slip opinion *1, 3 (6th Cir. Jan. 12, 2004) (Moore, J., dissenting). The same holds true for Petitioner Roe. In re John Glenn Roe, Case No. 04-3014 (6th Cir. Jan. 12, 2004) (Clay, J., dissenting) (incorporating Judge Moore's dissent by reference).

The Sixth Circuit based its decision on In re Sapp, 118 F.3d 460, 464 (6th Cir. 1997), which in turn rested on a reading of Gomez v. Untied States District Court, 503 U.S. 653 (1992) as interpreted by Lonchar v. Thomas, 517 U.S. 314 (1996). In re Sapp, 118 F.3d at 463. Petitioner contends that Gomez itself is called into question by the grant of certiorari in Nelson, where the question accepted for review implicates the viability of Gomez at least to an extent adequate to stay and abey these proceedings until this Court issues its decision in Nelson.

Moreover, on its face Gomez is inadequate precedent for denying Petitioner the right to use § 1983 to challenge the state's method of execution. Gomez is a three-paragraph per curiam

decision on an application to vacate a stay of execution issued by the Ninth Circuit. Gomez did not hold that all § 1983 claims brought by death-sentenced inmates were to be treated as successive habeas petitions. Rather, limited to its facts, Gomez held that because the inmate sought an equitable remedy, equity must take into account all of the relevant factors, including the state's interest in proceeding with its judgment.

In Gomez, prior to filing a § 1983 lawsuit challenging the state's intended method of execution, the petitioner had filed four federal habeas petitions. Id. at 653. Moreover, the Court found that the petitioner's claim "could have been brought more than a decade ago." Id. at 654. Thus, the Court held, regardless of whether the action was a § 1983 suit or a § 2254 petition, the inmate was seeking an equitable remedy, and, based on the inmate's litigation record in that case, the equities precluded review. The equities in this case, which are dramatically different from those in Gomez, favor Petitioner Roe.

In addition, Gomez was decided in 1992 before passage of the Antiterrorism and Effective Death Penalty Act, which drastically restricted claims that could be brought in successor petitions to those involving a constitutional violation establishing innocence or those raising claims clearly made retroactive by a subsequent decision by this Court. Gomez held that in the unique circumstances presented there, the equitable principles then in existence with regard to abuse of the writ should be applied. However, this Court has never held that the drastic statutory restrictions contained in 28 U.S.C. § 2244(b) apply to § 1983 actions, or that they apply only to 1983 actions brought by death-sentenced inmates, but not other inmates who have previously litigated habeas corpus claims. There is no basis for such a distinction. Indeed, this Court held in Lonchar v. Thomas that courts are not to abandon the normal "statutes, rules, precedents and practices" in capital cases, but to adhere to them. Lonchar, 517 U.S. at 323.

Finally, the fact that the district court below simply transferred Petitioner's § 1983 action is no bar to this Court's review. Under Castro v. United States, ____ U.S. ____, 124 S. Ct. 786 (2003), 28 U.S.C. § 2244(b) does not bar this Court's review. Petitioner Roe did not ask the Sixth Circuit Court of Appeals for authorization to file a successive habeas petition. Thus, there can be no "statutorily relevant 'denial' of a request that was not made." Id., 124 S. Ct. at 791. As this Court held,

> Even if, for argument's sake, we were to accept the Government's characterization, the argument nonetheless would founder on the statute's requirement that the "denial" must be the "***subject***" of the certiorari petition. The "subject" of Castro's petition is not the Court of Appeals' "denial of authorization." It is the lower court's refusal to recognize that this § 2255 motion is his first, not his second. That is a very different question.

Id. (Emphasis in original.) The same logic applies here.

III. Where a death-sentenced inmate has his civil rights complaint recharacterized and transferred as a successor habeas petition, 28 U.S.C. § 2244(b) denies the inmate a meaningful opportunity for appellate review of both the decision to convert and the merits of his 42 U.S.C. § 1983 complaint.

The Sixth Circuit's decisions left Petitioner Roe without any opportunity for meaningful appellate review of his civil rights complaint, or of the district court's transfer decision. He is the victim of form over substance, since his inquiry into the constitutionality of the painful death he is set to encounter was turned into a procedural question.

The State argues that Petitioner is precluded from appealing the district court's transfer of his case because transfer orders are not final or appealable, and because Petitioner is unable to meet the standard required for the collateral order doctrine for purposes of appealing the district court's transfer order. This argument forces Petitioner to accept the district court's recharacterization of his civil rights complaint as a successor habeas corpus petition and its transfer to the Sixth Circuit for a "gate keeping" review under 28 U.S.C. § 2244(b). Under the

State's argument, since the denial of permission to file a second habeas is not appealable under 28 U.S.C.S. § 2244(b)(3)(E), Petitioner is left without an avenue to seek appellate review of the merits of his § 1983 claim, or of the district court's decision to recharacterize the § 1983 complaint as a successor habeas petition.

Admittedly, Petitioner's facts in support of his § 1983 claim do not satisfy the stringent standards for filing a successor habeas petition. But the policies underlying the stringent requirements in 28 U.S.C.S. § 2244(b) simply do not hold true for § 1983 suits raising challenges to execution procedures (not to the underlying conviction and death sentence) that do not ripen during earlier habeas litigation. Neither finality nor justice is served by denying Petitioner Roe the right to a full and fair appellate review of both the district court's decision to recharacterize his civil rights complaint and the decision to, in effect, deny him relief on the merits of his complaint by dint of the transfer.

This Court should allow Petitioner's civil rights complaint to be heard. Adhering to rigid procedural guidelines goes against the fundamental fairness that is essential to our justice system. As Justice Kennedy has noted, "our analysis of fundamental fairness and rationality, by necessity, is contextual, taking into account both the purposes of the legislature and the practicalities of the criminal justice system." Richardson v. United States, 526 U.S. 813, 835 (1999) (Kennedy, J., dissenting). The finality of capital punishment demands such flexibility so that justice is not sacrificed and an irreversible sentence is administered in a constitutionally acceptable manner.

The lower courts' treatment of Petitioner's § 1983 action as a successor habeas petition violates Petitioner's constitutional rights to due process and, in effect, violates his constitutional

right to be free from arbitrary, capricious, cruel and unusual punishment. U.S. Const. amends. VIII and XIV.

IV. If Petitioner's complaint, brought under 42 U.S.C. § 1983 to challenge the state's method of execution, was properly recharacterized as a habeas petition, then it should not have been transferred for treatment as a successor petition because it raised claims that cannot ripen until it is clear when and by what means he will be executed.

Petitioner disputes the lower courts' recharacterization of his 1983 lawsuit as a habeas corpus petition. Based on the nature of the claim and the relief sought, Petitioner properly pursued § 1983 relief; however, even if Petitioner's § 1983 complaint was properly recharacterized as a habeas corpus petition, treating it as a successor petition runs afoul of the principles established in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

In Martinez-Villareal the petitioner filed an initial habeas corpus petition, which included a claim that the petitioner was incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). Years later, when he faced imminent execution, the petitioner filed another habeas corpus petition, again including a claim that he was incompetent to be executed under Ford. Martinez-Villareal, 523 U.S. at 641. This Court refused to treat Martinez-Villareal's subsequent habeas petition as a successor. Id. at 641, 644. Because Martinez-Villareal did not face an imminent execution date, the district court could not determine his competency to be executed during his initial habeas proceedings. Id. at 644-45. Martinez-Villareal's claim was not ripe for review until he actually faced execution. See id. Resultantly, this was the appropriate time for Martinez-Villareal to present his claim to the federal courts; the successor provisions could not bar his efforts.

The similarity to Martinez-Villareal requires comparable treatment of Petitioner's case. Like Martinez-Villareal, Petitioner's claims challenging the means by which Ohio intends to

execute him did not become ripe until now, with his execution imminent. Lethal injection did not exist as an option for execution in Ohio until 1993. It was not until 2001 that lethal injection became the sole means by which Ohio executes its death-sentenced offenders. Additional changes to Ohio's process may yet occur. Until an execution is imminent, the precise method by which Ohio intends to kill an inmate cannot be known. A challenge to the method of execution does not ripen until that time. Because Petitioner's claim only ripened now at the time of his imminent execution, no matter how the pleading is characterized, it should not be treated like a successor habeas corpus petition. Cf. id. at 644-45.

Furthermore, standards of decency evolve over time. Only recently has evidence come to light exposing the potential for a painful death by the drugs Ohio uses in its lethal injection protocol. The American Veterinary Medical Association (AVMA) released a report in 2000 in which it condemned the use of a neuromuscular blocking agent (which Ohio's Department of Rehabilitation and Corrections uses in its lethal injection protocol) in the euthanasia of companion animals. Some state legislatures have since adopted the AVMA's guidelines by enacting statutes specifically prohibiting the use of those drugs when euthanizing animals. See Md. Code Ann. Criminal Law, § 10-611 (2002); Tenn. Code Ann. § 44-17-303 (2001). These changes in the law are premised on evolving standards of decency that are applicable to capital punishment and that were not in effect or in the public consciousness when Petitioner Roe filed his habeas petition.

The AEDPA created a "gatekeeping mechanism" to dampen abuse of the writ by screening out most successor petitions. Id. at 641. Petitioner is not abusing the writ; his claims should not be subjected to the rigid limitations placed on successor petitions. Petitioner "brought his claim in a timely fashion, and it has not been ripe for resolution until now." Martinez-

Villareal, 523 U.S. at 645. If this Court agrees that Petitioner's § 1983 complaint should be characterized as a habeas petition, then it should grant certiorari to consider the question whether, as Petitioner contends, it should proceed directly in the district court without application of the appellate court's gatekeeping review.

V. The execution of a death-sentenced person by means of a lethal injection procedure that carries a real, unacceptable risk of leaving the person paralyzed while consciously suffering extreme pain constitutes cruel and unusual punishment.

Petitioner is scheduled to be put to death by lethal injection. The state intends to execute him by using drugs veterinarians are prohibited from using during the euthanasia of house pets. Specifically, the use of drugs to paralyze muscles during euthanasia violates veterinarians' ethical standards, because it risks torturing animals to death while their bodies are immobilized but their brains are wracked with pain.

The execution protocol that will be implemented in Petitioner's case includes the administration of three drugs. One of these drugs—pancuronium bromide—will likely force Petitioner into a state of "chemical entombment" while he consciously experiences suffocation and the pain of cardiac arrest.

Ohio's current execution procedures risk a torturous death, which evolving standards of decency and the Eighth Amendment prohibit. In an affidavit attached to Petitioner's § 1983 complaint, Mark J.S. Heath, a medical doctor board certified in anesthesiology, maintains that "Ohio's lethal injection protocol creates an unacceptable risk that the inmate will not be anesthetized to the point of being unconscious and unaware of pain for the duration of the execution procedure. If the inmate is not first successfully anesthetized . . . the pancuronium will paralyze all voluntary muscles and mask external, physical indications of the excruciating pain being experienced by the inmate during the process of suffocating (caused by the pancuronium)

and having a cardiac arrest (caused by the potassium chloride)." It is unconstitutional and inhumane to use a drug, the primary effect of which will almost certainly be to wrap Petitioner in a chemical veil to hide the ugly convulsions otherwise evident in human beings fighting suffocation and experiencing cardiac arrest.

Witnesses viewing the lethal injection procedure and the general public will never realize the cruel fraud perpetrated upon them. Instead of witnessing an inmate quiet and motionless, euphemistically thought of as being "put to sleep," they may well be witnessing the chemical cover-up of an act of excruciating torture during which the inmate may be fully conscious, but unable to express his conscious feelings or physically manifest his excruciating pain.

Furthermore, Ohio's lethal injection protocol fails to provide staff with adequate medical training to stand ready to take appropriate steps if it becomes evident that the condemned inmate is suffering excruciating pain.

The leading professional association of veterinarians condemns the use of paralyzing agents during the euthanasia of house pets. The American Veterinarian Medical Association's year 2000 Report on Euthanasia states that "[a] combination of pentobarbital [an anesthetic in the same category of drugs as thiopental] with a neuro-muscular blocking agent [like pancuronium] is not an acceptable euthanasia agent." The method of execution the state plans to use to end Petitioners' lives violates the AVMA's standards—veterinarians would not put dogs to sleep the way Ohio executes human beings.

Many states have passed laws governing the euthanasia of pets that preclude the use of a sedative in conjunction with a neuromuscular blocking agent. Texas, Tex. Health & Safety Code, § 821.052(a); Florida, Fla. Stat. §§ 828.058 and 828.065; Georgia, Ga. Code Ann. § 4-11-5.1; Maine, Me. Rev. Stat. Ann., Tit. 17, § 1044; Maryland, Md. Code Ann., Criminal Law, §

10-611; Massachusetts, Mass. Gen. Laws § 140:151A; New Jersey, N.J.S.A. 4:22-19.3; New York, N.Y. Agric. & Mkts § 374; Oklahoma, Okla. Stat., Tit. 4, § 501; Tennessee, Tenn. Code Ann. § 44-17-303. Other states have implicitly banned such practices. See Illinois, 510 Ill. Comp. Stat., ch. 70, § 2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, 2 CSR 30-9.020(F)(5); Rhode Island, R.I. Gen. Laws § 4-1-34, Connecticut, Conn. Gen. Stat. § 22-344a; Delaware, Del. Code Ann., Tit. 3, § 8001; Kentucky, Ky. Rev. Stat. Ann. § 321.181(17) and 321.207(5); South Carolina, S.C. Code Ann. § 47-3-420.

These statutory declarations, which embody societal values for the euthanasia of companion animals, underscore the inhumanity of Ohio's execution method. Euthanasia techniques banned as cruel to dogs and cats, by definition, violate standards of decency in the execution of human beings.

The Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a death sentence. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (opinion of Reed, J.). Petitioner should not be put to death under Ohio's current lethal injection protocol.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Petitioner respectfully requests that this Court grant him a writ of certiorari.

Respectfully submitted,
DAVID H. BODIKER
Ohio Public Defender

/s/ Gregory W. Meyers
GREGORY W. MEYERS (0014887)
Senior Assistant State Public Defender
and Member of the Bar of this Court
Counsel of Record

/s/ Ruth L. Tkacz
RUTH L. TKACZ (0061508)
Assistant State Public Defender
and Member of the Bar of this Court
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
Fax: (614) 644-0708

COUNSEL FOR PETITIONER

193122

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

JOHN G. ROE,

Petitioner,

-vs-

ROBERT TAFT, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Ruth L. Tkacz, a member of the Bar of this Court, hereby certify that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT was served electronically to Timothy D. Prichard, Senior Deputy Attorney General, 30 E. Broad Street, Columbus, Ohio, by e-mail transmittal at tprichard@ag.state.oh.us when this pleading was lodged with the Clerk for the United States Supreme Court on February 2, 2004, at approximately 11:00 a.m.

/s/ Ruth L. Tkacz
RUTH L. TKACZ (0061508)
Assistant State Public Defender