

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

BOBBY T. SHEPPARD,

Petitioner,

v.

NORMAN ROBINSON, Warden,

Respondent.

Case No. 1:12-cv-198

JUDGE GREGORY L. FROST

Magistrate Judge Michael R. Merz

ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court by Order of the Sixth Circuit remanding the case for further proceedings on Petitioner's method-of-execution challenges. (ECF No. 41.)

On January 14, 2013, this Court issued an Opinion and Order allowing Petitioner to file a second-in-time Petition raising Eighth Amendment and Fourteenth Amendment challenges to the manner in which Ohio conducts executions. (ECF No. 35.) Respondent filed a Return of Writ on February 11, 2013 (ECF No. 36), and Petitioner filed a Traverse on March 4, 2013 (ECF No. 37). This Court on July 5, 2013 issued an Opinion and Order denying Petitioner's claims as without merit (ECF No. 38), and on July 8, 2013, the Clerk issued judgment dismissing the habeas corpus action (ECF No. 39).

On August 2, 2013, Petitioner filed a Notice of Appeal to the Court of Appeals for the Sixth Circuit. (ECF No. 40.) Before the parties could commence briefing, however, the State of Ohio on October 10, 2013, adopted a new execution protocol. (Petitioner-Appellant Sheppard's

Motion to Remand, Sixth Circuit Case No. 13-3900, Document No. 21, at Pages 2-3.) On November 5, 2013, Petitioner filed a motion asking the Sixth Circuit to remand the case to this Court so that Petitioner could amend his method-of-execution challenges to target the October 10, 2013 protocol. (*Id.*) The Sixth Circuit on December 17, 2013, issued an Order granting Petitioner's Motion to Remand. (ECF No. 41.)

Petitioner's new claims respectively allege that Ohio's execution policy, procedures, and practices violate Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. As pled, however, those claims target an execution protocol that no longer exists. The primary if not sole reason that this Court permitted Petitioner to file a second-in-time Petition raising those claims at such a late date relative to the date that Petitioner filed his original petition was because those claims—although loosely informed by lethal injections that have occurred since Ohio resumed executions in 1999—strictly speaking targeted an execution protocol that only went into effect on September 18, 2011.

As Petitioner notes, however, the State of Ohio on October 10, 2013, adopted a new execution protocol that supersedes the protocol dated September 18, 2011. Thus, as pled, Petitioner's method-of-execution claims target an execution protocol that no longer exists and are accordingly moot. That must be remedied; but when and how is un-knowable at this time.

On January 16, 2014, the State of Ohio executed inmate Dennis McGuire pursuant to the October 10, 2013 execution protocol. This Court takes judicial notice of the fact that the Ohio Department of Rehabilitation and Correction ("ODRC") is presently conducting an investigation into circumstances surrounding the McGuire execution. (*In Re: Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016, ECF No. 435, at Page ID # 12473.) That ongoing investigation inarguably creates uncertainty about the continued viability of the October 10, 2013 protocol.

This matter is technically before the Court on remand from the Sixth Circuit for the purpose of allowing Petitioner to amend his claims in light of the new execution protocol that Ohio adopted on October 10, 2013. The Court recognizes, however, that any amendments to Petitioner's method-of-execution claims may be affected by the contents of any report or reports produced by ODRC's as-yet-not-completed investigation into the January 16, 2014 execution of Dennis McGuire. The Court also recognizes that Petitioner will require a certain period of time after the issuance of any report or reports that result from the investigation of the McGuire execution to file any amendment or supplement to Petitioner's method-of-execution claims. Because the Court has not granted—and is in no position to grant—any discovery on these method-of-execution claims, it is not for this Court to require Respondent to provide Petitioner or the Court with any report or reports that result from ODRC's investigation into the McGuire execution. Rather, it is incumbent upon Petitioner to obtain any such report(s).

The Court accordingly **DIRECTS** Petitioner, within sixty (60) days of the date the State of Ohio releases any and all reports that result from the investigation into the McGuire execution, to file any amendment or supplement to Petitioner's method-of-execution claims. Respondent shall have thirty (30) days to file an amended Return of Writ. Petitioner shall have thirty (30) days to file an amended Traverse/Reply.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE