

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS MCCANDLESS : CIVIL ACTION  
 :  
 v. :  
 :  
 DONALD T. VAUGHN, et al. : NO. 96-2310

**MEMORANDUM AND ORDER**

HUTTON, J.

December 14, 1999

Presently before the Court is Respondent District Attorney of Philadelphia County's Motion ("Commonwealth") to Stay the Operation of a Conditional Writ of Habeas Corpus and Petitioner's response thereto. For the reasons stated below, the Commonwealth's Motion is **DENIED**.

**I. BACKGROUND**

The genesis of this matter is a habeas corpus case in which this Court denied Petitioner's writ on June 27, 1997. On May 11, 1999, the United States Court of Appeals for the Third Circuit reversed the judgment of this Court and remanded the case with instructions to "order McCandless's release from confinement unless he is retried and convicted within a reasonable time." McCandless v. Vaughn, 172 F.3d 255, 270 (3d Cir. 1999) (emphasis added). The Respondent is now complaining that there has been insufficient time to "retry and convict" Petitioner, despite the fact that the Third

Circuit decision placed the Commonwealth on notice of the need to "retry and convict" well over six months ago.\<sup>1</sup>

On July 30, 1999, this Court entered an order consistent with the Third Circuit's mandate (Docket No. 37). As the Third Circuit remanded McCandless's writ without instruction concerning the boundaries of "a reasonable time," this Court's July 30, 1999 Order also left open to interpretation the term "a reasonable time."

As a result of the ambiguity created, Petitioner filed a motion with this Court on August 13, 1999, for clarification of the Order executing the Third Circuit's mandate. Upon consideration of Petitioner's clarification motion, the Commonwealth's response, and all extenuating circumstances, this Court issued an Order on September 17, 1999, amending the July 30 Order to state that "a reasonable time" was not to exceed one-hundred and twenty (120) days (Docket No. 45). Neither Petitioner, nor the Commonwealth moved for reconsideration or clarification of the Amended Order.\<sup>2</sup>

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<sup>1</sup> The Court acknowledges Respondent's position that the Third Circuit failed to return the State Court record until September 14, 1999, however, the Court took such circumstance into consideration when it amended the July 30, 1999 Order to impose a one-hundred and twenty (120) day limitation. (See Mot. for Stay at 2 n.1; see also Order, Hutton, J. at 1, filed Sept. 17, 1999).

<sup>2</sup> Respondent raises a question about the date from which the one-hundred and twenty (120) days was to have run. First, it is clear that by amending the July 30, 1999 Order, rather than issuing a new Order, said time limitation was intended to run from July 30, 1999. Second, this issue is largely academic as Respondent admits that even if the time limitation ran from September 17, 1999 and expired on January 15, 2000, the Commonwealth would still not be able to comply with said Order. (See Mot. for Stay at 2 n.2).

Petitioner's retrial was scheduled to begin on or about November 17, 1999. On October 29, 1999, the Philadelphia Court of Common Pleas began hearing a motion by Petitioner to exclude testimony of a now deceased individual because Petitioner had an inadequate opportunity to cross-examine during the original trial. Petitioner's motion in Common Pleas Court was granted on November 10, 1999.\<sup>3</sup>

The Commonwealth asserts that said evidentiary exclusion substantially handicaps its ability to retry Petitioner and that it intends to seek reconsideration and/or appeal of the decision. As such, it is the position of the Commonwealth that because such reconsideration or appeal cannot be concluded within the Court's one-hundred and twenty (120) day retrial period, it has been involuntarily prevented from complying with the conditional writ of habeas corpus. Petitioner, through his response to this instant motion, requests release by operation of the Third Circuits "reasonable time" mandate.

## **II. DISCUSSION**

The expiration of the one-hundred and twenty (120) day limitation in which Petitioner was to have been "retried and convicted" was on Monday, November 29, 1999. See Fed. R. Civ. P.

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<sup>3</sup> Respondent states that Petitioner's motion was granted on December 10, 1999. (See Mot. for Stay at 2). This is an obvious error as this instant motion was filed on November 26, 1999.

6(a). The Commonwealth's motion for stay was filed with the Court on Friday, November 26, 1999. It bears mentioning that the Commonwealth's motion is entirely devoid of any federal authority in support its position that a stay is warranted.\<sup>4</sup>

Further, the Commonwealth fails to evidence which Federal Rule of Civil Procedure is the basis for its motion to stay the Amended July 30 Order. As such, the Court finds that the most appropriate rule to be applied is the catch-all provision contained in Federal Rule of Civil Procedure 60(b), providing for relief from a Judgment or Order.\<sup>5</sup> See Fed. R. Civ. P. 60(b)(6) (stating "any other reason justifying relief").

The Third Circuit has stated that "[r]elief under Rule 60(b)(6) 'is available only in cases evidencing extraordinary

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<sup>4</sup> Respondent cites one federal case which held that the an appeal by the government in a federal criminal case tolls the time for trial under the Federal Speedy Trial Act. See United States v. Tyler, 878 F.2d 753, 756 (3d Cir. 1989). Such holding is of no value to Respondent's position as there is currently no federal claim being appealed. Further, Respondent is not appealing the Court's conditional writ of habeas corpus. Rather Respondent asserts that the potential appeal by the Commonwealth of an adverse State proceeding should toll the expiration of a time limitation in a Federal District Court Order. In this context, Respondent cites no support for such a conclusion.

<sup>5</sup> A motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) is clearly inappropriate as such motion must be made within 10 days after the entry of the Judgment. Fed. R. Civ. P. 59(e). As Respondent's motion cannot be characterized as a motion to reconsider or as an appeal, the most appropriate standard is Rule 60(b) which provides for relief from a Judgment or Order.

Aside from Fed. R. Civ. P. 60(b)(6), providing for relief from a judgment upon "any other reason justifying relief," there are five (5) additional grounds for granting Rule 60(b) relief. There is no basis, however, within the Respondent's motion, to conclude that any of these provisions are applicable. Respondent states no facts to support a finding of (1) mistake, inadvertence, surprise, or excusable neglect, (2) the existence of newly discovered evidence, (3) fraud, misrepresentation, or other misconduct, (4) that the judgment is void, or (5) that the judgment is satisfied, released or discharged. See Fed. R. Civ. P. 60(b)(1)-(5).

circumstances.’ ” Morris v. Horn, 187 F.3d 333, 341 (3d Cir. 1999) (citations omitted). “Furthermore, ‘[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).’ ” Id. In this matter the Commonwealth states that the reason for its inability to proceed with retrial is due to an unfavorable evidentiary ruling which it intends to appeal before Petitioner’s retrial. (See Mot. for Stay at 3). Such a reason by itself clearly does not satisfy the “extraordinary circumstances” requirement of Rule 60(b)(6). See, e.g., Morris, 187 F.3d at 341 (stating that the deliberate choice not to petition for certiorari when a similar case was pending was insufficient an “extraordinary circumstance” under Rule 60(b)).

Further, in Hilton v. Braunskill, the United States Supreme Court considered an analogous situation regarding the availability of a stay pending a State appeal of a conditional writ of habeas corpus. 481 U.S. 770, 777, 107 S. Ct. 2113, 2119 (1987). The Hilton Court first noted that “[t]here is a presumption in favor of enlargement of the petitioner with or without surety, but it may be overcome if the traditional stay factors tip the balance against it.” Id. at 777, 107 S. Ct. at 2119. The Court then stated that the traditional stay factors to be considered are:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the stay applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially

injure the other parties in the proceeding; and (4) where the public interest lies.

Id. at 776, 107 S. Ct. at 2119.

First, the Commonwealth in this matter makes no showing that there is any likelihood of success on the merits of any appeal, let alone a strong one. Second, although not discussed in the Commonwealth's motion, the Court notes that Petitioner will suffer an irreparable injury through his continued confinement beyond the "reasonable time" for retrial and conviction mandated by the Third Circuit. Third, the Commonwealth makes no showing that it will be injured by the release of Petitioner pending retrial, and the Court is without information to make such a determination. Fourth, although the Commonwealth points out that Petitioner has been charged with first degree murder, the Commonwealth makes no claim that Petitioner would be a current danger to the community some seventeen years after his defective conviction. See, e.g., McCandless, 172 F.3d at 259 (stating McCandless was convicted on August 20, 1982).

Although the Court is sensitive to the Commonwealth's position, it is forced to conclude that the Commonwealth has failed to present sufficient cause for the Court to justify a stay of the Amended July 30 Order. This is especially true in light of the fact that the mandate of the Third Circuit was not that retrial should commence within a "reasonable time," but rather that Petitioner must be "retried and convicted within a reasonable

time." See McCandless, 172 F.3d at 270; see also Order, Hutton, J., filed July 30, 1999, as amended Sept. 17, 1999 (Docket Nos. 37, 45).

Further, given that the Commonwealth is now well beyond the November 29, 1999 "retrial and conviction" deadline in the Amended July 30 Order, and that any appeal of the adverse Common Pleas ruling will prohibit a retrial even by mid-January of 2000,<sup>6</sup> some four months from the Court's Amended September 17 Order, it is evident that the Commonwealth is unable to retry and convict Petitioner within a reasonable time. As such, the Court denies the Commonwealth's Motion and Orders the Petitioner's release pending any retrial.

An appropriate Order follows.

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<sup>6</sup> See Mot. for Stay at 4 n.4 (stating an expedited appeal will not conclude by January 15, 2000).

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O R D E R

AND NOW, this 14<sup>th</sup> day of December, 1999, upon consideration of Respondent's Motion for Stay of a Conditional Writ of Habeas Corpus (Docket No. 47), and Petitioner's response thereto, IT IS HEREBY ORDERED that the Respondent's Motion is **DENIED**.

IT IS FURTHER ORDERED that pursuant to the Mandate of the United States Court of Appeals for the Third Circuit, and a reasonable time (to wit, 120 days) having elapsed since this Court issued its conditional writ of habeas corpus (Order dated July 28, 1999, entered July 30, 1999, as amended September 17, 1999), and pursuant to 28 U.S.C. § 2243, that the Respondents and their successors as the Petitioner's custodians shall immediately release Petitioner Thomas R. McCandless (State Prisoner No. AY-8946; Phila. Prisoner No. 433053) from custody in connection with case number 277-279, April Term 1982 (Court of Common Pleas, Philadelphia

County). The United States Marshal for this District shall deliver a certified copy of this Writ to the Warden of the Curran-Frumhold Correctional Facility, Philadelphia, Pennsylvania, forthwith.

BY THE COURT:

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HERBERT J. HUTTON, J.