

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

v.

BOBBY T. SHEPPARD,

Defendant.

Case No. 97-1474

*DEATH PENALTY CASE*

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MOTION TO SET EXECUTION DATE

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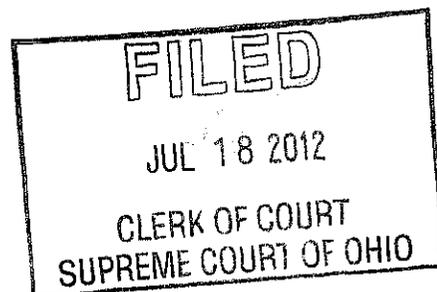
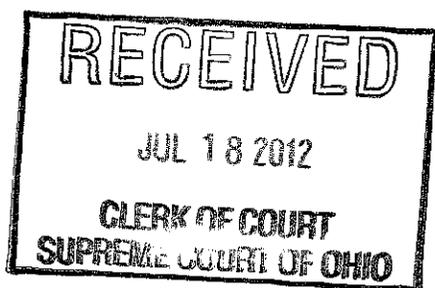
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BOBBY T. SHEPPARD



## MOTION TO SET EXECUTION DATE

### I. Statement of the Case and Facts

In May of 1995, Defendant Bobby T. Sheppard (hereinafter "Sheppard") was convicted in Hamilton County, Ohio, of aggravated murder with capital specifications and sentenced to death. *See State v. Sheppard* (1998), 84 Ohio St. 3d 230. After his conviction and sentence, Sheppard filed a motion for new trial in which he alleged that Juror Fox committed misconduct by consulting a psychologist during the trial. The trial judge denied the motion. Upon direct appeal, the Ohio Court of Appeals and this Court affirmed. *See State v. Sheppard*, 1997 Ohio App. LEXIS 2501 (June 11, 1997), Hamilton App. Nos. C-950402 and C-950744, unreported; *State v. Sheppard*, (1998), *supra*, certiorari denied, *Sheppard v. Ohi* (1999), 527 U.S. 1026. Additionally, the trial court dismissed Sheppard's third amended petition for post-conviction relief, and the court of appeals affirmed. *State v. Sheppard*, 1999 Ohio App. LEXIS 1179 (Mar. 26, 1999), Hamilton App. No. C-980569, unreported. This Court then declined to accept Sheppard's appeal. *State v. Sheppard* (1999), 86 Ohio St. 3d 1437 (1999), certiorari denied, *Sheppard v. Ohio*, 528 U.S. 1168 (2000).

On March 9, 2000, Sheppard filed an application with the court of appeals to reopen his appeal from his convictions pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St. 3d 6, alleging ineffective assistance of appellate counsel before that court. However, the court of appeals found that Sheppard had failed to show good cause for filing his application more than ninety days after that court's judgment was journalized, as required by App.R. 26(B)(2)(b). *State v. Sheppard* (Oct. 2, 2000), Hamilton App. Nos. C950402 and C-950744, unreported. On April 11, 2011, this Court affirmed the judgment of the Ohio Court of Appeals, on the alternate "merits" ground that Sheppard failed to show a genuine issue with respect to appellate counsel's

effectiveness. *State v. Shepard* (2001), 91 Ohio St. 3d 329.

In the meantime, on May 23, 2000, Sheppard filed with the trial court a second or successive petition for post-conviction relief, in which he presented for the first time a claim that trial counsel rendered constitutionally ineffective assistance in failing to support the motion for new trial with additional evidence. The trial court dismissed the petition for want of jurisdiction. Upon Sheppard's appeal, the Ohio Court of Appeals affirmed, holding that "where, as here, the petitioner's claims for relief could have been raised in his first post-conviction petition, a successive petition was insufficient to invoke the trial court's jurisdiction to entertain his claims." *State v. Sheppard*, 2001 Ohio App. LEXIS 1611 (April 6, 2001), Hamilton County No. C-000665, unreported, Slip Opinion at \* 5 - \*6, citing *State v. Murawski*, 1999 Ohio App. LEXIS 3723 (Aug. 12, 1999), Cuyahoga App. No. 74581, unreported (applying Ohio's doctrine of res judicata to second post-conviction petition). This Court subsequently dismissed Sheppard's discretionary appeal. *State v. Sheppard* (2001), 92 Ohio St. 3d 1445.

On June 20, 2000, Sheppard filed with the United States District Court for the Southern District of Ohio a petition for a writ of habeas corpus in which he challenged his conviction and sentence on constitutional grounds. On March 4, 2009, the district court issued an opinion and order and final judgment dismissing Sheppard's petition. On September 13, 2011, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *Sheppard v. Bagley* (6<sup>th</sup> Cir. 2011), 657 F.3d 338. On June 11, 2012, the Supreme Court of the United States denied Sheppard's petition for a writ of certiorari. *Sheppard v. Robinson*, \_\_ U.S. \_\_, 2012 U.S. LEXIS 4312. On July 6, 2012, the Sixth Circuit issued its mandate, bring to a close Sheppard's federal habeas corpus proceedings. See Attached Copy of Mandate.

## II. Argument and Request for Relief

“A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years ‘the significant costs of federal habeas review,’ [*McCleskey v. Zant* (1991),] 499 U.S. [467] at 490-491, the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. *See generally Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991). To unsettle these expectations is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty,’ *Herrera v. Collins*, 506 U.S. 390, 421, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993) (O’CONNOR, J., concurring), an interest shared by the State and the victims of crime alike.” *Calderon v. Thompson* (1998), 523 U.S. 538, 556; *see also State v. Steffen* (1994), 70 Ohio St. 3d 399, 411 (noting that the reasoning behind the Supreme Court's adoption of the cause and prejudice standard in *McCleskey* “echoes strikingly this court's concerns as articulated in the preamble to the Rules of Superintendence.”).

With the Sixth Circuit’s July 6, 2012 mandate, Sheppard’s lengthy federal habeas corpus proceedings have run their course. Sheppard has no currently pending actions before the Ohio courts, and any such actions which he might file in the future presumably are insufficient to warrant a further delay in the execution of sentence. Accordingly, it is now appropriate to set a final date for Sheppard’s execution. The State anticipates that in response Sheppard will cite a civil suit in the federal district court for the Southern District of Ohio, under Title 42 Section

1983, in which he and other condemned prisoners have challenged Ohio's procedures for conducting executions by lethal injection. "Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough* (2006), 547 U.S. 573, 584. The State respectfully submits that it is therefore appropriate for this Court to set a date for Sheppard's execution, and that the federal district court is in the best position to determine whether Sheppard can justify further delay to pursue his claims. Sheppard also likely will cite various motions filed by him to reopen his federal habeas corpus proceedings. The mere pendency of those motions cannot overcome the State's compelling interests. *Calderon v. Thompson, supra*.

Accordingly, the State respectfully requests that the Court grant the State's motion and set a date for Sheppard's execution forthwith.

Respectfully Submitted,

Joseph T. Deters (0012084P)  
Prosecuting Attorney



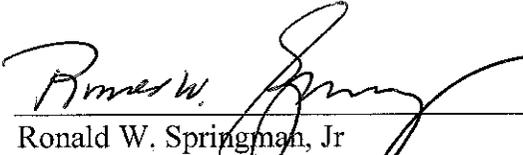
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**COUNSEL FOR PLAINTIFF STATE OF OHIO**

**CERTIFICATE OF SERVICE**

On 17<sup>th</sup> July, 2012, a copy of the foregoing was sent via first class, U.S. mail to: Allen L. Bohnert, 10 W. Broad St., Suite 1020, Columbus, OH, 43215, Counsel for Defendant.

  
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Ronald W. Springman, Jr  
Assistant Prosecuting Attorney