

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

BOBBY T. SHEPPARD,

Petitioner,

-vs-

NORMAN ROBINSON<sup>1</sup>, Warden,  
Chillicothe Correctional Institution,

Respondent.

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Case No. 1:12-cv-198

:

District Judge Gregory L. Frost  
Magistrate Judge Michael R. Merz

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**DECISION AND ORDER DENYING PETITIONER'S THIRD MOTION  
FOR MODIFICATION OF SCHEDULING ORDER**

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This capital habeas corpus case is before the Court on Petitioner's Third Motion to Modify Scheduling Order and Extend Time to Amend or Supplement His Method-of-Execution Claims (Doc. No. 48). Respondent opposes the Motion (Doc. No. 50) and Petitioner has filed a Reply in support (Doc. No. 51). Petitioner's current date to amend or supplement is April 13, 2015 (Notation Order granting Doc. No. 44). He seeks a full year's extension to March 21, 2016.

Sheppard's reasons for seeking the extension are that he previously received extensions until sixty days after the then-scheduled execution of Ronald Phillips which was to have taken place on February 11, 2015, and has now been re-scheduled as the next Ohio execution for January

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<sup>1</sup> Petitioner notes that Charlotte Jenkins has succeeded Norman Robinson as Warden at Chillicothe Correctional Institution. She is accordingly substituted as Respondent by operation of law. Fed. R. Civ. P. 25. However, the caption is **not** to be modified except on court order.

21, 2016. He asserts that the same reasons supporting the prior extensions apply again: there is a new execution protocol that has not yet been used, such that its first use will be “experimental”; and (2) the drugs to be used will be made by a compounding pharmacy and Ohio has no experience yet using compounded drugs. New reasons said to support the extension are (1) newly-enacted House Bill 663, referred to be Sheppard as the “execution secrecy law,” will change the way Ohio conducts executions and is the subject of separate litigation; and (2) the United States Supreme Court has granted *certiorari* in a § 1983 case involving the constitutionality of Oklahoma’s lethal injection protocol in *Glossip v. Gross*, 135 S.Ct. 1173,<sup>2</sup> 190 L. Ed. 2d 929 (Jan. 23, 2015).

Respondent opposes the Motion because (1) Ohio’s current protocol calls for thiopental sodium and pentobarbital which “have been universally recognized as constitutional,” (2) Sheppard’s habeas case(s) have been pending for fifteen years, and (3) § 1983 litigation is the proper forum for lethal injection protocol challenges.

The logic of Sheppard’s position and that of his counsel who have filed similar motions in other pending capital cases in this Court, seems to be that all lethal injection challenges in Ohio<sup>3</sup> should proceed serially. That is, because each execution will be in some way different from every other execution, all lethal injection litigation should be put on hold until all data from the last execution is discovered, analyzed, and presented to the Court as a reason for stopping the next execution. This logic is superbly suited to the abolitionist goal of stopping all executions. However, it avoids the Court’s duty to deal with individual cases involving particular judgments.

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<sup>2</sup> The case was originally captioned “*Warner v. Gross*,” but the Supreme Court refused to stay the execution of Charles Warner, who was executed by the state of Oklahoma on January 15, 2015, just days before the Court stayed the executions of the remaining three petitioners in the case. Since Warner’s execution the case has been captioned “*Glossip v. Gross*.”

<sup>3</sup> Given the citation of cases from other States, the logic may be that all lethal injection protocol cases in the nation should proceed seriatim.

The Court DENIES Sheppard's motion for the following reasons:

First, there is an execution protocol in place which is presumptively the protocol which will be used when Sheppard is executed. The lethal injection protocol challenge is the only claim that Sheppard presently has, since his other claims have been rejected. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6<sup>th</sup> Cir. 2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2751 (2011). The continued pendency of this case and the concomitant stay of execution depend on there being an extant pleading challenging the presumptive method of execution. It is inappropriate to stay an execution in this or any case because at some time in the future the State may promulgate a new protocol as to which Sheppard may have viable constitutional objections.

Secondly, the Sixth Circuit's direction to District Courts regarding the handling of these claims is less than crystal clear. Compare *Adams v. Bradshaw*, 644 F.3d 481 (6<sup>th</sup> Cir. 2011), with *Scott v. Houk*, 760 F.3d 497 (6<sup>th</sup> Cir. 2014); and *Frazier v. Jenkins*, 770 F.3d 485 (6<sup>th</sup> Cir. 2014). If all lethal injection challenges are put on hold and then handled serially, the Sixth Circuit will have very few opportunities to provide clearer guidance. Whatever guidance the Supreme Court may provide in *Glossip* probably will come by the end of the current term. The decision may not be helpful because the execution drug in question is midazolam which is not part of the current Ohio protocol.

Third, Judge Frost has upheld the constitutionality of House Bill 663. *Phillips v. Dewine*, 2015 U.S. Dist. LEXIS 18695 (S.D. Ohio Feb. 17, 2015). Although that decision has been appealed, the Sixth Circuit has not interfered in any way with the judgment (See docket in Case No. 2:14-cv-2730).

Petitioner's Third Motion to Modify Scheduling Order and Extend Time to Amend or

Supplement His Method-of-Execution Claims (Doc. No. 48) is DENIED.

April 1, 2015.

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