**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

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***Re: State of Delaware v. Robert W. Jackson, III***
**I.D. No. 92003717 DI**

***Robert W. Jackson, III v. Commissioner Carl C. Danberg and Department of Correction***
**C.A. No. 11C-06-080 RRC**

Submitted: July 13, 2011
Decided: July 14, 2011

On Defendant Robert W. Jackson, III's Motion for Stay of Execution Based on Pending or Anticipated Federal Litigation.
**DENIED.**[1]

On Respondents Commissioner Carl C. Danberg's and Department of Correction's Motion to Dismiss Jackson's Petition for Declaratory Relief.
**GRANTED**.

On Petitioner Robert W. Jackson, III's Motion for Stay of Implementation of Revised Lethal Injection Regulations Based on the Administrative Procedures Act.
**DENIED AS MOOT.**

Dear Counsel:

## INTRODUCTION

Robert W. Jackson, III ("Jackson") has moved this Court to stay his scheduled July 29, 2011 execution pending 1) the resolution of his anticipated petition for certiorari to the United States Supreme Court and 2) the resolution of his motion to reopen the judgment in his federal class action civil rights lawsuit pending before the United States District Court relating to the State's revised lethal injection protocol. Jackson contends that Supreme Court Rule 35(e) vests this Court with the authority to stay his execution on both grounds.

At the same time, Jackson has filed a petition for declaratory relief, together with a separate Motion for Stay of implementation of the revised lethal injection regulations (which, if granted, would operate as a *de facto* stay of execution), alleging that Commissioner Carl C. Danberg and the Department of Correction have failed to comply with Delaware's

[1] Although the State's instant motion to dismiss and Jackson's motion to stay execution were filed separately in Jackson's civil and criminal cases, respectively, given the relatedness of the issues and relief sought, the Court has addressed all pending motions in this consolidated opinion. Accordingly, Robert W. Jackson, III is both a petitioner vis-à-vis Commissioner Carl C. Danberg and the Department of Correction, and a defendant vis-à-vis the State generally. For consistency and ease of reference, Defendant Robert W. Jackson, III will be referred to as "Jackson" throughout this opinion, and Respondents Commissioner Carl C. Danberg, the Department of Correction will also be indicated as "the State," unless the context otherwise requires.

Administrative Procedures Act ("APA") when promulgating Delaware's execution policies and procedures. The State's instant motion to dismiss is predicated on Delaware Superior Court Rule of Civil Procedure 12(b)(6) and asserts that Jackson has failed to state a claim for which relief can be granted. Jackson previously raised this claim in 2008; this Court granted Respondents' motion to dismiss at that time based on the Department of Correction's statutory exemption from the APA; this dismissal was affirmed by the Supreme Court of Delaware. However, Jackson now includes a new contention that the Department of Correction, through its voluntary act of making certain execution policies and procedures publicly available via the internet, has "waived" its statutory exemption from the APA and must now comply with the rulemaking requirements of the APA, including the APA's requirements that proposed regulations be subject to a 30 day public comment period.

Upon review of the facts, the law, the parties' submissions, and oral argument on July 13, 2011, Jackson's motion for a stay of execution based on the pending or anticipated federal litigation is **DENIED.** The instant motion to dismiss is **GRANTED**, and it necessarily follows that Jackson's motion for a stay of implementation of the revised lethal injection regulations based on the Administrative Procedures Act is **DENIED AS MOOT.**

## FACTS AND PROCEDURAL HISTORY

The lengthy and complex procedural history of this capital murder case traces its origins to Jackson's 1993 conviction of, *inter alia*, First Degree Murder, in connection with the death of Elizabeth Girardi on April 3, 1992.[2] In turn, Defendant was sentenced to death; on direct appeal, Jackson's conviction was affirmed, but his death sentence was vacated due to a violation of his Sixth Amendment right to counsel.[3] Nonetheless, on resentencing, Jackson was again sentenced to death, and this sentence was affirmed by the Supreme Court of Delaware.[4]

[2] *See Jackson v. State*, 643 A.2d 1360 (Del. 1994).
[3] *Id.* at 1362.
[4] *Jackson v. State*, 684 A.2d 745 (Del. 1996). At both the initial sentencing phase and resentencing, the respective juries found that the aggravating circumstances outweighed the mitigating circumstances by an 11 to 1 margin. *Id.* at 748-49.

A multitude of state and federal court proceedings ensued, including claims for postconviction relief and petitions for *habeas corpus*.[5] Jackson also served as the class representative for a § 1983 class action, brought on behalf of the class of inmates sentenced to death in Delaware, alleging that Delaware's lethal injection protocol violates the Eighth Amendment prohibition on cruel and unusual punishment.[6] On February 1, 2010, the United States Court of Appeals for the Third Circuit affirmed the District Court's grant of summary judgment against Jackson and the class he represented and dissolved the extant stay of Jackson's execution.[7]

Most recently, the Supreme Court of Delaware affirmed this Court's denial of Jackson's second motion for postconviction relief.[8] Among other claims in Jackson's motion was his assertion that his initial trial counsel's statement to the original trial judge that Jackson was "guilty and [] ought to die," made in connection with original trial counsel's motion to withdraw as counsel, violated Jackson's Sixth Amendment right to counsel.[9] The

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[5] As previously observed by this Court, this case has a lengthy procedural history. *See Jackson v. Danberg*, 2008 WL 1850585, *1 n.1 (Del. Super. Ct. 2008) (providing an overview of the state and federal litigation in this case).

[6] *Jackson v. Danberg*, 594 F.3d 210 (3d Cir. 2010).

[7] *Id.* ("We conclude that, under [*Baze v. Rees*], an execution protocol that does not present a substantial risk of serious harm passes constitutional muster and that, based on the record before us, Delaware's protocol presents no such risk. Accordingly, we will affirm the District Court's grant of summary judgment for Delaware and dissolve the District Court's stay."), *cert denied* 131 S.Ct. 458 (2010).

[8] *Jackson v. State*, 2011 WL 1879055 (Del. 2011).

[9] *Id.* Defendant's trial counsel's comment was made during a sidebar conversation with the trial judge; in relevant part, trial counsel stated as follows:

> Your Honor, I've been a defense attorney for seventeen years and I am able to divorce myself emotionally from what I hear in representing a client. There is one exception to that.
>
> During the proof-positive hearing when I heard for the first time the graphic details that were given with regard to the victim in this case grabbing on to the handle of the axe with both hands while the defendant punched her with his free hand and she dropped to the ground, and then while she was writhing or spasming on the ground, then he struck her numerous times, instantly in my mind it brought back a circumstance where during the term of my marriage, my wife and I had a continual conversation regarding security at the house and the garage and her being in the garage.
>
> At that moment, I felt an absolute sense of revulsion toward the defendant. I reached the conclusion in my mind he ought to die. I identified I would not sit with him at the table for the remainder of the hearing.

Supreme Court rejected Jackson's contentions via opinion of May 17, 2011;[10] Jackson's motion for reargument was denied on June 17, 2011. Consequently, this Court held a sentencing hearing on June 29, 2011 and resentenced Defendant to death; this Court scheduled Jackson's execution for July 29, 2011.[11]

On June 3, 2011, while Jackson's motion for reargument was pending before the Supreme Court, he commenced the instant Petition for Declaratory Relief and motion for stay of implementation of the revised lethal injection regulations based on the APA. Jackson then filed a separate Motion to Stay Execution on July 5, 2011 based on 1) his representation that he will seek certiorari review in the United States Supreme Court of the Delaware Supreme Court's May 17, 2011 decision, and 2) his motion to reopen the judgment in a related federal class action case, filed June 27, 2011, challenging the constitutionality of Delaware's revised lethal injection protocols.[12]

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> I met with him after that and I was supposed to meet with him that week and I delayed meeting with him because it was an emotional strain for me to have to meet with him.
>
> Finally, weeks after I was supposed to meet with him I met with him. I found him to be distasteful. I had conversation with him about the state of the case. Without indicating what he said to me, the explanations that were given created emotional responses in me and I don't think it is fair to him.
>
> I didn't put this in the motion because I thought it was prejudicial to him for an attorney to say in my estimation he's guilty and he ought to die. It's the only time it's happened in my life. But nonetheless, it is what it is.

*See id.* at *4. The transcript of this sidebar was sealed and was not disclosed to subsequent counsel. Jackson's current counsel became aware of this exchange in April 2006.

[10] *Id.* at *11 ("We also hold that [trial counsel's] commentary did not deny Jackson's Sixth Amendment right to counsel under either *United States v. Cronic* or *Strickland v. Washington.* Consequently, the judge who denied Jackson's second motion for postconviction relief, which precipitated this appeal, did not err in denying relief. The judgment of the Superior Court is affirmed.").

[11] *State v. Jackson,* Del. Super., I.D. No. 92003717DI, Cooch, R.J. (June 29, 2011) (ORDER).

[12] Motion to Stay Execution. In this motion, Jackson also reiterated and amplified his position that this Court should stay his execution pending the disposition of the instant APA litigation. *Id.* at 13.

# CONTENTIONS OF THE PARTIES

## A. Motion to Stay Based on Pending or Anticipated Federal Litigation.

With respect to Jackson's Motion to Stay Execution pending the resolution of his anticipated petition for certiorari with the United States Supreme Court and his motion to reopen pending before the United States District Court, Jackson contends that Supreme Court Rule 35(e) vests this Court with the authority to stay his execution.[13] Jackson notes that Rule 35(e) states that any application for a stay of execution following the issuance of a mandate by the Supreme Court "may be granted by the Superior Court and shall be initially made to that Court. . . ."[14] Jackson contends that the language of Rule 35(e) authorizes this Court to stay his execution to facilitate his efforts to attain certiorari review by the United States Supreme Court.

With respect to Superior Court Civil Rule 61(l)(7)'s directive that an application to stay execution "for federal certiorari or habeas corpus proceedings" is to be made to the "appropriate federal court," Jackson's contentions are two-fold: first, Jackson argues that Rule 61(l)(7) only applies to sentences imposed pursuant to Rule 61(l)(6), and that his sentence was imposed under Delaware Supreme Court Administrative Directive 131, rather than Rule 61(l)(6);[15] second, Jackson argues that, even if his execution was scheduled pursuant to Rule 61(l)(6), the terms of Rule 61(l)(7) apply only to "federal" certiorari proceedings, which Jackson defines as petitions which seek review of a federal court ruling, but that his petition for certiorari seeks review of a decision from a state court, thereby rendering it outside the scope of Rule 61(l)(7).[16]

The State responds that the instant motion to stay execution is squarely within the prohibitions of Rule 61(l)(7).[17] The State argues that Jackson's assertion that his petition for certiorari does not constitute "federal certiorari"

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[13] Motion for Stay of Execution at 1.
[14] *Id.* (quoting Supreme Court Rule 35(e)).
[15] *Id.* at 3.
[16] Jackson alternatively contends that this Court should revisit prior decisions holding that Rule 61(l)(7) precludes this Court from issuing a stay due to federal certiorari because this "allow[s] a Superior Court Rule to trump a Supreme Court Rule. . . ."*Id.* at 5.
[17] State's Resp. to Mot. to Stay Execution at 4-5.

within the meaning of Rule 61(l)(7) is "creative, but unavailing," because the proper construction of the applicable rules reveals that the federal court is the proper forum for Jackson to seek a stay of execution.[18] Similarly, the State notes that the Supreme Court of Delaware has previously interpreted Rule 61(l)(7) to foreclose the very type of stay for certiorari that Jackson now seeks.[19] Finally, to the extent Jackson seeks a stay based on the federal class action litigation, the State contends that such a stay is also prohibited by 61(l)(7), and that Jackson may seek a stay from the applicable federal court, pursuant to Federal Rule of Civil Procedure 65, but that such relief should not issue from this Court.[20]

### B. Petition for Declaratory Relief and Motion for Stay of Execution Pursuant to the APA.

As with his 2008 claim, Jackson again argues that Commissioner Carl C. Danberg and the Department of Correction have failed to comply with the APA.[21] With respect to this Court's previous determination that 11 Del. C. §

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[18] *Id.* at 5.

[19] *Id.* at 5-6.

[20] *Id.* at 5, 9 ("Delaware's rules, read in *pari materia*, advise that when one has only a federal action pending or anticipated, it is in the federal court that he shall seek a stay."). The Court notes that, subsequent to Jackson's filing of a motion to reopen the judgment, the United States District Court has scheduled oral argument on Jackson's motion for July 27 and *sua sponte* issued a stay of Jackson's execution. *Jackson v. Danberg,* Civ. No. 06-300-SLR, Robinson, J. (D. Del. July 12, 2011) (AMENDED ORDER). The District Court's order provides as follows:

> IT IS ORDERED that plaintiffs' motion for appointment of counsel (D.I. 143) is denied insofar as plaintiffs seek appointment of additional counsel.
>
> IT IS FURTHER ORDERED that the court will hear oral argument on Wednesday, July 27, 2011 at 10:00 a.m. in courtroom 4B, fourth floor Federal Building, Wilmington, Delaware, regarding the substantive merits of plaintiffs' Rule 60 motion (D.I. 142).
>
> IT IS FURTHER ORDERED that plaintiff Jackson's execution shall be stayed until further order of the court. *In this regard, the court will not issue a decision before the scheduled execution date of July 29, 2011.

*Id.* In turn, the State filed a motion to dissolve this stay in United States District Court. Motion to Dissolve Stay, *Jackson v. Danberg*, 06-300-SLR (D. Del. July 12, 2011). The State subsequently requested an immediate hearing on its motion to dissolve stay.

[21] Petition for Declaratory Relief and Motion for Stay at 7 ("In the most recent changes made to the execution policies and procedures, Respondents did not comply with any of

4322(d)[22] exempted the Department of Correction from publishing confidential regulations to comply with the APA, Jackson argues that the relevant execution polices and procedures are no longer confidential, given that the Department of Correction has made the policies available via its website.[23] Consequently, Jackson contends that the web publication of the execution policies and procedures was "upon the written authority of the Commissioner," and, pursuant to § 4322(d), not entitled to an exemption from the APA's rulemaking requirements.[24] While Jackson acknowledges that the interpretation of the APA vis-à-vis § 4322(d) was previously decided by this Court and affirmed by the Supreme Court of Delaware, he notes that the Supreme Court in its affirmance specifically declined to reach the instant issue of what effect, if any, the Department of Correction's voluntary publication of the execution policies and procedures has on the exemption found in § 4322(d).[25] Jackson further contends that the spirit and purpose of § 4322 is to limit inmate access to Department of Correction protocols, rather than curtailing public access; accordingly, Jackson asserts that requiring the Department of Correction to comply with the APA's requirements in adopting a lethal injection procedure is not inconsistent with the statutory protections of § 4322.[26] Similarly, Jackson's motion for stay of execution is separately predicated on 29 Del. C. § 10144, which permits the Court to stay the enforcement of a regulation or decision of an agency if, "upon a preliminary hearing, that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm."

Conversely, the State contends that Jackson's claim based on the Department of Correction's admitted noncompliance with the APA is barred by *res judicata*; it is the State's position that this Court's 2008 order, which

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the APA's requirements for adoption or amendment of a regulation. Respondents did not provide public notice in the Register of Regulations, did not advise the public how to present views with respect to the proposed regulations, did not provide a comment period of at least thirty days, and did [not] issue any findings based on public comments. The execution policies and procedures are therefore invalid under the APA.").

[22] "The Department of Correction Policies and Procedures, including any Policy, Procedure, Post Order, Facility Operational Procedure or Administrative Regulation adopted by a Bureau, facility or department of the Department of Correction shall be confidential, and not subject to disclosure except upon the written authority of the Commissioner." § 4322(d).

[23] Petition for Declaratory Relief and Motion for Stay at 8.

[24] *Id.*

[25] *Id.* at 4.

[26] Jackson's Answ. to Mot. to Dismiss at 7-8.

was subsequently affirmed by the Supreme Court of Delaware, precludes Jackson from re-litigating this issue.[27] The State readily acknowledges that the instant regulations were not promulgated in compliance with the APA, but contends that Jackson has "misconstrued the Commissioner's exercise of his statutory discretion to disclose some policies with a waiver of his statutory authority to determine whether a policy remains confidential, in whole or in part."[28] The State argues that, if Jackson's argument is taken to its logical conclusion, the Department of Correction would be unable to engage in any of the activities that are published on the its website, including core functions such as the release of inmates, inmate transportation, prisoner health services, and sex offender registration, because these policies are publicly available via the website but have not been promulgated in compliance with the APA.[29] The State further notes that the legislature has apparently acquiesced in this Court's interpretation of § 4322, as this Court's 2008 order stated that any change to the Department of Correction's confidential procedures for adopting an execution protocol must emanate from the General Assembly, and observes that the General Assembly has taken no action on this issue in the intervening three years.[30]

Alternatively, the State argue that the lethal injection protocol does not constitute a "regulation," as defined by the APA.[31] Rather, the State asserts that the General Assembly has vested the Commissioner with the authority to create a protocol for administering lethal injection, thereby rendering this issue within the prerogative of the Commissioner, rather than the APA.[32]

[27] Motion to Dismiss at 2.
[28] *Id.* at 4.
[29] *Id.* at 5.
[30] *Id.* at 5-6.
[31] *Id.* at 6.
[32] *Id.* at 9-10.

# DISCUSSION

## A. A Stay of Jackson's Execution Will Not Issue from this Court.

### 1. This Court is Without Authority to Stay Jackson's Execution Pending the Related Federal Litigation.

The issue of whether this Court may stay Jackson's execution presents a question of construction and interpretation of Supreme Court Rule 35(e), Supreme Court Administrative Directive 131, and Superior Court Criminal Rule 61(l)(6)-(7). Under Supreme Court Rule 35(e),

> [a]n application [for a stay of execution], 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.

At the same time, pursuant to Superior Court Criminal Rule 61(l)(7):

> The [Superior] court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subdivision 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).

In turn, the scheduling of death sentences imposed under Rule 61(l)(6) and contemplated by Rule 61(l)(7) are set forth as follows:

> Following the completion of direct review, the court shall not set a date of execution until the defendant has an opportunity for one postconviction proceeding and review by the Supreme Court. If the defendant waives the right to a postconviction proceeding or to appeal, or the Supreme Court dismisses the defendant's appeal or affirms a ruling adverse to the defendant, the court shall promptly set a date for execution no less than 90 days, unless waived, nor more than 120 days from the date that the waiver was accepted or the Supreme Court's mandate issued.[33]

[33] Superior Court Criminal Rule 61(l)(6).

Although Jackson contends that his sentence was imposed solely pursuant to Supreme Court Administrative Directive 131, to the exclusion of Rule 61(l)6), this is both incorrect and irrelevant. Supreme Court Administrative Directive 131(10) provides:

> Upon affirmance of a subsequent Rule 61 motion, the Superior Court judge shall re-sentence the defendant within ten (10) days following receipt of the mandate. In the absence of a waiver by the defendant, the execution date shall be scheduled within thirty (30) days from the date of re-sentencing.

However, by its terms, Administrative Directive 131 is solely intended to be a procedural device to streamline the administration of capital cases; it neither enlarges nor diminishes the substantive legal rights of capital murder defendants.[34] By contrast, Rule 61(l)(6)-(7) address a capital murder defendant's respective rights regarding the scheduling of an execution date and the ability of a defendant to apply for a stay of execution, and also defines the proper (and, by implication, improper) fora in which a capital murder defendant may seek a stay of execution at various stages of postconviction proceedings. Administrative Directive 131 does not "enlarge" Jackson's rights and entitle him to obtain a stay from this Court pending the outcome of his certiorari proceedings in the face of the contrary language found in Rule 61(l)(7).

Further, Jackson's sentence was imposed under Rule 61(l)(6). Although Rule 61(l)(6) is implicated only after a defendant has had "an opportunity for one postconviction proceeding," the existence of multiple postconviction proceedings does not vitiate the applicability of the rule. Indeed, a fair reading of Rule 61(l)(6) and Administrative Directive 131 discloses that these provisions are consistent and complementary; Rule 61(l)(6) serves to assure that a capital murder defendant will have at least *one* opportunity for a postconviction proceeding and that he will not executed less than 90 days from the disposition of such proceeding. However, in those cases, such as the instant case, where the defendant has had a "subsequent [postconviction] Rule 61 proceeding," Administrative Directive 131 dictates the timing of the defendant's execution, but this does not diminish the defendant's legal rights under Rule 61(l)(6) nor otherwise

[34] Supreme Court Administrative Directive 131(2) ("This Directive is for the sole purpose of expediting the administration of capital murder cases and is not designed to enlarge or diminish the legal rights of those charged with capital murder.").

render Rule 61(l)(6) inapplicable to such sentences. Administrative Directive 131 merely clarifies the timeframe for scheduling a defendant's execution when the defendant has litigated more than one postconviction proceeding to a conclusion, a situation not expressly provided for by the terms of Rule 61(l)(6).

Finally, this Court rejects Jackson's contention that Rule 61(l)(7) does not apply because the "federal certiorari" proceedings enumerated in the rule encompasses only writs for certiorari that flow from proceedings in a federal court. Indeed, this proposition is definitively foreclosed by case precedent from the Supreme Court of Delaware; in *Steckel v. State*, just as in the instant case, the defendant's second motion for postconviction relief was denied by this Court, this denial was affirmed by the Supreme Court of Delaware, and the defendant expressed his intention to file a Petition for Certiorari to the United States Supreme Court.[35] Thus, the defendant was seeking certiorari from a state decision, rather than a decision from a federal court; the procedural posture of *Steckel* and the instant case are virtually identical. Tellingly, the Supreme Court of Delaware stated:

> Under Superior Court Criminal Rule 61(1)(7), **the Superior Court is not permitted to entertain an application to stay an execution date for purposes of subsequent postconviction proceedings.** Accordingly, the Superior Court denied [the defendant's] motion for a stay.
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> * * *
>
> There is no automatic stay of execution, even in capital cases, simply because [the defendant] intends to file a Petition for Writ of Certiorari with the United States Supreme Court.[36]

Consequently, Rule 61(l)(7) precludes this Court from entertaining a defendant's application for a stay to accommodate any Petition for Certiorari, whether such petition is predicated on a state or federal court decision. It necessarily follows that Supreme Court Rule 35(e) does not permit Jackson's instant motion for a stay of execution, because the instant motion is within the class of motions that is barred by Rule 61(l)(7). Indeed, in connection with Jackson's previous attempts to obtain a stay of execution, this Court has observed that he "cannot seek refuge in Supreme Court Rule 35(e), which provides generally for stays in capital murder cases," because

[35] 884 A.2d 483, 485 (Del. 2005).
[36] *Id.* at 485-87 (emphasis added).

"[t]he 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."[37] While the Supreme Court may consider an application for a stay of execution based on the reasons currently advanced by Jackson and reach the merits of such an application (as occurred in *Steckel*, *supra*), by the terms of Rule 61(l)(7), taken together with the Supreme Court's decision in *Steckel*, this Court is without jurisdiction to hear the instant motion for a stay of execution insofar as anticipated further certiorari litigation is concerned.

In short, Jackson was sentenced pursuant to Rule 61(l)(6), and Rule 61(l)(7) expressly provides that this Court "shall not entertain an application to stay an execution date. . .for the purpose of further postconviction proceedings." Instead, as directed by Rule 61(l)(7), any applications to stay an execution based on "federal certiorari proceedings or habeas corpus proceedings shall be made to the appropriate federal court." Accordingly, under Rule 61(l)(7) and *Steckel*, *supra*, this Court is without authority to stay Jackson's execution date based on his anticipated certiorari proceedings.[38]

To the extent Jackson moves this Court to stay his execution to accommodate his pending motion to reopen the judgment in the federal class action civil rights lawsuit, this Court declines to issue such a stay. Although the terms of Rule 61(l)(7) preclude this Court from entering a stay of execution for "further postconviction proceedings" and "federal certiorari or habeas corpus proceedings" it is arguable that a federal civil rights claim is not encompassed within these terms. Assuming, without deciding, that a stay of execution based on Jackson's pending federal class action civil rights litigation is not foreclosed by Rule 61(l)(7), it remains that the proper forum to request such a stay is the United States District Court for the District of Delaware. In support of his position that this Court may stay state proceedings pending the outcome of related federal civil rights litigation challenging Delaware's revised lethal injection protocol, Jackson cited

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[37] *State v. Jackson*, 2006 WL 1134759, *3 (Del. Super. Ct. 2006).

[38] Having found that this Court may not entertain Jackson's application for a stay of execution, this Court does not reach the question of whether Jackson has established the four criteria necessary for the grant of a stay of execution. *See generally Steckel*, 884 A.2d at 487 ("[To warrant a stay of execution, the defendant] must establish: (1) a reasonable probability that four Justices will vote to grant the petition for certiorari; (2) there is a significant possibility that the decision of this Court would be reversed; (3) there is a likelihood of irreparable harm in the absence of a stay; and (4) a stay is in the public interest.").

exclusively civil case precedent. In the instant context, the orderly administration of capital cases requires that any such stay emanate from the relevant United States District Court, as that court is better situated to understand the issues presented by the civil rights case and the relative necessity of a stay of execution. Indeed, in this case, the United States District Court has already entered just such a stay;[39] consequently, even if such a motion for stay is not within Rule 61(l)(7) and may be made to this Court pursuant to Supreme Court Rule 35(e),[40] the proper and orderly management of Jackson's federal civil rights lawsuit and its potential effect on his execution date is within the prerogative of the United States District Court, and this Court will not intervene to accommodate or facilitate Jackson's federal claims.

### 2. Jackson's Application for a Stay of Implementation of the Revised Lethal Injection Regulations Under the APA is Denied as Moot.

Jackson contends that the issues presented by the instant petition are "substantial enough to justify a stay" under both 29 Del. C. § 10144[41] and Supreme Court Rule 35(e).[42] However, given this Court's dismissal of Jackson's APA claim, discussed *infra*, there are no issues, and *perforce,* no "substantial" issues, remaining. Thus, his motion for a stay on this ground is now moot.

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[39] However, as noted, this stay is currently under attack by the State of Delaware. *See supra* note 20.

[40] "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."

[41] "When an action is brought in the Court for review of an agency regulation or decision, enforcement of such regulation or decision by the agency may be stayed by the Court only if it finds, upon a preliminary hearing, that the issues and facts presented for review are substantial and the stay is required to prevent irreparable harm." § 10144. The Court deems the oral argument on all of the instant motions, held July 13, 2011, to be the "preliminary hearing" for purposes of § 10144.

[42] *See supra* note 40.

## B. Jackson's APA Claim in His Petition for Declaratory Relief is Dismissed Pursuant to Rule 12(b)(6).

The State concedes the singular intervening factual development; *viz.*, that the State has since published a redacted version of the lethal injection protocols on the Department of Correction website. Although Jackson has alleged a new legal basis upon which the lethal injection protocols would be subject to the APA, this Court again concludes that the Department of Correction is statutorily exempt from the APA. Accordingly, Jackson has failed to state a claim on which relief can be granted.

As a threshold matter, the reasoning expressed in this Court's 2008 opinion and affirmed by the Supreme Court remains sound. That is, "[t]he Court agrees with the State that the General Assembly, through 10 Del. C. § 4322(d), rendered all [Department of Correction] policies and procedures confidential, and that this specific exemption removes the [Department of Correction] from the APA's general agency definition."[43] Thus, the only issue remaining is whether the Department of Correction has waived the statutory protection of § 4322(d) based upon the voluntary publication of certain execution policies and procedures on the its website. Given that this issue of waiver was not fully presented to this Court when considering Jackson's 2008 claims, and the Supreme Court of Delaware specifically declined to reach the question of waiver, *res judicata* does not bar Jackson's instant claim, and it will be considered on the merits.

As was the case at the time of this Court's 2008 opinion, there is a "dearth" of case law interpreting § 4322(d).[44] There does not appear to be a Delaware case addressing Jackson's contention that a government agency may impliedly waive its statutory exemption from the APA by voluntarily disclosing, either in whole or in part, policies and procedures. Nonetheless, a review of the policy considerations underlying § 4322 compels the conclusion that the Department of Correction's statutory exception contained in § 4322(d) is not susceptible to any such implied waiver.

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[43] *Jackson v. Danberg*, 2008 WL 1850585, *5 (Del. Super. Ct. 2008) (citations and quotation marks omitted), *aff'd*, 962 A.2d 256 (Del. 2008) ("[W]e affirm on the basis of the Superior Court's April 25, 2008 Memorandum Opinion."). For a more comprehensive analysis of the history and interpretation of § 4322(d), see *id.* at *4-5.

[44] *Id.* at *4.

Analysis of Jackson's § 4322(d) contentions must begin with the language of § 4322 itself;[45] it states:

> The Department of Correction Policies and Procedures, including any Policy, Procedure, Post Order, Facility Operational Procedure or Administrative Regulation adopted by a Bureau, facility or department of the Department of Correction shall be confidential, and not subject to disclosure except upon the written authority of the Commissioner.

In interpreting a statute, "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language."[46]

It is now settled that § 4322(d) operates to exempt the Department of Correction from the requirements of the APA.[47] Thus, this Court must now determine if the legislative intent underlying § 4322 was to subject the Department of Correction's policies and procedures to mandatory disclosure and compliance with the APA to the extent that the Department of Correction elects to voluntarily make such policies and procedures publicly available. Given that the phrase "shall be confidential and not subject to disclosure except upon the written authority of the Commissioner" is unambiguous, broad, and unqualified, Jackson must demonstrate a "clear legislative intent to the contrary," otherwise this language is "conclusive."[48] Here, there are no indications of any such legislative intent; instead, Jackson's claim rests entirely on the alleged loss of "confidential" status of the Department of Correction's policies and procedures based on nothing more than the Department of Correction's decision to voluntarily publish selected portions of its policies and procedures.

Moreover, the classification of the Department of Correction's policies and procedures as "confidential" emanates from the legislature, and the legislature did not define "confidential" to include the condition now suggested by Jackson. Absent further limitation or qualification by the legislature, Department of Correction's policies and procedures "shall be

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[45] *See, e.g.*, *Evans v. State*, 516 A.2d 477, 478 (Del. 1986) ("[The] Court's function in interpreting the statute is to discern the intent of the legislature. We begin with the language of the statute itself.").
[46] 1 Del. C. § 303.
[47] *Jackson*, 962 A.2d 256.
[48] *Evans*, 516 A.2d at 478.

confidential, and not subject to disclosure except upon the written authority of the Commissioner," regardless of whether, and to what extent, the Department of Correction may opt to voluntarily release selected information.[49] As it is currently written, the statutory exception conferred on the Department of Correction is unambiguous, and this Court may not interpret an unambiguous statute so as to include the extraneous requirement advanced by Jackson.

Finally, even if the unambiguous language of § 4322(d) did not preclude this Court from interpreting and constructing the statute, the interpretation suggested by Jackson would lead to an absurd result, one which is wholly at odds with the overall policy of transparency and open government. Delaware has a strong public policy favoring openness in public business;[50] Jackson's approach would turn this policy on its head. In essence, Jackson maintains that the Department of Correction's policies and procedures will forfeit the statutory protection provided by § 4322(d) anytime the Department of Correction makes such regulations available to the public. Under Jackson's view, the perverse incentive is obvious: rather than risk a subsequent claim of waiver of § 4322(d), the Department of Correction would be better served to provide no public information at all. Put differently, the Department of Correction would have no incentive to release or publish any information, lest it invite a plethora of legal challenges, again predicated on an alleged waiver of § 4322(d). The only way the Department of Correction could ensure the continued statutory protection of § 4322(d) would be to tightly guard any and all information that is even arguably related to Department of Correction policies and procedures. Such a result is simply irreconcilable with the overarching strong public policy in favor of "public business be[ing] performed in a public manner."[51]

The Court must avoid interpreting a statute so as to "yield mischievous or absurd results."[52] Additionally, "[s]tatutes must be considered and

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[49] 11 Del. C. § 4322(d); *see also Jackson*, 2008 WL at *5 ("Any change to the confidential procedure by which the Department of Correction presently adopts its lethal injection policies and procedures would require action by the General Assembly.").
[50] *See, e.g.*, 29 Del. C. § 10001 ("It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.").
[51] *Id.*
[52] *See Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (citations omitted).

construed together and harmonized if reasonably possible." As stated, Jackson's interpretation would lead to an impermissibly absurd result, one that conflicts with the general declaration of public policy contained in 29 Del. C. § 10001; this, too, is to be avoided. Instead, "[s]tatutes must be considered and construed together and harmonized if reasonably possible."[53] To this end, § 4322(d) may be easily harmonized with § 10001 by interpreting § 4322(d) consistent with its unambiguous language and context.[54] Accordingly, Jackson's contention that the Department of Correction has waived the protection of § 4322(d) is incorrect as a matter of law. In turn, for all the reasons expressed in this Court's 2008 opinion, Jackson's Petition for Declaratory Relief shall be dismissed.[55]

## CONCLUSION

Accordingly, for all the reasons stated above, the State's motion to dismiss Jackson's Petition for Declaratory Relief is **GRANTED**. Jackson's motion for a stay based on his 1) anticipated Petition for Certiorari and 2) federal class action civil rights claim is **DENIED.** Jackson's motion for a stay of implementation of the revised lethal injection regulations based on the Administrative Procedures Act is **DENIED AS MOOT.**

//Original Signed//
*Richard R. Cooch, R.J.*
Richard R. Cooch

RRC/rjc
oc: Prothonotary

[53] *Price v. .0673 Acres of Land, in Baltimore Hundred, Sussex County*, 224 A.2d 598, 602 (Del. 1966).
[54] *See supra* notes 45, 46.
[55] Having found that the Department of Correction continues to enjoy the statutory protection of § 4322(d), the Court again need not reach the issue of whether the instant policies constitute "regulations," as defined by the APA.