

ARKANSAS SUPREME COURT

No. CR 94-358

NOT DESIGNATED FOR PUBLICATION

TERRICK NOONER
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered June 1, 2006

PRO SE PETITION FOR WRIT OF
MANDAMUS AND MOTION FOR
IMMEDIATE EXECUTION OF
SENTENCE [CIRCUIT COURT OF
PULASKI COUNTY, CR 93-966A]

PETITION FOR WRIT OF
MANDAMUS TREATED AS MOTION
TO SET DATE FOR EXECUTION OF
SENTENCE AND PETITION AND
MOTION FOR IMMEDIATE
EXECUTION DECLARED
PREMATURE

PER CURIAM

Petitioner Terrick Nooner was found guilty by a jury of capital murder and sentenced to death. We affirmed. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995). Petitioner subsequently filed in the trial court a petition pursuant to Criminal Procedure Rule 37.1. The petition was denied, and the order was affirmed. *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999).

In 2003, petitioner filed a *pro se* motion to lift the stay of execution in his case. We declared the motion moot because there was no stay of execution as such in effect. *Nooner v. State*, 352 Ark. 481, 101 S.W.3d 834 (2003) (*per curiam*). Petitioner then asked that the motion be reconsidered. The motion and an amended motion for reconsideration were denied. *Nooner v. State*, CR 94-358 (Ark. May 15, 2003) (*per curiam*).

On February 13, 2004, and February 27, 2004, petitioner again filed *pro se* motions in which

he asked this court to lift the stay of execution in his case. We said, as we had when the motion to lift the stay of execution was denied in 2003, that the circuit court was obligated to vacate the stay of execution it issued when petitioner's Rule 37.1 petition was affirmed on appeal. *See* Ark. R. Crim. P. 37.5(g)(2). In its response to the 2003 motion, the State said that it did not intend to request that the Governor set another execution date until such time as petitioner had exhausted his federal remedies. As there was nothing on our docket or in petitioner's motions to indicate that there had been any change in petitioner's status, *i.e.* that an execution date had been set and that there was a stay in effect, petitioner's motions were declared moot. *Nooner v. State*, CR 94-358 (Ark. March 25, 2004) (*per curiam*).

In December 2004, petitioner filed a motion in which he again asked this court to lift the stay of execution. The motion was apparently based on petitioner's belief that he had exhausted his federal remedies. We concluded that petitioner had not demonstrated that there had been any change in his circumstances since his prior motions were declared moot in March 2004 and held the motion to be moot. *Nooner v. State*, CR 94-358 (Ark. January 20, 2005) (*per curiam*).

On December 6, 2005, petitioner filed a petition for writ of mandamus in which he asked that an execution date be set on the ground that the United States District Court of Appeals for the Eighth Circuit had disposed of his appeal. We treated the motion as a motion to set a date for execution of the death sentence and for other relief. In its response to the mandamus petition, the State noted that after the Eighth Circuit Court of Appeals affirmed the denial of relief in petitioner's case in *Nooner v. Norris*, 402 F.3d 801 (8th Cir. 2005), petitioner filed a motion to stay the mandate from that court pending the filing of a petition for writ of *certiorari* with the United States Supreme Court. A copy of the court's order entered December 7, 2005, granting the stay through March 6, 2006, or final

disposition of the case by the Supreme Court if a petition for writ of *certiorari* were indeed filed was appended to the State's response. As it was clear that petitioner had not exhausted his federal remedies and thus had not demonstrated that there was an change in his circumstances since the December 2004 motion to set an execution date was declared moot, the mandamus petition was declared moot. *Nooner v. State*, CR 94-358 (Ark. January 5, 2006) (*per curiam*).

On May 4, 2006, petitioner filed the instant petition for writ of mandamus seeking to have his sentence executed without delay. In the petition he asserts that no petition for writ of *certiorari* will be filed in the United States Supreme Court and that he did not approve of his attorney's proceeding with a motion to proceed *in forma pauperis* in his case. On May 25, 2006, petitioner filed a related motion also now before us seeking immediate execution of the sentence.

In its response to the petition, the State said that a petition for writ of *certiorari* was filed by petitioner's attorney in the Supreme Court, *Nooner v. Norris*, No. 05-9830, and was pending. In an amended response, the State advised that the petition had been denied. The State further contended, correctly, that any complaint petitioner has about actions taken by his attorney in the federal court proceeding is a matter to be addressed by the federal court inasmuch as there is no current proceeding in a State court in petitioner's case.

Even though petitioner's petition for writ of *certiorari* has been denied by the United States Supreme Court, petitioner offers nothing to establish that an execution date has been set and thus has not demonstrated that there has been a change in his circumstances since the December 2004 motion to set an execution date was declared moot. Accordingly, the instant mandamus petition and motion for immediate execution of sentence are premature.

Petition treated as motion to set date for execution of sentence and petition and motion for

immediate execution of sentence declared premature.