

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

ALVA E. CAMPBELL, JR.,

Petitioner,

: Case No. 2:15-cv-1702

- vs -

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

CHARLOTTE JENKINS, 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. 19). The Warden opposes the Motion (ECF No. 20) and Campbell has filed a reply in support (ECF No. 21).

Motions to amend under Fed. R. Civ. P. 15 are non-dispositive under 28 U.S.C. § 636(b)(1)(A) and thus come within the decisional authority of Magistrate Judges in the first instance, in referred cases.

On September 21, 2015, the Court denied a prior Motion to Amend by Campbell based on the reasoning set forth in *Landrum v. Robinson*, 2015 U.S. Dist. LEXIS 116914 (S.D. Ohio Sept. 2, 2015); *Turner v. Hudson*, 2015 U.S. Dist. LEXIS 119882 (S.D. Ohio Sept. 9, 2015); *Franklin v. Robinson*, 2015 U.S. Dist. LEXIS 120595 (S.D. Ohio Sept. 10, 2015); *Raglin v. Mitchell*, Case No. 1:00-cv-767 (ECF No. 243), as to the proper interpretation and application of the Supreme Court's decision in *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2738 (2015). *Campbell v. Jenkins*, No. 2:15-cv-1702, U.S. Dist. LEXIS 125772, (S.D. Ohio, Sept. 21,

2015)(copy at ECF No. 16). The prior Motion was denied “without prejudice to its renewal not later than October 13, 2015.”¹ If Campbell does move again to amend, he must state plainly how the claims he wishes to plead here differ from those claims he has pled in *In re Ohio Lethal Injection Protocol Litig.*, Case No. 2:11-cv-1016.” *Id.* at PageID 471. Because the instant Petition is a second-in-time application for habeas, the Court also ordered that in any renewed motion, Campbell “must state his position as to why this is not a second or successive habeas petition on which this Court is without jurisdiction absent prior permission from the circuit court of appeals.” *Id.*

ANALYSIS

Cognizability

Based on the reasoning set forth in *Turner v. Hudson*, 2016 U.S. Dist. LEXIS 6019(S.D. Ohio Jan. 19, 2016), denying a parallel motion to amend in a capital habeas case, the Court concludes that the claims sought to be pleaded in Campbell’s proposed amended petition are not cognizable in habeas corpus, but are rather method-of-execution claims which must be pursued in a § 1983 action. Campbell is already a plaintiff in *In Re: Ohio Execution Protocol Litigation* Case No. 2:11-cv-1016, and has pleaded parallel claims in that case. Campbell’s Motion to Amend is DENIED on that basis. See also *Henderson v. Warden*, No. 1:12-cv-703, 2015 U.S. Dist. LEXIS 134120 (S.D. Ohio Sept. 30, 2015)(Frost, D.J.)

The Warden also argues Campbell’s federal statutory claims are barred by Ohio’s

¹ Extended to October 27, 2015. The instant Motion is timely filed.

Eleventh Amendment immunity (Opposition, ECF No. 20, PageID 567). The immunity of States from suit in federal court provided by the Eleventh Amendment does not apply to habeas corpus cases. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 178-79 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976); *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *Ex Parte Royall*, 117 U.S. 241, 249 (1886). Therefore the Eleventh Amendment is not a basis on which to deny the Motion.

Campbell's proposed amended petition contains the following Ground for Relief

Ground Three: CAMPBELL'S SENTENCE OF DEATH BY LETHAL-INJECTION UNDER OHIO LAW IS AN INVALID SENTENCE AND THUS UNCONSTITUTIONAL BECAUSE OHIO'S EXECUTION LAWS ARE PREEMPTED BY FEDERAL LAW.

Sub-claim A. Lethal-injection executions in Ohio are unconstitutional because Ohio statutory and administrative law governing executions, as written and as administered, are preempted by federal law, leaving Ohio with no valid lethal-injection statute and no valid lethal-injection protocol, and thus no way to carry out a death sentence.

Sub-claim B. DRC's actions in obtaining execution drugs, its import, purchase, possession, dispensing, distribution and/or administration (and any other terms of art under the CSA) of those drugs violate the CSA.

Sub-claim C. The Ohio lethal-injection statute and DRC's Execution Protocol purport to permit DRC to obtain controlled substances used in executions without a valid prescription, in violation of the CSA and DEA regulations.

Sub-claim D. The Ohio lethal-injection statute and DRC's Execution Protocol purport to authorize DRC to provide controlled substances to Drug Administrators in contravention of the CSA and DEA regulations.

Sub-claim E. DRC's actions in obtaining execution drugs violate the FDCA because those drugs used in an execution are unapproved drugs and/or misbranded drugs and/or constitute unapproved Investigational New Drugs.

Sub-claim F. Thiopental sodium can never be used as an execution drug in compliance with the FDCA.

(ECF No. 19-1). Whether Ohio enjoys sovereign immunity with respect to these claims or whether federal law pre-empts Ohio execution law in the ways Campbell argues – arguments the Warden makes – are issues that are not properly presented in this case. Campbell cites no Supreme Court decisional law clearly establishing within the meaning of 28 U.S.C. § 2254(d)(1) that a State’s ignoring of federal drug laws in executing a death sentence violates the United States Constitution. Put another way, there is no clearly established constitutional right not to be executed with drugs obtained or used in violation of federal statute. On that basis, Ground Three is not cognizable in habeas corpus. On the other hand, it seems appropriate to test this proposition in § 1983.

Second or Successive

Campbell filed a previous habeas corpus petition in this Court challenging his conviction and death sentence. *Campbell v. Warden*, No. 2:05-cv-193. This Court denied relief, the Sixth Circuit affirmed, and the Supreme Court denied certiorari. *Campbell v. Bradshaw*, 674 F.3d 578 (6th Cir. 2012), *cert. den. sub nom Campbell v. Robinson*, 133 S. Ct. 527, 184 L. Ed. 2d 344 (2012). A habeas petitioner may not proceed on a second or successive habeas petition directed to the same judgment without prior permission from the circuit court of appeals. 28 U.S.C. § 2244(b)(2).

The Warden contends that “[b]ecause only the Circuit Courts have statutory jurisdiction to make a screening determination of whether a petition is successive, this Court has no

jurisdiction to take on that ‘gate-keeping’ function.” (ECF No. 20, PageID 571, citing *Felker v. Turpin*, 518 U.S. 651, 662 (1996).). The Sixth Circuit has interpreted the AEDPA differently, holding that a district court must make the second or successive characterization in the first instance and transfer the case only after it has decided that an application is second or successive. *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).

Campbell cites a host of cases in which this Court and others have held that petitions such as his are not second or successive because they arise anew whenever a new lethal injection protocol is adopted (Motion, ECF No. 19, PageID 488-89, citing *Sheppard v. Warden, Chillicothe Corr. Inst.*, No. 1:12-cv-198, 2013 U.S. Dist. LEXIS 5560, at *19 (S.D. Ohio Jan. 14, 2013); *Tibbetts v. Warden*, No. 1:14-cv-602, 2014 U.S. Dist. LEXIS 177726 (S.D. Ohio Dec. 29, 2014) (Merz, M.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, 2012 U.S. Dist. LEXIS 93083, at *8-9 (S.D. Ohio July 5, 2012) (Sargus, J.); and *Phillips v. Robinson*, No. 5:12-cv-2323, 2013 U.S. Dist. LEXIS 108820, at *44-45 (N.D. Ohio Aug. 2, 2013) (Lioi, J.).

Campbell’s Motion fails to mention that all of these cases were decided before *Glossip*, *supra*. The rationale for treating claims as arising anew was based on extending the statute of limitations analysis in *Cooney v. Strickland*, 479 F.3d 412, 418-19 (6th Cir. 2007) and *Cooney (Beuke) v. Strickland*, 604 F.3d 939, 942 (6th Cir. 2010), to the second or successive issue.

That rationale is no longer viable in light of *Glossip*. Habeas claims must attack the validity of the judgment itself and thus accrue when the death sentence is imposed, not when the State

adopts a new lethal injection protocol. Challenges directed to the particulars of a method of execution must, under *Glossip*, be brought in § 1983 litigation.

Landrum v. Robinson, 2015 U.S. Dist. LEXIS 146195 (S.D. Ohio Oct. 28, 2015)(Merz, M.J.)(concluding that a parallel second-in-time petition based on adoption of a new lethal injection claim was second-or-successive).

This case is accordingly ordered TRANSFERRED to the Sixth Circuit Court of Appeals for a determination of whether it can proceed.

January 20, 2016.

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