

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	Cr. ID No. 92003717DI
)	
ROBERT W. JACKSON, III,)	
)	
Defendant.)	
)	

Submitted: March 29, 2006
Decided: April 5, 2006

Upon Defendant's Motion to Vacate Execution Date or, Alternatively,
For Stay of Execution.

DENIED.

ORDER

This 5th day of April, 2006, upon consideration of Defendant's Motion to Vacate Execution Date or, Alternatively, for Stay of Execution, and the State's responses thereto, it appears to the Court that:

1. Robert W. Jackson, III ("Defendant") was arrested on April 9, 1992, and later indicted on two counts of First Degree Murder, Burglary Second Degree, Conspiracy Second Degree, Robbery Second Degree, and three counts of Possession of a Deadly Weapon During the Commission of a Felony. After a jury trial that ended on March 30th, 1993, and presided over by the Honorable Vincent A. Bifferato, Defendant was convicted of all the

indicted counts. Following a penalty hearing, the jury unanimously found that the prosecution had proven beyond a reasonable doubt the existence of two statutory aggravating circumstances and, by a vote of 11 to 1, found that the aggravating circumstances outweighed any mitigating circumstances found by the jury. The trial judge agreed with the jury's recommendation and sentenced Defendant to death by lethal injection.

On direct appeal, the Delaware Supreme Court affirmed Defendant's convictions but vacated the death sentence as to both counts of First Degree Murder and remanded for a new penalty hearing.¹ After the new penalty hearing in September 1995, the jury again unanimously found that the prosecution had proven the existence of two statutory aggravating circumstances and, by a vote of 11 to 1, found that the aggravating circumstances outweighed any existing mitigating circumstances. The Court then independently assessed the evidence in conjunction with the jury's recommendation and again imposed upon Defendant a sentence of death. That sentence of death was affirmed by the Delaware Supreme Court upon appeal.²

¹ *Jackson v. State*, 643 A.2d 1360 (Del. 1995).

² *Jackson v. State*, 684 A.2d 745 (Del. 1996).

Then, in August 1997, Defendant filed a petition for postconviction relief in this Court. After various proceedings, that petition was denied in August 1999. On appeal, the Delaware Supreme Court affirmed the denial of Defendant's petition for postconviction relief.³

In August 2001, Defendant began federal proceedings by filing a Petition for Writ of Habeas Corpus in the United States District Court for the District of Delaware. The District Court subsequently denied Defendant's petition.⁴ On December 20, 2005, the Third Circuit Court of Appeals denied Defendant's application for a certificate of appealability under 28 U.S.C. § 2253.⁵ The mandate from the Third Circuit Court of Appeals was received by this Court on January 13, 2006. This Court held an office conference on January 18, 2006, and issued an order that set Defendant's execution date as May 19, 2006. This was the date requested by the State. Defendant now brings the instant motion to vacate that order or, alternatively, to stay Defendant's May 19, 2006, execution.

2. Defendant argues that the decision of Third Circuit Court of Appeals is "flawed, and that it should be reviewed by the United States Supreme

³ *Jackson v. State*, 770 A.2d 506 (Del. 2001).

⁴ *Jackson v. Carroll*, 2004 WL 1192650 (D. Del.).

⁵ *Jackson v. Carroll*, 2005 WL 3477556 (3d Cir.).

Court, via a Petition for Writ of Certiorari.”⁶ Defendant requests the relief sought by the instant motion in order to pursue a writ of certiorari without the burden of a “truncated schedule imposed by the execution date.”⁷ The United States Supreme Court has apparently granted a 60-day extension of time for Defendant to file a petition for writ of certiorari with that court.⁸ Both the deadline for filing Defendant’s Petition for Writ of Certiorari and Defendant’s execution date are apparently the same day: May 19, 2006.⁹ Defendant contends that “[i]t is appropriate for this Court to grant this motion since this Court set the current execution date, at least in part, based upon undersigned counsel’s prior belief that there would be no certiorari proceeding herein.”¹⁰ Defendant advises in this motion that he will file a petition for writ of certiorari with the United States Supreme Court so that the court may review the Third Circuit’s December 20, 2005, denial of Defendant’s application for a certificate of appealability, which Defendant characterizes as a “plainly erroneous ruling on a matter of constitutional

⁶ Def.’s Mot. ¶ 8. Counsel for Defendant indicated at the January 18, 2006, office conference that they did not expect that any further litigation would ensue.

⁷ *Id.* at ¶ 10.

⁸ *Id.* at ¶ 8.

⁹ *See* Def.’s Reply ¶ 1.

¹⁰ Def.’s Mot. ¶ 11.

law” and “in conflict with the decisions of other Circuits and with the decisional law of the United States Supreme Court.”¹¹ Defendant claims that “[t]he granting of this motion shall cause no substantial prejudice to the State ... [and that] [c]learly, as in all death penalty cases, [Defendant] will suffer irreparable harm if the stay is denied.”¹²

Defendant also relies on paragraph (C)(1) of Supreme Court Administrative Directive 131, which provides, in pertinent part, that “[t]he judge may issue, upon the defendant’s written motion, a stay of execution to allow for disposition of the petition for a writ of certiorari or a motion for postconviction relief.”¹³ This language, Defendant argues, should prevail over the supposedly contrary language in Superior Court Criminal Rule 61(D)(7)¹⁴ and authorizes this Court to grant Defendant’s request for a stay of

¹¹ *Id.* at ¶ 14, 17 (“[T]he Third Circuit erroneously applied the demanding materiality standard of *Kyles v. Whitley*, 514 U.S. 419 (1995), which requires *the defendant* to show a ‘reasonable probability’ of a different result, when the proper materiality standard under the circumstances of this case ... [is that] which requires *the State* to show that the error is harmless beyond a reasonable doubt.”).

¹² *Id.* at ¶ 18-19.

¹³ Def.’s Reply ¶ 2 (quoting Admin. Dir. No. 131, Del. Supr., Veasey, C.J. (July 11, 2001) at 5).

¹⁴ Super. Ct. Crim. R. 61(D)(7) provides:

The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subsection for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate

execution. Defendant also argues that this Court’s authority to issue a stay in this situation (i.e., in the course of federal habeas corpus proceedings) can be found in Supreme Court Rule 35(e).¹⁵

3. The State, on the other hand, responds that, under the appropriate Superior Court Criminal Rules and Delaware case law, “once the execution order was issued [on] January 23, the Court lost all authority to issue a stay pending any further legal proceedings.”¹⁶ Essentially, the State argues that this Court is not the proper forum for the request presently made by the Defendant; rather, such a motion should be made to “the appropriate federal court.”¹⁷ As for the applicability of Supreme Court Rule 35(e), the State counters that “the last sentence of Rule 61(*l*)(7), referring to Supreme Court Rule 35(e), cannot be read to erase the preceding sentence of the rule and its reference to federal litigation.”¹⁸ Finally, in response to Defendant’s

federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

¹⁵ Supr. Ct. R. 35(e) provides:

An application, either pro se or through counsel, by a defendant sentenced to death, for a stay of execution of sentence, following the issuance of the mandate of this Court, in any proceeding, including postconviction proceedings, may be granted by the Superior Court and shall be initially made to that Court, whose decision shall be reviewable by this Court.

¹⁶ State’s Ans. 4.

¹⁷ *Id.* (quoting Super. Ct. Crim. R. 61(*l*)(7)).

¹⁸ State’s Supp. to Ans. 5.

assertion that the May 19, 2006, execution date was set, at least in part, because defense counsel indicated at the January 18, 2006, office conference that no further litigation would take place, the State contends that “[t]he subjective expectations of the Court, the State, and the defense [with respect to whether or not further litigation would occur] ... were and are totally irrelevant.”¹⁹

4. The issue is whether this Court has the authority to either 1) vacate its January 23, 2006, order setting an execution date or 2) issue a stay of execution, in order that the Defendant may be able to pursue a Petition for Writ of Certiorari in the United States Supreme Court for review of the Third Circuit Court of Appeal’s denial of Defendant’s application for a certificate of appealability in Defendant’s federal habeas corpus action. For the reasons set forth below, Defendant’s motion is **DENIED**.

5. First, as to Defendant’s Motion to Vacate Execution Date, no authority was submitted by Defendant that would allow this Court, on these facts and with this case’s procedural background, to “vacate” the January 23, 2006, order setting the May 19, 2006, execution date.²⁰ Nor was this relief

¹⁹ State’s Ans. 4.

²⁰ The word “vacate” is defined as “[t]o nullify or cancel; make void; invalidate.” Black’s Law Dictionary 1546 (7th ed. 1999). Thus, a vacation of an order is a nullification of the order. A “stay”, however, has been defined as “[t]he postponement or halting of a proceeding, judgment, or the like.” *Id.* at 1425.

strenuously argued for by the Defendant. Most of Defendant's arguments are supportive of his request for a stay. Any vacation of the January 23, 2006, order would be, as a practical matter, tantamount to a stay. The Court will not vacate its January 23, 2006, order.

6. Second, as to Defendant's request that the Court stay defendant's execution date, this Court holds that it is presently without authority to issue such a stay.

Superior Court Criminal Rule 61(l)(7) provides:

The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subsection for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

Under this rule, "the Superior Court is not permitted to entertain an application to stay an execution date for purposes of subsequent postconviction proceedings."²¹ As Rule 61(l)(7) provides, the proper judicial official for such an application is a judge of the "appropriate federal court," which, in this case, is a judge of the Third Circuit Court of Appeals or a justice of the United States Supreme Court. This conclusion is further buttressed by the applicable federal statute, 28 U.S.C. § 2101(f), which provides:

²¹ *Steckel v. State*, 884 A.2d 483, 485 (Del. 2005) (affirming Superior Court's denial defendant's motion for stay of execution).

In any case in which the final judgment or decree of any court is subject to review by the [United States] Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of *certiorari* from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court...

That section “makes clear that only an appellate court or a justice of the Supreme Court has jurisdiction to stay an appellate court’s final judgment pending Supreme Court review of a *certiorari* petition.”²² Here, the Third Circuit Court of Appeals rendered the final judgment when it denied Defendant’s certificate of appealability. Therefore, a stay in this case can only, at this juncture, be granted by a judge of that court or by a justice of the United States Supreme Court.

Moreover, Defendant cannot seek refuge in Supreme Court Rule 35(e), which provides generally for stays in capital murder cases. The last sentence of Rule 61(l)(7), which states the applicability of Rule 35(e), cannot be read to swallow the sentence that precedes it. As Rule 61(l)(7) provides:

The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subsection for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

²² *U.S. v. Lentz*, 352 F.Supp.2d 718, 725 (E.D. Va. 2005) (denying defendant’s motion to stay because the court, as a District Court, did not have jurisdiction to enter such a stay).

The last sentence of Rule 61(l)(7) (“An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e)”) operates to make Rule 35(e) applicable only to those application[s] to stay execution” that do not involve “further [state] postconviction proceedings,” or “federal certiorari or habeas corpus proceedings.”

Defendant’s reliance on paragraph (C)(1) of the Delaware Supreme Court’s Administrative Directive 131 for the proposition that this court has the authority to issue a stay in this situation, where Defendant is continuing with efforts to seek relief from the federal courts, is misplaced. Read in context with the entirety of Supreme Court Administrative Directive 131, paragraph (C)(1) potentially allows a stay in the situation of either 1) a direct appeal from a judgment of the Delaware Supreme Court via a petition for writ of certiorari in the United States Supreme Court, or 2) “a motion for postconviction relief.” Paragraph (C)(1) does not speak to the situation presently before this Court: the pendency of ongoing federal habeas corpus proceedings. The fact that paragraph (C)(1) is captioned generally “POST APPEAL PROCEEDINGS” does not alter this sensible construction of paragraph (C)(1), especially when that paragraph is considered along with Administrative Directive 131 as a whole, and with Rule 61.

Defendant additionally claims that the date that this Court set for Defendant's execution was based, at least in part, by defense counsel's apparent belief at the January 18, 2006, conference that Defendant was not going to authorize any further litigation. A part of Defendant's argument seems to be that because (in Defense counsel's view) the execution date was set in part based on such stated intentions of Defendant, the execution should be stayed because those intentions have changed. The Court did adopt a sentencing date of "not less than ninety (90) days nor more than one hundred twenty (120) days" (thus tracking the language of paragraph (C)(1) of the Directive), but did so in part because this timetable has been utilized by other Superior Court judges in setting an execution date after state postconviction litigation is concluded. However, such a claim by the Defendant is irrelevant for present purposes since, as stated above, this Court is without authority to entertain Defendant's instant motion.²³

This Court's holding that its lack of jurisdiction to stay Defendant's May 19, 2006, execution makes it unnecessary to analyze the factors for the issuance of a stay.²⁴

²³ See *Steckel*, 884 A.2d, at 485.

²⁴ See *Id.* at 487.

7. For all of the above reasons, Defendant's Motion to Vacate Execution Date or, Alternatively, for Stay of Execution is **DENIED**.

IT IS SO ORDERED.

oc: Prothonotary
cc: Loren C. Meyers, Esquire
Thomas A. Foley, Esquire
John S. Malik, Esquire