

**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

OPINION AND 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 for consideration of Petitioner's Appeal from the April 1, 2015 Decision and Order of the Magistrate Judge (ECF No. 53), Respondent's response memorandum (ECF No. 56), and Petitioner's reply memorandum (ECF No. 57).¹

The Sixth Circuit on December 17, 2013, remanded this case to the Court to reconsider Petitioner's method-of-execution claims in light of the new execution protocol that became effective on October 10, 2013. (ECF No. 41.) This Court subsequently ordered Petitioner to file any amendment or supplement to his method-of-execution within sixty (60) days of the date the State of Ohio issued all reports stemming from its investigation into the January 16, 2014, execution of Dennis McGuire. (ECF No. 42.) After Ohio adopted another execution protocol effective April 28, 2014, Petitioner sought and received another extension of time—to October 2,

¹ The Magistrate Judge's April 3, 2015 Scheduling Order did not permit the filing of a reply memorandum. (ECF No. 54.) This Court therefore **STRIKES** the impermissible filing. (ECF No. 57.)

2014—to amend his claims. (ECF No. 43.) On September 10, 2014, Petitioner again sought and received an extension of time—to April 13, 2015—to amend his claims. (ECF No. 44.)

Petitioner is now before the Court with a third request to modify the scheduling order. (ECF No. 48.) He seeks an extension of time to March 21, 2016, to amend his claims. He bases that request on the premise that he requires sixty (60) days from the first execution that Ohio conducts under the latest iteration of its execution protocol, scheduled for January 21, 2016, to gather the facts and evidence necessary to meaningfully amend his method-of-execution claims. Petitioner also posits that the passage by the Ohio General Assembly of an “execution secrecy” law (“House Bill 663”), as well as the United States Supreme Court’s acceptance of a § 1983 case challenging the drugs that Oklahoma uses to conduct executions, provide additional reasons for granting a year-long extension. The Magistrate Judge disagreed. And so does this Court.

The Magistrate Judge pointedly observed the following:

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 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.

(ECF No. 52, at Page ID # 593.) The Magistrate Judge proceeded to offer three reasons for denying Petitioner’s request. First, the Magistrate Judge noted that Ohio has in place a protocol that presumptively it will use to execute Petitioner and that the only claims pending in this proceeding are method-of-execution challenges. (*Id.* at Page ID # 594.) Second, the Magistrate Judge observed that continuing to stay executions (or delay indefinitely the adjudication of

method-of-execution habeas corpus claims) will deprive the Sixth Circuit of the opportunity to provide clearer guidance as to how district courts should treat method-of-execution claims raised in habeas corpus. To that point, the Magistrate Judge also discounted the Oklahoma case upon which Petitioner relies, not only because it targets a drug that Ohio has removed from its execution protocol, but also because the Supreme Court is not likely to issue a decision on that case until the end of the term. Finally, the Magistrate Judge pointed out that the undersigned has already upheld the constitutionality of House Bill 663.

Petitioner has appealed the Magistrate Judge's decision. This Court, when reviewing a magistrate judge's order on non-dispositive matters, applies a "clearly erroneous or contrary to law" standard. *See, e.g., United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001). Petitioner asserts that the Magistrate Judge's decision is clearly erroneous and contrary to law because none of the reasons the Magistrate Judge cited for denying Petitioner's request addresses the justifications upon which this Court has previously relied in granting Petitioner extensions of time to amend his claims. (ECF No. 53, at Page ID # 600-08.) The Court disagrees.

The Sixth Circuit remanded the instant case to this Court so that Petitioner could amend his method-of-execution claims in light of a new execution protocol that Ohio issued after this Court entered its original judgment denying Petitioner's method-of-execution habeas claims. (ECF No. 42, at Page ID # 435-36.) This Court subsequently extended the time for Petitioner to amend his claims because of an inkling that the contents of any report(s) issued by the State of Ohio concerning the January, 2014 execution of Ohio inmate Dennis McGuire might affect Petitioner's amendments. Neither that inkling, nor any of the reasons that Petitioner offers now, are sufficient to justify extending until a year from now the time for Petitioner to amend his

method-of-execution habeas corpus claims.

The fact that Ohio may, or even is likely to, modify or replace its execution protocol *some day* does not justify granting an extension today. (ECF No. 53, at Page ID # 602.) In the event that Ohio does modify or replace its execution protocol, nothing from this Order prevents Petitioner from seeking an extension at that time. The Magistrate Judge's decision in that regard was not clearly erroneous or contrary to law.

The fact that Petitioner is attempting to revive certain claims that this Court already rejected in Petitioner's first-in-time habeas corpus action does not logically justify the extension of time he seeks in the instant, separate second-in-time habeas corpus action. (*Id.* at Page ID # 602-03.) The Magistrate Judge's decision in that regard was not clearly erroneous or contrary to law.

The fact that Petitioner has identified but laudably opted not to pursue other means of litigating his method-of-execution challenges that could take even longer than the instant case he is litigating is a specious basis upon which to request what he appears to characterize as a relatively less egregious year-long extension of time. (*Id.* at Page ID # 603.) The Magistrate Judge's decision in that regard was not clearly erroneous or contrary to law.

Petitioner's arguments suggesting that the Sixth Circuit has evidenced no uncertainty in the handling of method-of-execution habeas corpus claims and that the instant case does not deserve to be a "test case" for "clarification" purposes does not justify granting the year-long extension Petitioner seeks. (*Id.* at Page ID # 603-05.) The Magistrate Judge's reliance in that regard was not clearly erroneous or contrary to law.

The Court disagrees with Petitioner's assertion that the Magistrate Judge misunderstands

the nature of the *In re Ohio Execution Protocol Litigation* that is pending before this Court. (*Id.* at 605-07.) In fact, the differences between the nature of that litigation and the instant case crystalize the reason this Court will not grant Petitioner's request for an extension. Although method-of-execution challenges raised in § 1983 litigation in the Sixth Circuit may rely on fact-specific or inmate-specific data from execution to execution, method-of-execution challenges raised in habeas corpus do not because they are global in nature. Against a constantly changing landscape, this Court previously granted extensions of time out of an abundance of caution. The Court is now of the view that it must temper the exercise of that caution with a recognition that the constantly changing landscape of carrying out executions in Ohio does not justify indefinitely postponing adjudication of method-of-execution habeas corpus claims.

The Court agrees with the Magistrate Judge in discounting Petitioner's reliance on the United States Supreme Court's decision to review a § 1983 case raising several challenges to Oklahoma's execution policy, procedures, and practices. Whatever guidance the Supreme Court may eventually provide concerning those § 1983 claims, it does warrant now extending until next year the time for Petitioner to amend his method-of-execution habeas corpus claims.

Finally, the Court is of the view that nothing about its decision in *Phillips v. DeWine* concerning House Bill 663 justifies extending until next year the time for Petitioner to amend his method-of-execution habeas corpus claims. (ECF No. 53, at Page ID # 607-08.) The Magistrate Judge's decision in that regard was not clearly erroneous or contrary to law.

The Court **ADOPTS** the Magistrate Judge's April 1, 2015 Decision and Order (ECF No. 52), **OVERRULES** Petitioner's appeal from that decision (ECF No. 53), and **DENIES** Petitioner's third motion for modification of the scheduling order (ECF No. 48).

Petitioner shall have until and including April 13, 2015 to amend or supplement his 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